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The Formation of Intent and the Foundation of Text: The Travaux Préparatoires of SRSG John G Ruggie, 2005-2011

Travaux Préparatoires, preparatory or preliminary text has a quite distinct meaning in French law.[1] Traditionally, and certainly in France and other jurisdictions, the heart of traveaux préparatoire are those memorializations of moments and processes "From the birth of a reform to the moment when the definitive act comes into force."[2] In the United States, the alignment of technology with the emergence of the administrative apparatus, made it

[1] Guillaume Meunier, "Les travaux préparatoires from a French Perspective: Looking for the Spirit of the Law," *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* , April 2014, Bd. 78, H. 2 (April 2014), pp. 346-360

[2] Ibid., p. 349.

possible to develop a routinized and data rich environment in which the kernels of intent could be memorialized, and thus memorialized, preserved and then utilized by actors looking for something exogenous (and legitimate, in the sense of having an authoritative connection to text) on which to ground their reading of text.[3]

Guillaume Meunier drew on Montesquieu and the spirit of the law for the normative legitimation of the impulse.[4] It may be as useful to consider these as privileged historical morsels in search of the spirit of the law to which they point that both freezes text in time, place, and space, and permits a common external point against which the clarity of text might be measured. An indispensable element in the judicial quest for *ratio legis* (the legal rationale), traveaux préparatoires have acquired its own forms and mechanisms. But the general idea—that it is useful to consult preparatory work in interpreting statutes—and by extension, to embed the intent of the drafters into the reading of the text they produced, finds its way into many legal systems, but with great variation.[5] But, and certainly some states, that search for intent from which to embed meaning in text is only triggered were the next is neither clear nor complete.[6] Indeed, the "Acte Claire" doctrine widely used in Europe has generalized the spirit of that notion and embedded it in the jurisprudence of the European Union. The U.S. analog came at the end of the prior century.[7] Text first, and where text is not clear or complete—then *the spirit of the law* must be exhumed from the evidence left by those responsible for the constitution and enactment of text as law.[8]

And yet, the doctrine produces a tension—one that produces interpretive pluralism in the face of clarity and completeness determined by heterogeneous courts.[9] The tension remains between a core premise embracing the certainty that text has primacy over intent against the core premise that text is merely the memorialization of an intent that is itself—"the law."[10] The reliance on preparatory work—in the parlance of the United States, something like a legislative history[11]—then, runs counter to a quite powerful stream of jurisprudence that emerged in its current form with the drafting of the first post-Revolutionary French Civil Code. For its drafters, the law speaks for itself. Its text is what it is. One applies the text in itself through the act of reason, the rules of which reflect

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[3] Nicholas R. Parillo, 'Leviathan and interpretive revolution: the administrative state, the judiciary, and the rise of legislative history, 1890-1950,' (2013) 123(2) Yale Law Journal 266-404.
[4] Meunier, supra, pp. 347-348.
[5] See, e.g., Holger Fleischer, " Comparative Approaches to the Use of Legislative History in Statutory Interpretation," *The American Journal of Comparative Law* 60(2) (2012) 401-437.
[6] Meunier, "Les traveaux Préparatoires," supra, 347-348 (France).
[7] Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).
[8] Relating to rules for referring a matter to the European court of Justice. Discussed in Paul Craig and Gráinne de Burca, The Evolution of EU Law (OUP, 1999), 223-224, and referencing Case 28/62-30/62 *Da Costa en Schaake NV and Others v. Nederlandse Belastingadministratie* [1963] ECR31, [1963] CMLR 224; Case 2983/81 CILFIT and *Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415 CMLR 472.
[9] See, G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) 24(6) European Law Journal 358; T Horsley, *The Court of Justice of the European Union as an Institutional Actor. Judicial Lawmaking and Its Limits* (CUP, 2018); discussed in Martin Höpner and Susanne K. SchmIbidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review,' (2020) 22 Cambridge Yearbook of European Legal Studies 182-204.
[10] Some commentators in the United States refer to this tension sometimes as an interpretive dialogue between courts and legislatures. See, James J. Brudney & Ethan J. Leib, 'Statutory Interpretation as "Interbranch Dialogue"?,' (2019) 66 UCLA Law Review 346-398.
[11] Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes," *Southern California Law Review* 65 (1991) 845-874. Jeffrey A. Pojanowski, 'Reading Statutes in the Common Law Tradition,' (2015) 101 Virginia Law Review 1357-1424.

collective understanding. Meunier's quote taken from Portalis' 1801 *Discourse on the French Civil Code*[12] is as applicable to the art of using authoritative aids in discerning the meaning of statutes in context, as it is to the function of the commentator seeking to gloss an authoritative text.

> Il y a une science pour les législateurs, comme il y en a une pour les magistrats; et l'une ne ressemble pas à l'autre. La science du législateur consiste à trouver dans chaque matière, les principes les plus favorables au bien commun; la science du magistrat est de mettre ces principes en action, de les ramifier, de les étendre, par une application sage et raisonnée, aux hypothèses privées; d'étudier l'esprit de la loi quand la lettre tue, et de ne pas s'exposer à être tour à tour esclave et rebelle, et à désobéir par esprit de servitude.[13]

And in some jurisdictions, even the principle that one can consult such preparatory work, or for that matter, any other evidence of intent, is viewed as problematic—because the consultation of such text would serve to admit the possibility of incorporating inferences about intent into the text. In some legal systems and among some jurists, text must speak for itself—however at variance that text will be read from the intent of those who enacted it. In the United States, for example, the textualist school of jurisprudence (and interpretation) was built around the insight that in interpreting (or commenting on) text, one must take into account all of its text—one must confine one's analysis to a journey to the spirit of the text. and no more.[14] And that journey toward textual interpretation, it might be necessary to understand the original context in which text was made authoritative.[15] Others take the view that the journey to meaning takes one into the soul, or the spirit, of the legislator,[16] rather than that of text. But even that journey can vary as certain jurisdictions define the scope of legislative history with local characteristics.[17]

The issue becomes more complicated when the temporal element is introduced—the principle of original understanding of text that is separated by centuries or decades from those charged with its application.[18] In that context, it is the meaning of the times that informs the text, rather than the specific intent of the drafters or adopters. Or it frees the text from the chains and structures of its origins (a way, perhaps of re-interpreting SRSG

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[12] Jean-Etienne-Marie Portalis, *Discours préliminaire sur le projet de Code civil, 1er pluviôse an VIII* (1801); available [http://classiques.uqac.ca/collection_documents/portalis/discours_1er_code_civil/discours.html]; quoted in Meuniwer, supra, at p. 348.

[13] Ibid., p. 23 ("There is a science for legislators, as there is for magistrates; and the one doesn't look like the other. The science of the legislator consists of finding in each matter the principles most favorable to the common good; the science of the magistrate is to put these principles into action, to develop them, to extend them, by a wise and reasoned application, to private hypotheses; to study the spirit of the law when the letter kills, and not to expose oneself to being alternately slave and rebel, and to disobey out of a spirit of servitude").

[14] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (West, 2012).

[15] See, e.g., Rik Peters, 'Constitutional Interpretation: A View From a Distance,' (2011) 50(4) History and Theory 117-135;

[16] Holger Fleischer, " Comparative Approaches to the Use of Legislative History in Statutory Interpretation," supra, 404-405; William Eskridge, Jr., "The New Textualism," *UCLA Law Review* 37 (1990) 621, 629.

[17] For one example, see, Darla Jackson, 'Legislative History: A Guide for the State of Oklahoma,' (2011) 30 Legal Reference Services Quarterly 119-126 (noting the jurisprudence around the issue, as well as the issues raised by the availability of on-textual historical sources, including recordings and podcasts).

[18] Daniel A. Farber, 'The Originalism Debate: A Guide for the Perplexed,' (1989) 49 Ohio State Law Journal 1085-1106; Daniel Levin, 'Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory,' (2004) 29(1) Law & Social Inquiry 105-126; William Michael Teanor, 'The Original Understanding of the Takings Clause and the Political Process,' (1995) 95(4) Columbia Law Review 782-887.

Ruggie's famous "end of the beginning" phrase[19]) precisely because it is impossible to reproduce the historical moment in the present.[20] But the fundamental issue remains; it is one of privileging sources of authority and developing hierarchies of text that might be drawn on to understand and apply binding or influential provisions adopted in some form by institutional actors representing a collective. In this case the focus is on the text of the UNGP endorsed by the UNHRC, around which clusters additional text from which the intent, design, and meaning of its provisions may be understood. It is then for the commentator to acknowledge and sort through the material the importance of which depends in large part on the *interpretive conventions and predilections* of a collective, the preferences of institutional actors within these collectives, or the normative fractures within or between these collectives about the authority of sources and the principles for extracting meaning from text. Any commentator on the UNGP inevitably finds themselves in Italo Calvino's City of Melania.[21] It is a city "caught up in dialog" which remains the same even as the city's population "renews itself: the participants in the dialogues die one by one and meanwhile those who will take their places are born, some in one role, some in another."[22] In place of people, one encounters text and institutions, which must be embraced even as its casts of characters remain engaged in dialogues that survive them and in some sense exists autonomously of those burdened with its continuation.

For the commentator, like the jurist, one starts an analysis of such preparatory sources from those made public, and more precisely those made specifically to convey reasoning, intent, or design. In many jurisdictions, the scope of what is made available varies widely.[23] Yet even that may be limited by the imposition of "open records" laws that may impose tight confidentiality constraints on certain information. [24] At a minimum, that suggests that choices among forms of textual interpretation—focused exclusively on text, on text in historical context, or on text as the manifestation of the spirit of the intent it memorialized, would reduce commentary to either polemic or to the management of interpretation by steering to a preferred analytical foundation. It follows, then, that intent may be as important a source of commentary as the authoritative text the core of which was identified in Chapter 2. A commentary ought to guide or at least describe the possibilities of any of these interpretive paths rather than pre-select one around which comment is offered.

What, them, should be included in the travaux préparatoires of the UNGP? At its broadest, virtually everything that was produced, remembered (and for purposes of authenticity at least) preserved in usable (or accessible) form might be relevant. That relevance will vary by degree. But how does one measure the degree of relevance? Traditionally there were two ways to approach answers. *The first* is to measure relevance as *a function of the relationship of the producer of data* (reports, speeches, statements, position papers, demonstrations recorded, interviews, and the like) *to the production of the authoritative text* toward the interpretation of which this data would supply information from which it would be possible to infer intent or design. The closer the material is to either the producer of text or to those responsible for endorsing (in the case of the UNGP) or enacting (in the case of institutional adoption with authoritative effect) the stronger the presumption that the material may more strongly reflect intent or design in the relevant text.

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[19] 2011 SRSG Report, discussed supra Chapter 2.
[20] See, e.g., Hans Georg Gadamer, Truth and Method (London: Shed and Ward, 1979), discussion at 263-274.
[21] Italo Calvino, *Invisible Cities* (William Weaver (trans); San Diego: Harcourt, 1974), pp. 80-81.
[22] Ibid., 80.
[23] Meunier, "Les travaux Préparatoires," supra,
[24] For some of the complications, see Robert L. Hughes, 'The Common Law of Access to Governmental Records,' (1995) 16(2) Newspaper Research Journal 39-55.

Closeness, in turn, can be measured by the relationship of the producer of text that evidences intent or design, to the text to be interpreted. Thus, for example, text produced by SRSG Ruggie about the structures, spirit or meaning of a specific principle of the UNGP may be more useful than that of a professor with no connection to the UNGP enterprise producing their own sense of meaning, intent or design. On the other hand, all stakeholders, including that professor with no connection, do produce text that quite precisely memorializes their intent, design, and response to the UNGP enterprise—for example the highly critical text of the NGO Human Rights Watch to the endorsement of the UNGPs.[25] These express the intent or design of their creators, but in the process may also provide evidence of what the UNGP text *does not mean* by virtue of their responses and comments. Or, alternatively, they may help explain how or why these groups then recast the meaning and spirit of the UNGP in the way they did—for example, translating critique into the movement for the creation of an binding international legal instrument characterized as taking the spirit of the UNGP to its next phase.[26] And, indeed, in a consultations based process, the role of stakeholder input was substantial both in terms of numbers and impact.[27] The impact, though, might be measured by the official reports submitted by the SRSG.

The second was to measure authority by the *character of the intent-bearing material in relation to the relevant text*; that is the extent to which it is understood to be intended to convey intent or design to the community to whom text is to be conveyed and then applied. Thus, perhaps, to illustrate the point with an extreme example, a verbal discussion by the SRSG over drinks to his wife's second cousin's college roommate, whom he has just met, which is then jotted down by this roommate, may have less authority than statements written into SRSG Ruggie's reports delivered to the UNHRC. There appears to be a loose consensus around this relationship between relevance and the character of the document (textual or now aural or virtual memory) relied on. But that consensus is, like all others, a convention that is built on the consequences of hierarchy. Indeed, SRSG Ruggie might well have been at his most candid when speaking to his wife's second cousin's college roommate. Yet, for purposes of the authority of memorialization of intent or design, that conversation lacks authority precisely because it was not intended to explain, describe, argue, or present formally and deliberately the intent or design to be conveyed to the community for whom the text was delivered . The conversation with the cousin's roommate *was not consciously intended to bind*; and intent and design—like the text into which it is to be incorporated, is as much a formally constituted process of dialectic engagement as the writing of the text itself. Nonetheless, *intent to bind*, as a convention for gauging the importance of secondary text as a window on intent and design, and therefore on the meaning of the text to be interpreted or applied, may sometimes reveal more accurately what the formally constituted intent-bearing documents suggest. In those cases, one might note the tension between formal expressions of intent (with the intent to bind) and functional expressions of intent (which reveal more profoundly sub-textual motivation or premise).

Since the UNGP fall somewhere within the nebulous terrains of international law/norm making—soft law to use the ancient phrase—it might be useful to approach these questions from the sensibilities built into the rules

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[25] Human Rights Watch Press Release, UN Human Rights Council: Weak Stance on Business Standards: Global Rules Needed, Not Just Guidance (16 June 2011), available [https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards], last accessed 1 March 2024.

[26] Cf., Carlos López, "The 'Ruggie process': from legal obligations to corporate social responsibility? in Surya Deva, and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP, 2013), 58-77

[27] "The Ruggie team held forty-one multi-stakeholder meetings on all continents; every document, comment, and meeting report was posted on the website of the Business and Human Rights Resource Centre (BHRRC)." Brigitte Ham, 'The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty,' (2022) 23 Human Rights Review 103-125, 113.

for interpretation in this field. For purposes of this Commentary, then, one might take the sensibilities of the Vienna Convention on the Law of Treaties as a guide.[28] Article 31 of the Vienna Convention starts with the soft presumption that privileges textual meaning "in their context and in the light of its object and purpose."[29] Text, context, object/purpose, and application are all relevant, though it is for the reader to assess which they would privilege.[30] To that end, "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31."[31]

That leaves the question of the identification of the relevant documents. To those ends, the commentary will apply both of the conventions described above—gauging the importance of texts useful for extracting intent and design from the relationship of its author to the text to be interpreted, and the object of the text to consciously and formally convey intent. For that purpose, this Chapter focuses on core documents formally memorializing the evolution of intent, the travaux préparetoires "[f]rom the birth of the SRSG's mandate] to the moment when the definitive [UNGP is endorsed."[32] That produces a challenge: during the course of the SRSG's mandate, a substantial number of interactions occurred and were recorded. These include speeches by the SRSG, consultations and meetings, some of which were summarized, appearances at a number of events, and the commendatory of stakeholders, some of which were persevered in retrievable form. In addition, key texts produced by the UNHRC add a critical layer of intentionality as the institutional actor with the authority to endorse the authoritative text of the UNGP.

The commentary starts from the presumption that among all of these memorialization of text from which intent might be extracted, the most useful and authoritative are the formal reports that the SRSG delivered to the UNHRC from the start of his mandate to the presentation of the final draft of the UNGP. The further presumption is that these formal reports contain the essence of intention that were then mirrored or reproduced in the interactions engaged around them. The object is to read these documents to provide insight into intent in the formation and drafting process; the SRSG Reports reflect the arc of movement of the SRSG's mandate and with it the development of the framework, principles, and approaches that ultimately served as the basis for the drafting of the UNGP. And borrowing from theology, the commentator should keep well in mind that "while every reading. . . is necessarily selective, care should be taken to avoid tendentious interpretations, that is, readings which, instead of being docile to text make use of it only for their own narrow purpose."[33]

The Chapter also considers the two UNHRC resolutions creating and then extending the mandate of the SRSG. These are important for the development of the intent and expectations of the body charged with the receipt of and response to the SRSG's work. And they inform the interpretation of the UNHRC Resolution, discussed in Chapter 2, endorsing the UNGP. Other documents will be referenced in commentary of the UNGP principles and in the later chapters as relevant. A caveat—in the absence of big data textual harvesting (text s data) and analytics;[34] it is difficult to reference everything that was produced that might either provide clues and support

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[28] Vienna Convention on the Law of Treaties, Art. 31(1), May 23, 1969, 1155 UNTS 331.
[29] Ibid., Article 31(1).
[30] See discussion Chapter 1, infra.
[31] Vienna Convention on the Law of Treaties, supra, Article 32.
[32] Ibid., p. 349.
[33] Pontifical Biblical Commission, "The Interpretation of the Bible in the Church" (presented to John Paul II on 23 April 1993); available [https://catholic-resources.org/ChurchDocs/PBC_Interp-FullText.htm], last accessed 29 February 2024.
[34] That applies, for example, to the substantial number of inputs received during the consultations held during the SRSG's mandate.

other text that provides clues to intent. Part of the value of a commentary is in its choices of sources. This commentary will stick quite close to the inner rings of preparatory sources, extending farther only as circumstances require. That will be much more likely when speaking to the spirit of the UNGP and its phenomenological interpretation—that is the interpretation evidenced by the application of its principles to the regulatory work of others.[35]

With this in mind—and especially the premises that (1) that commentary may point to but not advance a particular point of view, and (2) that given the contestations around the meaning of text and the meaning/sources of intent/design and its relevance every perspective is contestable—the consideration of the value of the UNGP's travaux préparatoire in providing a basis for inferring intent or design as an aid to reading-interpreting-applying the UNGP principles (and understanding and applying the "spirit" of the UNGP is organized as follows.

Section 3.1 considers a fundamental organizing principle of the SRSG's working style—his "principled pragmatism—as a source or basis for understanding both the production of the travaux préparatoire as well as the intent/design embedded within them. Principled pragmatism served as a term of art to distinguish the core methodological differences between the approach taken by the SRSG and that of his predecessors, especially those responsible for the development of the failed *Norms* project.[36] The SRSG was quite blunt about that assessment and the lessons he drew from that failed project:

> My major concern was the legal and conceptual foundations of the Norms, especially as expressed in the General Obligations section and the implications that flow from it. . . . But in the worst case scenario, I fear, they would turn transnational corporations into more benign twenty-first century versions of East India companies, undermining the capacity of developing countries to generate independent and democratically controlled institutions capable of acting in the public interest – which to my mind is by far the most effective guarantor of human rights.[37]

It also embraces a methodology of iterative dialectic—where transformation can be achieved by starting from the status quo, and applying to it an arc of development that one reads into its history, which is then projected forward toward the desired ends. And, indeed, for the SRSG's work, his principled pragmatism is closely tethered to a core or ruling premise: 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. The travaux préparatoires then elaborate both methodology and its application in the service of the primary goal-belief and its intricately developed sub-principles.

Section 3.2 then takes a deep dive into the key official explanatory documents produced by the SRSG during his mandate. These include three distinct types of reports. The first include the annual reports made to the

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[35] See discussion in Part Three, The Spirit of the UNGP, infra chapters 10-12.
[36] See, Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). The historical context in which these differences arose and were, in the memorialized thinking of the SRSG, made inevitable, are discussed in Chapter 4, infra.
[37] John G. Ruggie, Opening Statement to United Nations Human Rights Council, Geneva, Switzerland (25 September 2006); available [https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf], last accessed 13 February 2024

UNHRC produced between 2006 and 2010 (except the 2011 SRSG Report 17/31[38] and the drat 2010 Report circulating a first draft of the UNGP, [39]both of which were discussed in Chapter 2). The second were the reports delivered to the UN General Assembly in 2008-2010These reports , and their addenda, were intentionally produced to convey both the arc of the work of the SRS (and thus the manifestation of the application of principled pragmatism as a form of iterative dialectics in) and the intention/objectives that were eventually to be organized as the three pillar protect-respect-framework and memorialized (coded) in the text of the UNGP. Interestingly, it is possible to consider that the iterative dialectic of principled pragmatism and its guidance of the UNGP project is more visible in the many Addenda attached to principal reports, than in the reports themselves. Particularly important for purposes of extracting the scope of intention are the "Clarifying concepts" addenda attached to the 2008 SRSG Report,[40] and the 2011 SRSG Report on Conflict Regions.[41]

Section 3.3 then considers briefly the pre-endorsement resolutions of the UNHRC. These serve to manifest the other source of intention-design that counts—that of the official or institutional body the endorsement of which was critical to the legitimacy and authority of the UNGP—and thus the strength of power to set the framework for moving the business and human rights project forward. Section 3.4 then takes up other relevant documents. Lastly, Section 3.5 extracts the key principles, premises, and objectives that might suggest the core of the SRSG's intention/design/objectives that were reduced to text in the UNGPs. The object here is to provide a

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[38] 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://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other], last accessed 23 February 2024.

[39] 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.

[40] 2008 SRSG Report Clarifying Concepts-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Clarifying the Concepts of "Sphere of influence" and "Complicity" A/HRC/8/16 (15 May 2008); available [https://documents.un.org/doc/undoc/gen/g08/134/78/pdf/g0813478.pdf?token=LqcuAByu2At8uTpHzb&fe=true]; last accessed 25 February 2024; 2008 SRSG Report Clarifying Concepts Addendum 1-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Clarifying the Concepts of "Sphere of influence" and "Complicity" Addendum 1 A/HRC/8/5/Add.1 (23 April 2008); available [https://documents.un.org/doc/undoc/gen/g08/131/10/pdf/g0813110.pdf?token=OPsT69u12IwcKDy7YR&fe=true]; last accessed 25 February 2024.; 2008 SRSG Report Clarifying Concepts Addendum 2-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Clarifying the Concepts of "Sphere of influence" and "Complicity" Addendum 2 A/HRC/8/5/Add.2 (23 May 2008); available [https://documents.un.org/doc/undoc/gen/g08/136/61/pdf/g0813661.pdf?token=irXDuqrrusYJAtRhE0&fe=true], last accessed 25 February 2024.

[41] 2011 SRSG Report 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://documents.un.org/doc/undoc/gen/g11/135/63/pdf/g1113563.pdf?token=Vl5XEMdPZslHQiME5s&fe=true]; last accessed 25 February 2025.

summary of general intention that then might inform the way in which one can approach the meaning and application of the text of the UNGP, and from that, the spirit of the UNGPs.

The object is not history but rather an effort to extract evidence of intention, principle, objectives that might inform a reading of the text of the UNGP, or, more generally of interpreting its ″spirit.″ It is a long chapter-- the SRSG′s principles pragmatism served as the ordering instrument of an iterative inductive dialectic between generative principles/objectives, contemporary structures and practices, and the arc of their development. To that end a substantial amount of descriptive and predictive analysis was produced on the basis of which the mandate′s objectives could be advanced and the underlying principles fulfilled in ways that both (1) remained faithful to contemporary structures, practices, principles, and sensibilities--the then current architecture of business and human rights-- (2) while advancing the arc of development of these structures in ways that realized the principles for which the mandate was created.

The reports produced by the SRSG between 2006 and 2010 (the 2011 reports and their addenda were considered in Chapter 2) expose this inductive iterative dialectic nicely--a step by step process of data rich analytics that uses its understanding of the present to suggest the ways that this present already points to a desired future. The harvesting of that data, the curation of consultation, the deployment of road testing projects, to which a directed analytics was applied provides an important basis for understanding the fundamental inductive and iterative principled based structure of the UNGP itself, as well as a means of interpreting the plausible range of the interpretation of its 31 principles within its 3 Pillars.

3.1 Principled Pragmatism in the Travaux Préparatoires

The SRSG abandoned the Norms' focus on the development of a legal structure at the international level that might more directly impose obligations of multinational corporations. Instead, the SRSG considered legal obligations, which flow from and through states, as well as other obligations, that affect corporate entities more directly under traditional legal concepts.[42] The methodology adopted was what he described as principled pragmatism: ''an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most—in the daily lives of people."[43] Fine words indeed, but what do they mean? The aim, then, was to identify "the directions in which achievable objectives may lie."[44] It suggests an iterative dialectic of sorts. One starts with a core principle tied to a normative objective. That was supplied by the UNHC in creating the SRSG's mandate—identify and clarify standards of corporate responsibility and accountability with regard to human rights, elaborating the role of state regulatory responses, considering complicity and spere's of influence, to

[42] The starting point is "corporate liability for abuses that amount to violations of international criminal or humanitarian law." John G. Ruggie, Remark s delivered at the Business & Human Rights Seminar
Old Billingsgate, London (8 December 2005); available [https://www.business-humanrights.org/en/latest-news/doc-remarks-by-john-g-ruggie-business-human-rights-seminar-old-billingsgate-london-december-8-2005/], last accessed 29 February 2024]hereafter Ruggie 12-2005 Remarks. "The reasons for starting at this point is that it is a critically important issue on its own, where greater clarity is needed, while it may also shed light on the general strategy of legalizing corporate human rights obligations. " Ibid.
[43] Jon G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (NY: W.W. Norton & Company, 2013), p. xlii-xliii).
[44] Ruggie 2005 Remarks, supra.

develop human rights impacts assessments, and to compile a list of best practices.[45] In this case the SRSG identified it as confronting the core contradiction of the current era of globalization: "History does teach us that severe imbalances between the scope of markets and business organization, on the one hand, and the capacity of societies to protect and promote core values and objectives, on the other, are not sustainable."[46] To overcome the manifestation of this contradiction in the contemporary era of globalization it is necessary to "adjust the international institutional order"[47] To those ends it is necessary to understand contemporary social and economic practices, sensibilities, perceptions, and customs. "What is needed is a strategy for strengthening the corporate contribution to the protection and promotion of human rights that recognizes and leverages the dynamics at work in each of these spheres."[48] The SRSG "envisioned a model of widely distributed efforts and cumulative change. But for such efforts to cohere and become mutually reinforcing, they require an authoritative focal point."[49]

At the heart of the pragmatic part of the dialectic was the recognition of the fundamental polycentricity of governance[50] within transnational economic pathways.[51] Governance revolved around systems of public law and policy, civil governance systems that reach to external stakeholders, and systems of private governance constructed around principles of corporate governance. To develop structures for embedding human rights within these systems it would be essential to develop ways of embedding that work within each of these clusters of regulation and that can be aligned between them. Legal obligations were to focus on the identification and harmonization of legal standards; "achieving greater clarity of, and possibly greater convergence among, emerging standards is a pressing need."[52] From the start of the mandate, the SRSG acknowledged that the mandate's scope extended beyond just the legal realm, to include a "full range of governmental responsibilities and policy options in relation to business and human rights."[53] It includes all sources of corporate responsibility.[54] That broadening provided the opening for realizing a needed "strategy for strengthening the corporate contribution to the protection and promotion of human rights that recognizes and leverages the dynamics at work in each of these spheres."[55] This approach, then, marked the arc of the development of the UNGP and provided the conceptual basis for the three pillar protect-respect-remedy framework. It was at the heart of the "smart mix of measures" that was meant to align the regulatory structures of each pillar. And it was all held together by the organizing principle—that business activity must take into account in meaningful ways the adverse human rights impacts of their activities.

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[45] 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 [UNHRC resolution 2005/69].
[46] Ruggie 12-2005 Remarks, supra.
[47] Ibid.
[48] Bid.
[49] Ruggie, Just Business supra, p. xliii.
[50] Enrico Partiti, 'Polycentricity and Polyphony in International Law: Interpreting the Corporate Responsibility to Respect Human Rights,' (2021) 70(1) The International & Comparative Law Journal 133-164; generally, Larry Catá Backer, 'The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity,' (2012) 17(2) Tilburg Law Review 45-67.
[51] Ruggie, Just Business, supra, xliii.
[52] Ruggie 2005 Remarks.
[53] Ibid., p. 6.
[54] Ibid. (including legal compliance as well as social norms, moral considerations and strategic behavior).
[55] Ibid.

The SRSG's mandate began with a series of studies that were designed to elicit information from stakeholders including the corporate sector,[56] along with a set of fact-finding missions.[57] Its progress was elaborated in a series of reports from 2006 through 2011. In June 2008, the UNHRC[58] unanimously welcomed the framework and extended the SRSG's mandate to provide practical recommendations and concrete guidance; that is, to transpose the framework from policy to system.[59] With this encouragement and the support of key state actors,[60] Professor Reggie's work ultimately resulted in the production of a set of Guiding Principles.[61] The initial effort, a set of draft Guiding Principles ("Draft Principles") was circulated in November 2010, and introduced by a short Report ("2011 Report").[62] Thereafter, and incorporating the results of extensive consultation held over the winter, the Special Representative circulated a set of final Guiding Principles ("Guiding Principles") in March 2011, preceded by a short Introduction.[63] The UNHRC endorsed the Guiding Principles in June 2011.[64]

During the transformation—from study, to normative framework, to Guiding Principles—important international human rights actors lent critical support to the approach.[65] The European Union leadership

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56. The SRSG planned to conduct surveys of business policies and practices with regard to human rights to learn how businesses conceive of human rights, what standards they reference, and their use of impact assessments. John G. Ruggie, Opening Remarks at Wilton Park Conference on Business & Human Rights 4 (Oct. 10-12, 2005), *available at* http://www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc. Legal teams were also contacted to determine how European and American courts understand the concepts of complicity and sphere of influence in this context. *Ibid.*

57. *Ibid.* at 5.

58. *United Nations Human Rights Council*, UNITED NATIONS HUM. RTS., http://www2.ohchr.org/english/bodies/hrcouncil/ (last visited Mar. 20, 2012).

59. Rep. of the Human Rights Council, 8th sess., June 2-8, 2008, sec. 8/7, U.N. Doc. A/HRC/8/52 (Sept. 1, 2008) (prepared by Alejandro Artucio), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.52.doc.

60. Some key state actors provided funding for portions of the work leading to the Guiding Principles. *See, e.g.*, John Ruggie, *Business and Human Rights: The Evolving International Agenda*, (John F. Kennedy Sch. of Gov't Faculty Research, Working Paper No. RWP07-029, 2007), *available at* http://web.hks.harvard.edu/publications/getFile.aspx?Ibid=262 (Ibidentifying the financial support of the governments of Canada, Belgium, Norway, Sweden, and United Kingdom; the Friedrich Ebert Stiftung, German Marshall Fund of the United States; and United Nations Foundation).

61. *See Taking Responsibility*, *supra* note **Error! Bookmark not defined.**.

62. Special Representative of the Secretary-General, *Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Draft (Nov. 2010), *available at* http://www.reports-and-materials.org/Ruggie-UN-draft-GuIbiding-Principles-22-Nov-2010.pdf (by John Ruggie)[hereinafter 2011 Report].

63. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (the UNGP).

64. Human Rights Council Res. 17/4, 17th Sess., July 6, 2011, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement. "In an unprecedented step, the United Nations Human Rights Council has endorsed a new set of Guiding Principles for Business and Human Rights* designed to provide -for the first time- a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity." *New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council*, UNITED NATIONS HUM. RTS. (June 16, 2011), http://www.business-humanrights.org/media/documents/ruggie/ruggie-guIbiding-principles-endorsed-16-jun-2011.pdf.

65. Mary Robinson has noted that the "Protect, Respect, Remedy Framework has put in place the foundation upon which to build principled, but pragmatic solutions to a range of challenges at the interface of business and human rights." Mary Robinson, Remarks at the Swedish EU Presidency Conference on Corporate Social Responsibility (Nov. 10-11, 2009), *available at* http://www.realizingrights.org/pdf/Mary_Robinson-Protect_Respect_Remedy-Stockholm-Nov2009.pdf. Ms. Robinson was President of Ireland (1990-1997), United Nations High Commissioner for Human Rights (1997-2002), and

endorsed the framework;[66] its near contemporaneous incorporation into other soft law systems as a basis for interpretation, from that of the OECD Guidelines for Multinational Corporations,[67] to the corporate social responsibility frameworks of the International Organization for Standardization[68]added legitimacy. The support of key states was crucial to the success of the project. For example, Norway will "continue to support the Special Representative's work both politically and financially."[69] The SRSG compiled a list of examples of influential people and organizations that had by then applied the "Protect, Respect and Remedy" Framework.[70] Now reduced to a set of Guiding Principles, this framework seeks inter-systemic harmonization that is socially sustainable, and thus stable. The framework both recognizes and operationalizes emerging governance regimes by combining the traditional focus on the legal systems of and between states with the social systems of non-state actors and the governance effects of policy.

The initial report produced by the SRSG in 2006 was based on Mr. Ruggie's preliminary research and conceptualization of the mandate.[71] The foundation of the initial efforts were on deepening the SRSG's "personal understanding of situations on the ground,"[72] The object now was to avoid the policy tension that caused the

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is now a civil society actor on the Board of Directors of Realizing Rights. *See Our Board*: *Mary Robinson*, REALIZING RTS., http://www.realizingrights.org/index.php?option=com_content&view=article&Ibid=75&ItemIbid=88 (last visited Mar. 20, 2012).

66. *Protect, Respect, Remedy: Making the European Union Take a Lead in Promoting Corporate Social Responsibility*, ESILIGIEL FILES WORDPRESS 1 (2009), http://esiligiel.files.wordpress.com/2009/11/eu-presIbidency-statement-on-protect-respect-remedy.pdf ("The United Nations' Protect, Respect and Remedy framework provides a key element for the global development of CSR practices. It constitutes a significant input to the CSR work of the European Union.").

67. *See, e.g.*, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International Against Vedanta Resources plc*, BUS. & HUM. RTS. RESOURCE CENTRE (Sept. 25, 2009), http://www.business-humanrights.org/Links/Repository/266990/jump [hereinafter Final Statement]. The National Contact Point explained that Vedanta ought to consider implementing the SRSG's suggested steps for human rights due diligence, especially respecting the adoption of a policy, ensuring that human rights impacts are incorporated in analysis of business decisions, mainstreaming human rights policy throughout the enterprise, and monitoring and auditing implementation. *Ibid.* at § 78.

68. See ISO 26000—Social Responsibility, *Int'l Org. for Standardization*, http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_discovering_iso26000.htm (last visited Mar. 20, 2012); Sandra Atler, *The Impact of the United Nations Secretary-General's Special Representative & the UN Framework on the Development of the Human Rights Components of ISO 26000* (John F. Kennedy Sch. of Gov't, Working Paper No. 64, 2011), *available at* http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_64_atler_june%202011.pdf.

69. *See, e.g.*, Norwegian Ministry of Foreign Affairs, Report No. 10 to the Storting: Corporate Social Responsibility in a Global Economy 78 (2009), *available at* http://www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Reports-to-the-Storting/2008-2009/report-no-10-2008-2009-to-the-storting.html?Ibid=565907.

70. *See Special Representative of the United Nations Secretary-General for Business & Human Rights, Applications of the U.N. "Protect, Respect and Remedy" Framework*, BUS. & HUM. RTS. RESOURCE CENTRE, http://www.business-humanrights.org/media/documents/ruggie/applications-of-framework-1-mar-2011.pdf (last updated Mar. 1, 2011).

[71] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises E/CN.4/2006/97 (22 February 2006); available [https://undocs.org/en/E/CN.4/2006/97], last accessed 25 February 2024 []the 2006 SRSG 2006 Report]. Work on the mandate began by "conducting extensive consultations on the substance of the mandate as well as alternative ways to pursue it – with states, non-governmental organizations, international business associations and individual companies, international labor federations, UN and other international agencies, and legal experts." Ibid., at ¶ 3.

[72] 2006 SRSG 2006 Report, ¶ 3; also ¶¶ 3-5.

*Norm*s project to falter.[73] The structure of the 2006 SRSG Report suggested the iterative working style of principled pragmatism: it starts with a foundational account of the SRSG's understanding of globalization as the context within which the problem at the center of his mandate arises;[74] he then describes the qualitative data based abuses and correlates that are a consequence of the current course of development;[75] and this is followed by a consideration of the scope and character of existing responses.[76] This data based analytic foundation then serves as a platform for considering strategic direction.[77] The framing of that consideration is then crystalized in a formal discussion of the principled pragmatism that will guide the arc of the work on the mandate.[78]

The 2007 SRSG Report addressed the four elements of the initial mandate.[79] Supporting evidence was drawn from the SRSG's continued information gathering and stakeholder consultations among civil society consultations on five continents; four workshops of legal experts; among many others.[80] It also outlined what was coming for the remainder of the mandate. Five clusters of standards were created that evolved into the current three-pillar framework.[81] These clusters include: the state duty to protect against human rights abuses by third parties, potential corporate responsibility and accountability for international crimes, corporate responsibility for other human rights violations under international law, soft law mechanisms, and self-regulation.[82] The SRSG focused on accountability and interpretive mechanisms.[83] "As indicated at the outset, the Special Representative of the Secretary-General takes his mandate to be primarily evidence-based. But insofar as it involves assessing difficult situations that are themselves in flux, it inevitably will also entail making normative judgements."[84]

The 2008 SRSG Report was based on fourteen multi-stakeholder consultations on five continents with concern expressed for a common need among them all – "a common framework of understanding, a foundation on

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[73] The two bookends of the debate include one position that "corporations cannot violate international human rights laws because they are only applicable to states." Based on this reading, the only duty for companies is to comply with the national laws where they operate along with the voluntary initiatives they choose to undertake. Montreal Nov.2006 speech p.2. At the opposing position of the debate is the UN Norms which seek "to impose on corporations the full range of international human rights standards that states have adopted for states, with Identical obligations ranging from "respecting" to "fulfilling" those rights." Ibid. The debate between these two opposing views did not result in any light on the subject nor movement in policy, which then resulted in the appointment of SRSG Ruggie. Ibid.

[74] Ibid., ¶¶ 9-19.

[75] Ibid., ¶¶ 20-30

[76] Ibid., §§ 31-53.

[77] Ibid., ¶¶ 54-69. "Having examined the broader context of the mandate, the next step is to identify an approach that can move the agenda forward effectively." Ibid., ¶ 54.

[78] Ibid., ¶¶ 70-81.

[79] Report of the Special Representative to the Secretary General of the United Nations on human rights and transnational corporation, ¶ 81.s and other business enterprises. *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Act*, ¶ 1, U.N. Doc. A/HRC/4/035 (February 9, 2007).

[80] Regional multi-stakeholder consultation took place in Johannesburg, Bangkok, and Bogotá. The workshops including legal experts took place in London, Oslo, Brussels, and New York. And the two Geneva-based consultations included work on the extractives and financial services industries. Feb.2007 London speech p.1

[81] Paris speech. April 2007, p.2

[82] Paris speech. April 2007, pp.2-4

[83] Mr. Ruggie emphasized there is commonly an underdeveloped accountability mechanism within voluntary initiatives that affects the performance of the initiative in that companies cannot correct what they don't know is wrong. May 2007 Washington speech, p.5.

[84] 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).

which thinking and action can build in a cumulative fashion."[85] In this report the three-pillar Protect-Respect-Remedy framework was unveiled.[86] The five clusters of standards from the 2007 report became the three most important principles. The complementary principles of the framework now include the state duty to protect, the corporate responsibility to respect, and access to remedies. The SRSG noted that it is necessary for all social actors involved in business and human rights to play an active role in addressing these issues.[87] This Report also explored governance gaps in more detail. These gaps have created an environment that permits wrongful acts by companies lacking a system of adequate sanctions or reparations; narrowing this gap is the fundamental challenge.[88]

The Human Rights Council renewed the SRSG's mandate in 2008.[89] The HRC directed the SRSG to operationalize the framework, by providing "'practical recommendations' and 'concrete guidance' to states, businesses and other social actors on its implementation."[90] It stressed "the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State."[91] The HRC also emphasized "that transnational corporations and other business enterprises have a responsibility to respect human rights."[92]

The 2009 SRSG Report incorporates policy considerations that touch on the global economic crisis of 2008 and the resulting pressure on stakeholders to reduce the priority of human rights concerns.[93] The SRSG emphasized that the business and human rights agenda should be more closely aligned with the overall world economic policy agenda.[94] The 2009 report considered mostly the issue of operationalization. A Report is to follow in 2010 in which the SRSG is to release a set of applicable principles to aid in fulfilling the requirements of

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[85] May 2008 speech, p.4

[86] 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).

[87] Ibid., at ¶ 7.

[88] This gap is vast between "the scope and impact of economic forces and actors" on one side and "the capacity of societies to manage their adverse consequences" on the other. 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*, ¶ 3, U.N. Doc. A/HRC/8/5 (April 7, 2008).

[89] Human Rights Council, Eighth session, Agenda item 1, Organizational and procedural matters, A/HRC/8/52, 1 September 2008; 8/7. Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises June 18, 2008, at 30-32 (adopted without a vote). http://www2ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.52.doc.

[90] S.A. Oct. 2009 speech, p.1

[91] Human Rights Council, Eighth session, Agenda item 1, Organizational and procedural matters, A/HRC/8/52, 1 September 2008; 8/7. Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises June 18, 2008, at 31.

[92] Ibid.

[93] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Business and human rights: Towards Operationalizing the "protect, respect and remedy" framework*, at ¶ 15, U.N. Doc. A/HRC/11/13 (April 22, 2009), available http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf.

[94] It is pointed out quite clearly from the 14 consultations that "Every stakeholder group, despite their other differences, has expressed the urgent need for a common framework of understanding, a foundation on which thinking and action can build in a cumulative fashion." The result of this was the Protect, Respect and Remedy Framework. *Supra* note ????, at 4. Chatham house speech...

each pillar. The 2010 SRSG Report may also include suggestions for institutionalizing the framework within a to-be-developed governance framework.

The journey from differentiation of the SRSG's mandate from the *Norms* in 2006, first to the development of the "Protect, Respect and Remedy" Framework in 2010, and then to the distillation of the framework in the form of implementable principles in 2011, suggests both the narrowness of the framework within which this project could be developed and the effects of the limiting context in which these approaches can be effectuated. Principled pragmatism, the hallmark of the Ruggie project, produced both great innovation and vision in the "Protect, Respect and Remedy" Framework, and substantial compromise, with the offer of more muted implementation of the framework's vision in the form of the Principles ultimately endorsed. That journey was nicely chronicled in the Reports. But more importantly, perhaps, the Reports were designed to produce the evidentiary basis to support the legitimacy of the project, as well as the arc of its development. To those ends, the Addenda to the reports—especially the four Addenda to the 2007 Mapping Report (4/35) are especially useful. That utility extends beyond structure to intent, and from intent toward the interpretive range of the principles that eventually were written into the UNGP.

For all its compromises, the "Protect, Respect and Remedy" Framework operationalized through the UNGP took important steps toward realizing the objectives of the SRSG's mandate. Its greatest innovation was also the most difficult for the human rights community to embrace—that global governance respecting human rights impacts could not be resolved solely through the announcement and imposition of law. But the Guiding Principles represent innovation that is subject to substantial pressure to conform to conventional understandings of the arrangement of governance power within the state system that serves as the foundation of the international political order.[95] The issue, in a sense, suggested the tension between the SRSG's inductive approach against the traditional deductive approach that marked prior efforts, like the Norms.[96] The former starts from that patterns and practices and then builds principles around them (structured through the animating objective); deductive processes start from the rules that can logically be deduced from principle and then seeks to change behaviors around those rules. Indeed, the UNGP' most forward-looking and valuable characteristics are also ones that make the project vulnerable. For states, there is too great a recognition of the autonomy and power of social-norm systems. For corporations, there is too great a recognition of the power of states beyond their own borders, of international norms in mediating their obligations to states and to their stakeholders, and a sense that the power of international norms is neither specific nor legitimate enough. And for non-governmental communities, there is too little emphasis on the forms and structures of law tied to states and on the subordination of non-state actors in all cases to the state-based law-norm system. The former ought to be obliged to incorporate international consensus within their domestic legal orders, and the latter ought to be bound by this domesticated global law within the legal systems of states. The UNGP framework represents a microcosm of the tectonic shifts in law and governance systems, and the organization of human collectives confronts the consequences of globalization. States, corporations, and non-governmental organizations content with the current forms will try to bend the most

95. Typical, perhaps, was the U.S. statement in support of the resolution endorsing the GP. *See* Daniel Baer, *Businesses and Transnational Corporations Have a Responsibility to Respect Human Rights: Guiding Principles for Business and Human Rights*, HUM. RTS. (June 16, 2011), http://www.humanrights.gov/2011/06/16/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights/. "In highlighting the importance of the Guiding Principles, we also want to take this opportunity to emphasize the essential foundation of the human rights system that remains an important backdrop for the Special Representative's work, namely, State obligations under human rights law with respect to their own conduct." *Ibid.*

96 Discussed in Chapter 2, supra.

innovative aspects of the UNGP to suit their sense of the past. That, at any rate, is what likely emerges from the premises that drove both the SRSG mandate and the UNGP that was its fruit.

3.2 A Deeper Dive: The SRSG Reports: 2006-2010

The Three Pillar framework approach of the UNGP was not just a reaction to the failed *Norms* project. Nor was it merely an elaboration of voluntary principles-based codes in the style of the Global Compact or of the Millennium Development Goals. The SRSG's reports suggest, from the first, a much broader intent, one based on the SRSG's interpretant and development of his original mandate,[97] but one grounded strictly on current structures of legality and practice. By 2011 that mandate had assumed the character of and nature of an institutionalized multi-level governance framework that the Protect-Respect-Remedy Framework represents. It served as an embodiment of the smart mix of measures that the three pillar framework implied—each autonomous .The development of that design and of the intention to memorialize its workings through the UNGP may be gleaned from the SRSG's 2006-2010 reports, including the several Addenda used increasingly and to strategic effect by the SRSG starting with the 2007 Reports. These touched on the evidentiary basis for the choices made by the SRSG in framing what was first the Protect, Respect, and Remedy Pillars, and from them the UNGP. It also served to engage with and develop approaches to key conceptual issues—among them the concepts and application of extraterritoriality, of the nature and approaches to conflict zones, and of the character and stability of non-state based regulatory systems grounded in markets and private law. Though the expression of that intent leaves open a quite broad set of interpretive possibilities within the UNGP, nonetheless its public elaboration provides a framework within which the plausibility of any interpretation may be tested by any actor seeking to apply the UNGP in any context.

3.2.1 The Arc of Intent from 2006 Through 2011.

One gets a sense of this when one considers the arc of conceptual development in the SRSG's Reports produced between 2006 and 2011. The initial report produced by the SRSG in 2006[98] was based on his preliminary research and conceptualization of the mandate.[99] The initial object was to distance the conceptual framework of the SRSG's project from that which produced the failed Norms.[100] The 2006 Report reaffirmed the

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[97] UNHRC Resolution 2005/69.

98. Special Rep. of the Secretary-General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement (by John Ruggie) [hereinafter SRSG 2006 Report].

99. *Ibid.* at para. 3. Work on the mandate began by "conducting extensive consultations on the substance of the mandate as well as alternative ways to pursue it—with states, non-governmental organizations, international business associations and individual companies, international labor federations, U.N. and other international agencies, and legal experts." *Ibid.*

100. *Ibid.* at para. 61-69. The SRSG devoted some attention to this aspect of the opening task of the project. "My major concern was the legal and conceptual foundations of the Norms, especially as expressed in the General Obligations section and the implications that flow from it. I judged them to be poorly conceived and, therefore, highly problematic in their potential effects." Opening Statement to United Nations Human Rights Council, Professor John G. Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Geneva (Sept. 25, 2006), *available at* http://198.170.85.29/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf.

classical organization of public power, within which the law-state system held a primary position,[101] and with respect to which law, including international law, served as the most authoritative source of obligation.[102] But the Report also recognized the possibility of spaces for regulation under regimes other than law, where the state and its domestic-international legal system were not directly involved.[103] But that space was not a public space; it was a space for private governance.[104] The possibility of bifurcating governance would permit the development of a further possibility—one creating a governance regime in which the several components of governance could be harnessed in a coordinated way. That possibility was to be explored on the basis of a distinct approach that the SRSG described as principled pragmatism.[105] Principled pragmatism served not just as a conceptual framework, but also as a methodological roadmap for the elaboration of a framework amalgamating the legal systems of states,

101. The "premise [is] that the objective of the mandate is to strengthen the promotion and protection of human rights in relation to transnational corporations and other business enterprises, but that governments bear principal responsibility for the vindication of those rights." SRSG 2006 Report, *supra* note 98, at para. 7.

102. *Ibid.* at para. 61.

103. "The role of social norms and expectations can be particularly important where the capacity or willingness to enforce legal standards is lacking or absent altogether." *Ibid.* at para. 75. But, as will become evident, the relationship between social norm systems and law-state systems will remain the most difficult framing issue of the SRSG project.

104. Early on the SRSG indicated a conceptual rejection of the notion of corporations as public actors.

> In the best case scenario, these formulations would do little more than keep lawyers in gainful employment for a generation to come. But in the worst case scenario, I fear, they would turn transnational corporations into more benign twenty-first century versions of East India companies, undermining the capacity of developing countries to generate independent and democratically controlled institutions capable of acting in the public interest—which to my mind is by far the most effective guarantor of human rights.

Opening Statement to United Nations Human Rights Council, *supra* note 58.

105. SRSG 2006 Report, *supra* note 98, at paras. 70-81.

the governance systems of international organizations, and the social norm systems of corporations.[106] The Report also set out the information gathering tasks that were to serve as the foundation for the SRSG's proposals.[107]

The 2007 Reports addressed the principal elements of the initial mandate.[108] Its object was to provide a comprehensive mapping of customary practices by states, international actors, and corporations to serve as a basis for extracting principle.[109] It elaborated a series of five clusters of standards, which were to serve as the basis of the "Protect, Respect and Remedy" Framework.[110] The SRSG also began to consider issues of implementation, focusing initially on accountability and interpretive mechanisms.[111] The importance of the 2007 Report lies not merely in the mapping, but rather in the organization of that mapping. That organization had strong substantive

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106. The SRSG has described principled pragmatism:

> The very first time I ever made any remarks on this mandate I was asked to describe my approach to this, and I called it principled pragmatism. It is driven by principle, the principle that we need to strengthen the human rights regime to better respond to corporate-related human rights challenges and respond more effectively to the needs of victims. But it is utterly pragmatic in how to get from here to there. The determinant for choosing alternative paths is which ones provide the best mix of effectiveness and feasibility. That is what we have been trying to do with this mandate since 2005.

John Ruggie, *Business and Human Rights: Achievements and Prospects*, POL'Y INNOVATIONS (Oct. 28, 2008), http://www.policyinnovations.org/Ibideas/briefings/data/000089. On the understanding of the implementation of SRSG's principled pragmatism, see *Principled Pragmatism—the Way Forward for Business and Human Rights*, UNITED NATIONS HUM. RTS. (June 7, 2010), http://www.ohchr.org/EN/NewsEvents/Pages/PrincipledpragmatismBusinessHR.aspx. Principled pragmatism followed the framework through to the development of the Guiding Principles.

> Like the Framework, the Guiding Principles draw on extensive research and pilot projects carried out in several industry sectors and countries, as well as several rounds of consultations with States, businesses, investors, affected groups and other civil society stakeholders. All told, the mandate will have conducted 47 international consultations from beginning to end.

Special Rep. of the Secretary-General, *Guiding Principles for the Implementation of the United Nation's 'Protect, Respect and Remedy' Framework*, para. 12, U.N. Doc. DRAFT (Nov. 2010), *available at* http://www.ohchr.org/Documents/Issues/TransCorporations/GPs_Discussion_Draft_Final.pdf (by John Ruggie)[hereinafter Draft Principles].

107. Regional multi-stakeholder consultation took place in Johannesburg, Bangkok, and Bogotá. The workshops including legal experts took place in London, Oslo, Brussels, and New York. And the two Geneva-based consultations included work on the extractives and financial services industries. John G. Ruggie, Prepared Remarks at Clifford Chance, London (Feb.19, 2007), *available at* http://www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf.

108. Special Rep. of the Secretary-General, *Report of the Special Representative of the Secretary-General of the United Nations on Human Rights and Transnational Corporations and Other Business Enterprises*, para. 5, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement (by John Ruggie) [hereinafter SRSG 2007 Report].

109. *Ibid.* at paras. 3, 5.

110. These clusters include: the state duty to protect against human rights abuses by third parties, potential corporate responsibility and accountability for international crimes, corporate responsibility for other human rights violations under international law, soft law mechanisms, and self-regulation. John G. Ruggie, Remarks at International Chamber of Commerce Commission on Business in Society, Paris 2-4 (Apr. 27, 2007), *available at* http://www.reports-and-materials.org/Ruggie-speech-to-ICC-27-Apr-2007.pdf.

111. Mr. Ruggie emphasized that there is commonly an underdeveloped accountability mechanism within voluntary initiatives that affects the performance of the initiative in that companies cannot correct what they don't know is wrong. John Ruggie, Voluntary Principles on Security & Human Rights Remarks at Annual Plenary, Washington, D.C. 5 (May 7, 2007), *available at* http://www.reports-and-materials.org/Ruggie-remarks-Voluntary-Principles-plenary-7-May-2007.pdf.

effects—creating the beginnings of a framework for conceptualizing the structure of global governance of corporate actions with human rights effects, and revealing the generally accepted content of this framework through the aggregate behavior rules of states, international bodies, and corporations.

The 2008 Report presented the first synthesis of the conceptualization and data gathering projects of the 2006 and 2007 Reports.[112] Its theme was the construction of "a common framework of understanding, a foundation on which thinking and action can build in a cumulative fashion."[113] It was the first real attempt to sketch out a multi-governance framework which would organize contributions by each of the major systemic stakeholders—states, businesses and non-governmental stakeholders—into a system which coordinated and harmonized the governance orders of each of the stakeholders' polycentric system of governance. Each system could then contribute to the objective of the mandate—the protection of human rights in economic intercourse—through their respective governance systems.[114] The object of this approach was practical, derived from the recognition emphasized in the fact-finding of the prior reports. As a result, multiple governance organs contributed to the maintenance of human rights.[115] The failure to coordinate between them, and to systematize their approach to human rights within each system, contributed significantly to the governance gaps that were at the heart of human rights governance failures.[116] The three-pillar "Protect, Respect and Remedy" Framework was first introduced as a response to this need.[117]

The first three reports, then, can be understood as forming a single unit that starts from a rejection of past efforts, and involves reframing, data gathering, and reconceptualization grounded in that data and an openness to coordinating polycentric systems within and beyond states and their legal orders. With the renewal of the SRSG's mandate by the HRC in 2008,[118]the focus changed from conception to operationalization.[119] It stressed that "the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State."[120] The 2009 Report[121] provided a first attempt at conceptualizing operationalization.[122] The emphasis

112. Special Rep. of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter SRSG 2008 Report].
113. John Ruggie, Special Rep. for Bus. & Human Rights, Next Steps in Business and Human Rights at the Royal Institute of International Affairs, Chatham House, London 4 (May 22, 2008) *available at* http://www.reports-and-materials.org/Ruggie-speech-Chatham-House-22-May-2008.pdf.
114. SRSG 2008 Report, *supra* note 112.
115. *Ibid.* at paras. 6-8.
116. This gap is vast between "the scope and impact of economic forces and actors" on one side and "the capacity of societies to manage their adverse consequences" on the other. *Ibid.* at para. 3.
117. *Ibid.*
118. Rep. of the Human Rights Council, *supra* note 59.
119. HRC directed the SRSG to operationalize the framework, by "providing 'practical recommendations' and 'concrete guidance' to states, businesses and other social actors on its implementation." John G. Ruggie, U.N. Special Rep. for Bus. & Human Rights, Remarks for ICJ Access to Justice Workshop, Johannesburg, South Africa 1 (Oct. 29-30, 2009), *available at* http://www.reports-and-materials.org/Ruggie-remarks-ICJ-Access-to-Justice-workshop-Johannesburg-29-30-Oct-2009.pdf.
120. Rep. of the Human Rights Council, *supra* note 59.
121. Special Rep. of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (by John Ruggie) [hereinafter SRSG 2009 Report].
122. It is pointed out quite clearly from the fourteen consultations that "[e]very stakeholder group, despite their other differences, has expressed the urgent need for a common conceptual and policy framework" of understanding, "a foundation

was on the principal measures through which states and businesses operated as the starting point for framing issues of implementation. States operated through law and policy, and so operationalization required an emphasis on policy coordination and the aggressive implementation of law and legal obligation that bound states. Businesses operated through contract and the expectations of their principal stakeholders, regularized through markets. Operationalization required an emphasis on the mechanics through which these stakeholders could hold companies accountable. The form chosen was the disclosure regimes already proven relatively effective in the regulation of securities markets on many states.

The 2010 SRSG Report[123] refined and developed the ideas of the 2009 Report. It considered the results of extensive consultations with governments, businesses, and civil society actors and refined the framework in response. The legal basis of the state's duty was made a more central element of the "Protect, Respect and Remedy" Framework. The emphasis on the corporate responsibility was more discernibly articulated through its disclosure obligations. The Report emphasized the state's paramount role in dispute resolution.[124] Corporate activity was relegated to the realm of the grievance and the management of the exotic. The remedial framework emphasized the importance of the formal judicial mechanism, and its more informal mediation variant, though the latter was meant to be administered through the court system.[125]

The 2009 and 2010 Reports, then, also can be understood as a single unit but with several moving parts. In addition, the Addenda, first encountered as a supplement to the SRSG UNHRC Reports, prove increasingly important in marking the progression of analysis and interpretation through which the text of the UNGP and its framework were shaped With the 2010 Report, the structuring of the operationalization of the "Protect, Respect and Remedy" Framework is substantially elaborated. If the emphasis of the first three reports was on the principle part of principled pragmatism, the focus of the last two was on the practical aspects. For that purpose, the SRSG considered the practical element of each of the framework's pillars. The state duty to respect was practically conceived as centering on the issue of legal system coherence. States act through law/regulation, and that law/regulation system could only advance human rights objectives if it was internally coherent. Coherence also required an element of external coherence. External coherence is necessary to bind the distinct stakeholder systems together (state, international, and corporate).[126] The corporate responsibility was practically conceived through the device of human rights due diligence. This focus suggested both the governance character of the device—human rights due diligence was the expression of the "law" of corporate behavior within its operational framework—and the means through which it could enforce its norms and connect them to the governance systems of states and international actors. However, the SRSG appeared to increasingly focus on the third pillar of the framework—access to justice—as the place where the concepts of the framework could be practically realized on the ground. But that reduction of the access to remedy pillar also tended to reframe it as a consequential element of the state duty to protect and the corporate responsibility to respect human rights.

The "Protect, Respect and Remedy" Framework, then, is not just a reaction to the failed Norms project. Careful review of the SRSG's reports suggests its character and nature is that of an institutionalized multi-level

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on which thinking and action can build." SRSG 2008 Report, *supra* note 112, at para. 8; Rep of the Human Rights Council, *supra* note 59. The Protect-Respect-Remedy framework resulted. Ruggie, *supra* note 113.

123. Special Rep. of the Secretary-General, *Report of the Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/14/27 (Apr. 9, 2010), *available at* http://www.reports-and-materials.org/Ruggie-report-2010.pdf (by John Ruggie) [hereinafter SRSG 2010 Report].

124. *See Ibid.* at para. 96.

125. *See Ibid.* at paras. 103, 113.

126. *Ibid.* at para. 52.

governance framework that the "Protect, Respect and Remedy" Framework represents. But there is a potentially wide gulf between conceptualization and operationalization. The "Protect, Respect and Remedy" Framework as developed through the SRSG's 2006 through 2010 reports builds a framework grounded in the actual practices of state and non-state actors, gathering together the aggregate of practices and governance presumptions that together effectively regulate the behavior of states and corporations in matters relating to human rights. That exercise suggested both the important role of the state and the emerging role of corporations as governance centers. Though corporations are neither states nor public actors, and thus can neither exercise the privileges of states nor be burdened by state obligations, they emerge as autonomous actors, even in more modest form. The recognition of polycentric centers of governance—one law and state based and the other norm and non-state based—marks the principle innovative insight of the "Protect, Respect and Remedy" Framework project. It would find its expression in the elaboration of governance-tinged principles structuring a system that operationalizes these frameworks. These suggest the core premises that fuel intent and design that finds its way into the text of the UNGP.

But that move from insight to a governance system required approval or acknowledgement of some sort, and from the UNHRC, a state system based international body. In the march from framework to operational principles, one can discern a substantive movement away from the broadest possibilities of the framework to something perhaps more modest. This is reflected in the SRSG's last, 2011 Report.[127] It served as an introduction to the Draft Principles themselves, along with an Official Commentary. Its principal objective was to describe the transformation of "Protect, Respect and Remedy" from framework—an articulation of theory—to principle—a workable set of guiding norms that might be applied by states, corporations, and other stakeholders to implement the "Protect, Respect and Remedy" Framework.[128] Refined and finalized, the UNGP were submitted with a short summary.[129] But in that process of transforming framework to principle, the substance of the project was also changed—and that also provided an important element of the intent and design ultimately reflected in the UNGP text. In particular, the move toward greater horizontal parity between the state duty and the corporate responsibility to respect human rights was recast as a more conventionally hierarchical ordering in which state duty structures the human rights enterprise itself. Yet, the UNGP mean to leave enough of an opening for the maintenance of a governance space in which corporate enterprises can develop and manage cultures of governance beyond the more narrowly tailored state and law-based structures of human rights norms. With this as framework, it is now possible to more carefully consider the key reports produced by Mr. Ruggie between 2006 and 2011.

3.2.2. 2006 SRSG Report.[130]

The 2006 initial interim report produced by SRSG provided an opportunity to interpret and to begin to work toward the objectives set out in the mandate, as interpreted by the SRSG.[131] It also described current work

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127. *See* Draft Principles, *supra* note 106.

128. 2011 Report, *supra* note 62, at paras. 12-15.

[129] Discussed in Chapter 2, supra.

[130] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises E/CN.4/2006/97 (22 February 2006); available [https://undocs.org/en/E/CN.4/2006/97], last accessed 25 February 2024 (hereafter the 2006 SRSG Report).

[131] This initial mandate required Ruggie.

> "a) To Identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights; b) To elaborate on the role of

and posited a roadmap for future work. The SRSG began "work by conducting extensive consultations on the substance of the mandate as well as alternative ways to pursue it – with states, non-governmental organizations, international business associations and individual companies, international labor federations, UN and other international agencies, and legal experts."[132] Ruggie's visits to countries around the world, holding formal meetings, and stakeholder consultations were all in an effort to deepen his personal understanding of the situations on the ground.[133] His survey of Fortune Global 500 companies was used to gain additional background information relevant to his mandate.[134]

The 2006 SRSG Report was intended "to frame the overall context encompassing the mandate as the SRSG sees it, to pose the main strategic options, and to summarize his current and planned program of activities."[135] The SRSG suggested a three part contextualization for the mandate: "the institutional features of globalization; overall patterns in alleged corporate abuses and their correlates; and the characteristic strengths and weaknesses of existing responses established to deal with human rights challenges."[136] The SRSG devoted substantial space to distinguishing the efforts under his mandate form those that produced the Norms. The object was not merely to suggest that the mandate work was intended to improve the provisions set out in the Norms, but rather to suggest an abandonment of the core assumptions animating the Norms and the embrace of a different conceptual starting point. Each is discussed in turn.

1. Context of the Mandate: Globalization. Globalization has led to a number of results that have affected the issue of business and human rights. Today's global world includes "a variety of actors for which the territorial state is not the cardinal organizing principle have come to play significant public roles."[137] Globalization has manifested itself in the form of over 70,000 transnational firms, about 700,000 subsidiaries, along with millions of suppliers spanning the globe.[138] Globalization has produced a number of positive effects as well.[139] And it is hardly

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

Ibid., ¶ 1.

[132] Ibid. at ¶ 3.

[133] Ibid. at ¶ 3.

[134] Ibid. at ¶ 4. The questions asked were whether these companies have human rights policies and practices in place, and if so, what standards they used to develop them.

[135] Ibid. at ¶ 6.

[136] Ibid. at ¶ 8.

[137] Ibid. at ¶ 10. This is most evident in the economic realm. "The rights of transnational firms – their ability to operate and expand globally – have increased greatly over the past generation, as a result of trade agreements, bilateral investment treaties, and domestic liberalization." Ibid. at ¶ 11. Arm's length transactions have decreased and more intra-firm trading taking place while becoming a more significant share of overall global trade. What used to be external trade between national economies has now become internalized within the firms using supply chain management that functions in real time.

[138] Ibid. at ¶ 11. Arm's length transactions have decreased and more intra-firm trading taking place while becoming a more significant share of overall global trade. What used to be external trade between national economies has now become internalized within the firms using supply chain management that functions in real time.

[139] Including higher standard of living and in some cases a significant opportunity for poverty reduction. Ibid. at ¶ 13.

surprising that the transnational corporate sector has attracted this much attention from other social actors, including civil society and states themselves.[140]

There are three distinct drivers behind the increased attention that transnational corporations are receiving. The first is that "the successful accumulation of power by one type of social actor will induce efforts by others with different interests or aims to organize countervailing power."[141] Secondly, "some companies have made themselves and even their entire industries targets by committing serious harm in relation to human rights, labor standards, environmental protection, and other social concerns."[142] The third and final driver is the simple fact "that it *has* global reach and capacity, and that it is capable of acting at a pace and scale that neither governments nor international agencies can match."[143] There is a widening gap between global markets and the capacity of societies to manage the resulting consequences; this may pressure political leaders to look inward, but entrenching global markets in both shared values and institutional practices is a better method to achieve this outcome.[144]

2. Context of the Mandate: Abuses and Correlates. The SRSG noted the dearth of data impeding an empirically based approach to the problem of human rights abuses. The implication, of course, was that prior attempts proceeded in the absence of necessary hard data and, perhaps then, expressed ideology and political preference. He argued that in the absence of a repository or database for consistent, comprehensive, and impartial information, it was difficult to say with certainty if abuses related to the corporate sector are increasing or decreasing.[145] In the absence of data, policy choices could not be legitimately developed.[146]

But data gathering requires context. And the SRSG offered one: It is generally believed that economic development, coupled with the rule of law, is the best way to guarantee the entire spectrum of human rights.[147] But there are grounds to suspect that the expansion and deepening of globalization has increased the possible involvement of transnational involvement in human rights violations.[148] By going global, transnational firms have to adopt a system that embraces many corporate entities spread across and within many countries. The result is that networks form within the firm, that although enhancing economic efficiency also increase the difficulty that firms have when managing the global value chain.[149] When the number of links in this chain increases, there are greater vulnerabilities for the global enterprise as a whole.[150] It is these institutional features of transnational corporations, which if left alone, increase the chance that the company will violate its own corporate principles or social expectations of responsible corporate behavior.[151]

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[140] Ibid.
[141] "At the global level today, a broad array of civil society actors has been in the lead. And when global firms are widely perceived to abuse their power ... a social backlash is inevitable." Ibid. at ¶ 14.
[142] "This has generated increased demands for greater corporate responsibility and accountability, often supported by companies wishing to avoid similar problems or to turn their own good practices into a competitive advantage." Ibid. at ¶ 15.
[143] Other social actors are looking at how to leverage this to cope with pressing societal problems, often because governments are either unable or unwilling to perform their functions properly. Ibid. at ¶ 16.
[144] Ibid. This outcome is the broadest macro objective of the SRSG's mandate.
[145] The abuses are just reported more extensively because there are more actors tracking them, and there is greater transparency than in the past. Ibid. at ¶ 20.
[146] Ibid.
[147] Including civil, political, economic, social and cultural rights. Ibid. at ¶ 21.
[148] Though this is also because of the absolute number of firms that are in existence now. Ibid.
[149] Ibid. at ¶ 22.
[150] Ibid.
[151] Ibid. at ¶ 23.

The focus of study, then, had to relate to this concept of what constituted the core challenge of business and human rights lies–the creation of policy instruments of corporate and public governance that contain and reduce the human rights violations tendencies.[152] To that end, the SRSG began by surveying sixty-five instances recently reported by NGOs that involved alleged corporate human rights abuses.[153] The results of this survey showed two implications for the design of policy responses. First, there are significant differences in the various industry sectors in terms of the types and magnitude of human rights challenges.[154] And secondly, there is a clear "negative symbiosis between the worst corporate-related human rights abuses and host countries that are characterized by a combination of relatively low national income, current or recent conflict exposure, and weak or corrupt governance."[155]

3. Context of the Mandate: Existing Responses. Developing and instituting policies and practices to deal with human rights challenges has been an issue for some time. Firms have adopted initiatives both individually and in collaboration with business associations, NGOs and even governments or international organizations. [156] Ruggie conducted a survey of Fortune Global 500 firms though only 80 of the 500 has submitted responses by the time of the 2006 report. Nearly 80% of the respondents report having an explicit set of principles or management practices regarding the human rights dimensions of their operations.[157] By a ratio of two-to-one, human rights are included in the overall corporate social responsibility code or principles of major corporations, rather than being free-standing principles.[158]

When asked which international human rights instrument is referenced by the company policy, three-fourths cite the ILO declarations or conventions, 62% cite the Universal Declaration of Human Rights, 57% cite the UN Global Compact and 40% cite the OECD Guidelines for Multinational Enterprises.[159] Only four out of ten claim that they "routinely" conduct human rights impact assessments of their projects, with a slightly higher number of corporations claim that they do so "occasionally."[160] The stakeholders that these policies include are employees (virtually all companies); suppliers, contractors, distributors, joint venture partners, and other in the value chain (90% of companies); surrounding communities (66%); and the country in which they operate (just under 60%).[161] It was evident from this early sample that most major firms are aware that they have some human rights responsibilities, have adopted some form of policies and practices, think about them systematically, and institute some form of internal and external reporting system as well.[162] There is also an emerging group of collaborative agreements involving firms and social actors in this area including the UN Global Compact,[163] OECD Guidelines

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[152] Ibid.
[153] Ibid. at ¶ 24. These were likely the most egregious instances of abuse, so the reports are unlikely to demonstrate a representative sample of all situations, but more closely representative of the worst.
[154] Ibid. at ¶ 29.
[155] Ibid. at ¶ 30.
[156] Ibid. at ¶ 31.
[157] Ibid. at ¶ 33.
[158] Non-discrimination and workplace health and safety issues are included in most cases, followed closely by other core labor rights (85% of policies), right to health (56%), and the right to adequate standard of living (43%). Ibid.
[159] Ibid. at ¶ 34.
[160] Ibid. at ¶ 35.
[161] Ibid. at ¶ 36.
[162] Ibid. at ¶ 38.
[163] The largest social corporate responsibility initiative which engages firms in implementing ten universal principles in the areas of human rights, labor standards, environmental practices, and anti-corruption.

for Multinational Enterprises,[164] and the ILO.[165] Essentially, up to this point, it was only fragments of collaborative governance emerging in various sectors which were each tailored to their specific situations.[166]

4. Strategic Directions: The Norms. Having described the context in which the mandate would be interpreted and an approach to governance policy analyzed, the SRSG sought to describe the set of core conceptual issues that had to be addressed to move the human rights agenda forward. The most challenging issue centered on governance standards. This issue was broken down in two parts. First, the SRSG conceded that standards did not yet exist. Second, that moving forward on realizing standards required an acknowledgement of past efforts–and especially of the reasons for the failure of prior efforts to develop standards. This brought the SRSG squarely to the issue of the Norms.[167]

The Norms are comprised of 23 articles, drafted like a treaty, which set out human rights principles for companies in areas including international criminal and humanitarian law; civil, political, economic, social, and cultural rights; as well as consumer protection and environmental practices.[168] It included useful information: the summary of rights that may be affected by business, positively and negatively, and the collation of source documents from international human rights instruments as well as voluntary initiatives have considerable utility.[169] "Had the Norms exercise confined itself to compiling such an inventory, coupled with a set of benchmarks of what practices business must or should avoid, and what it could help to achieve, the subsequent debate might have focused on substantive issues."[170] But the Norms sought to do more than that. The creators of the Norms asserted that they merely reflected and restated international legal principles that are applicable to businesses with regard to human rights, and on this basis developed what the SRSG described as a set of globally applicable "non-voluntary" rules "in some sense directly binding on corporations."[171]

But the SRSG suggested this was an impossible project.[172] "What the Norms have done, in fact, is to take existing state-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well."[173] As such, the Norms became an ideological rather than an empirical instrument for approaching regulatory issues of multinational corporations. The "Norms exercise became engulfed by its own

[164] Including National Contact Points, a group of "government offices in the participating countries that, among other functions, take up "specific instances" (complaints, in ordinary language) of company non-compliance with the Guidelines."
[165] Which has responsibility for labor rights for years and its Declaration on Fundamental Principles and Rights at Work is widely referenced by other initiatives.
[166] Some of these more narrowly tailored initiatives include the Extractive Industries Transparency Initiative (EITI)(dealing with revenue transparency), Kimberley Process Certification Scheme (KPCS)(created to stem the flow of conflict diamonds), and the Voluntary Principles on Security and Human Rights (VPs)(created to address the nexus between the legitimate security needs of companies in the extractive sector and the human rights of people in surrounding communities). Ibid. at ¶¶ 45-48.
[167] Ibid. at ¶ 55. See, Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
[168] Ibid. at ¶ 56.
[169] Any fair discussion of standards will inevitably cover some of the same grounds. Ibid. at ¶ 57.
[170] Ibid., at ¶ 58.
[171] Ibid. at ¶ 60.
[172] "But taken literally, the two claims cannot both be correct. If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones." Ibid.
[173] Ibid.

doctrinal excesses."[174] The ensuing debate obscured rather than illuminated promising areas of consensus and cooperation among business, civil society, governments, and international institutions with respect to human rights.[175] It was no surprise, then, that the Norms were not accepted by most businesses, while human rights groups were in favor, or that governments currently using the SRSG's mandate sought to move beyond the resulting stalemate.[176]

Still, it was possible to discern a certain "fluidity in the applicability of international legal principles to acts by companies."[177] Though "[a]ll existing instruments specifically aimed at holding corporations to international standards . . . are of a voluntary nature,"[178] under customary international law, practice and opinion increasingly suggests that corporations may be liable for committing, or for their complicity in, human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture and crimes against humanity.[179] Liability under domestic criminal law might also be evolving.[180] Lastly, direct corporate liability under international law might be considered within a surety or agency principle—especially where corporations operate in territories with weak or non-functioning governments.[181]

But the Norms would not be a sensible way to capture that dynamic flexibility in a governance forms. First, the Norms imprecisely allocated human rights responsibilities among states and corporations.[182] Second, the imprecision was attributed to the failure to provide a set of principles for making such differentiation.[183] And lastly, "in actual practice the allocation of responsibilities under the Norms could come to hinge entirely on the respective capacities of states and corporations in particular situations – so that where states are unable or unwilling to act, the job would be transferred to corporations."[184] For the SRSG, the conclusion was clear—the Norms project was not worth salvaging. A different conceptual basis was needed.

5. Strategic Directions and Animating Approach: Principled Pragmatism. To move beyond the Norms, the SRSG proposed an approach grounded in principled pragmatism.[185] This combines the empiricism that was emphasized as a central element of the mandate and data based principles applied to the realities of corporate operation within states and between them under accepted rules of economic globalization. To that end, the SRSG recognized an important element, that companies are constrained by a double set of behavior standards, legal standards as well as social/moral considerations.[186] This the SRSG offered as a basic principle for the construction of regulatory systems designed to guide the behavior of multinational corporations with respect to their human

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[174] Ibid., at ¶ 59.
[175] Ibid. at ¶ 69.
[176] Ibid.
[177] Ibid., at ¶ 64.
[178] Ibid., at ¶ 61.
[179] Ibid. at ¶ 61.
[180] For example, the SRSG noted that the US Alien Tort Claims Act has been influential in its use to create liability for offenses under international standards but the mere fact that providing the possibility of a remedy has made a difference though it is a limited tool due to its expense and difficulty. Ibid. at ¶ 62.
[181] Ibid. at ¶ 65.
[182] Ibid. at ¶ 66.
[183] Ibid. at ¶ 67.
[184] Ibid. at ¶ 68.
[185] "It is essential to achieve greater conceptual clarity with regard to the respective responsibilities of states and corporations." Ibid., at ¶ 70.
[186] This includes what companies must do, what their internal external stakeholders expect of them and what is desirable. Each of these has a different basis in the fabric of society, exhibiting different operating modes, and is responsive to different incentive and disincentive mechanisms. Ibid. at ¶ 70.

rights obligations. The effect of the distinction was to ground legal standards in the state, and thus in the political sector, and to ground social standards in the corporation and international organizations, that is in the economic and social sectors or global (national and transnational) society.

Beyond that, the SRSG suggested the utility of the extension of an extraterritorial application of home country legal standards for abuses committed by domestic firms abroad.[187] The mandate is for the most part evidence based, but since these situations are in constant flux, normative judgments will have to be made. The basis for these judgments is a principled form of pragmatism: "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people."[188] The SRSG pointed to several sources for emerging legal standards of corporate conduct, focusing on standards for corporate complicity in the human rights violations of others,[189] and labor standards.[190] He also pointed to sources of social obligation directly applicable to corporations. These included individual company policies and voluntary initiatives while aiming to identify the best practices that have been adopted. The focus was to strengthen transparency and accountability mechanisms. [191] In addition, a compendium of best practices was compiled to consider the most common practices around the globe.[192]

The conceptual basis of the mandate—and the scope of its empirical project—becomes clear. "The role of social norms and expectations can be particularly important where the capacity or willingness to enforce legal standards is lacking or absent altogether."[193] But the role of the state, and state based legal regimes remains "not only primary, but also critical."[194] The role of the SRSG was principally evidence based[195]—providing information necessary to afford states the opportunity to effectively and thoroughly employ their authority to impose legal requirements on states through their domestic law systems.

> But insofar as it involves assessing difficult situations that are themselves in flux, it inevitably will also entail making normative judgments. In the SRSG's case, the basis for those judgments might best be described as a principled form of pragmatism: an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.[196]

For that purpose, an additional governance system—social, non-state based, and grounded in the nature of the relationships between corporations and their stakeholders, would be required. Subsequent Reports first elaborate this "principled pragmatism" and then develop the basis for implementing a multi-level governance framework that targets in distinct ways, states (as legal actors) and corporations (as social-economic actors).

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[187] Ibid. at ¶ 71. Though there could be problems with this as companies may then be subjected to differing international standards.
[188] Ibid. at ¶ 81.
[189] "With regard to emerging legal standards for establishing corporate complicity in human rights abuses, the SRSG will follow with interest the work of the expert panel convened by the International Commission of Jurists. Additionally, he is working with legal teams in several countries to examine case law in different jurisdictions." Ibid. at ¶ 72
[190] "There can be little mystery about core labor standards; the ILO has actively addressed issues concerning work and related human rights for a very long time." Ibid. at ¶ 73.
[191] Ibid. at ¶ 74.
[192] Ibid., at ¶ 76-78.
[193] Ibid., at ¶ 75.
[194] Ibid., at ¶ 79.
[195] "As indicated at the outset, the SRSG takes his mandate to be primarily evidence based." Ibid. at ¶ 81.
[196] Ibid. at ¶ 81.

3.2.3. The 2007 Reports.

The SRSG produced two substantive Reports, one with four important addenda in 2007. Each is described and analyzed below.

The 2007 SRSG Report 4/74 (Mapping)[197] focuses on that portion of the SRSG's mandate to 'identify and clarify,' to 'research' and 'elaborate upon,' and to 'compile' materials – in short, to provide a comprehensive mapping of current international standards and practices regarding business and human rights.[198] The 2007 SRSG Report also included four addenda . The first considered the current framework of state responsibilities to regulate and adjudicate corporate activities under UN core human rights treaties.[199] The second addendum described the results of two workshops held in New York and Brussels respecting the extent of a legal architecture for human rights responsibilities of corporations under international law.[200] The third addendum summarized survey data on current practices and on corporate human rights policies and practices.[201] The fourth addendum summarized an extensive study of business practices among three different sorts of business organizations.[202] Lastly, the SRSG produced a report on human rights impacts assessments.[203] On the website of the SRSG

[197] 2007 SRSG GA Report Mapping-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Business and human rights: mapping international standards of responsibility and accountability for corporate acts, A/HRC/4/35 (19 February 2007); available [https://undocs.org/en/A/HRC/4/35]; last accessed 25 February 2024.
[198] Ibid. at ¶ 5.
[199] 2007 SRSG Report Mapping 4/35 Addendum 1-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions Addendum 1: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries A/HRC/4/35/Add.1 (13 February 2007); available [https://undocs.org/en/A/HRC/4/35/Add.1]; last accessed 25 February 2024.
[200] 2007 SRSG Report Mapping 4/35 Addendum 2-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions Addendum 2: Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops A/HRC/4/35/Add.2 (15 February 2007); available [https://undocs.org/en/A/HRC/4/35/Add.2]; last accessed 25 February 2024.
[201] 2007 SRSG Report Mapping 4/35 Addendum 3-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions Addendum 3: Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms A/HRC/4/35/Add.3 (28 February 2007); available [https://undocs.org/en/A/HRC/4/35/Add.3]; last accessed 25 February 2024.
[202] 2007 SRSG Report Mapping 4/35 Addendum 4-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions Addendum 4: Business recognition of human rights: Global patterns, regional and sectoral variations A/HRC/4/35/Add. 4 (8 February 2007); available [https://undocs.org/en/A/HRC/4/35/Add.4]; last accessed 25 February 2024.
[203] 2007 SRSG Report Methodology-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions A/HRC/4/74 (5 February 2007); available [https://undocs.org/en/A/HRC/4/74], last accessed 25 February 2024.

maintained by the Office of the High Commissioner of Human Rights, the description shifted the emphasis a little.[204]

3.2.3.1 The 2007 SRSG Report Mapping 4/35. The SRSG starts by contextualizing this effort within the dynamic rearrangements of power relationships manifested through globalization. Globalization provides the parameters of the "problem" of the multinational corporation—its contribution to aggregate global poverty reduction and targeted costs on specific people and communities.[205] This results from a well-understood misalignment of the power to act and the power to regulate.[206] This necessarily requires realignment—and thus the objective of the mandate—among institutions, political, social and economic, involved in the production of benefits and burdens affecting people.[207]

Within this context the 2007 Report seeks to map "evolving standards, practices, gaps and trends."[208] For the purpose, the Report is divided into "five clusters of standards and practices governing 'corporate responsibility' . . . and 'accountability.'"[209] These five clusters provide the foundation for what would eventually emerge as the three pillar regulatory framework.[210] The five clusters include: State Duty to Protect, Corporate Responsibility and Accountability for International Crimes, Corporate Responsibility for Other Human Rights Violations under International Law, Soft Law Mechanisms, and Self-Regulation.[211] Each is described in turn.

1. The State Duty to Protect. It is firmly embedded into international law that there is a duty of the state to protect against non-state human rights abuses.[212] International law also allows states to exercise its jurisdiction as

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[204] OHCHR, website: Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises; available [https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other], last accessed 2 March 2024 ("This report describes principles and characteristics of human rights impact assessments for business, including similarities to environmental and social impact assessments, and provides updates on current initiatives.")

[205] 2007 SRSG Report Mapping 4/35, at ¶ 2.

[206] "Clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation." Ibid., at ¶ 3.

[207] Ibid., at ¶ 3-4. "The permissive conditions for business-related human rights abuses today are created by a misalignment between economic forces and governance capacity. Only a realignment can fix the problem." Ibid., at ¶ 82.

[208] Ibid at ¶ 5.

[209] Ibid at ¶ 6. Corporate responsibility is understood to be "the legal, social or moral obligations imposed on companies" and corporate accountability is understood to include "the mechanisms holding them to these obligations." Ibid.

[210] It is now clear how these five areas have now been tailored and developed into the current PRR Framework. The first cluster, the State Duty to Respect has not changed at all. The second and third, Corporate Responsibility and Accountability for International Crimes and Corporate Responsibility for Other Human Rights Violation under International Law have become the Corporate Responsibility to Respect in the new framework. The fourth and fifth clusters, Self-regulation and Soft-law Mechanisms have become the third part of the framework, Access to Remedies; although the self-regulation cluster fits in with the corporate responsibility to respect as well. See discussion, below at Part IV, infra.

[211] Ibid. In line with the strong evidentiary basis of principles development, the "report draws on some two-dozen research papers produced by or for the SRSG. He also benefited from three regional multi-stakeholder consultations in Johannesburg, Bangkok, and Bogotá; civil society consultations on five continents; visits to the operations of firms in four industry sectors in developing countries." Ibid., at ¶ 7

[212] Ibid at ¶ 10.

long as there is a basis for it.[213] "The regional human rights systems also affirm the state duty to protect against nonstate abuse, and establish similar correlative state requirements to regulate and adjudicate corporate acts"[214] There is still concern that states are unable to protect human rights and the answers from the initial surveys conducted just reinforce that idea. Most states do not have solid policies or practices in place to protect human rights and simply rely on other initiatives like the OECD Guidelines or the voluntary Global Compact.[215] "In sum, the state duty to protect against nonstate abuses is part of the international human rights regime's very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations."[216]

2. The Corporate Responsibility and Accountability for International Crimes. This responsibility is based on individual liability that is contained in the Statute of the International Criminal Court. Corporations can now be held liable under the same principles that individuals are liable for genocide, crimes against humanity, and war crimes.[217] And a growing number of countries are including laws such as these in domestic law and beginning to hold corporations liable just as individuals can be held liable.[218] Problems with this direction arise when corporations are uncertain about which laws will apply to them – all the more reason for a universal law being adopted by all countries around the globe.[219] A further cause of concern for corporations is that some may be held liable if their corporate culture expressly or tacitly permits the commission of an offence by an employee.[220] But there is currently no uniform policy that will attach liability to a company for its employees' actions; and piercing the corporate veil is still difficult to accomplish in this sense, but there is now a greater risk that companies may be held liable for complicity in crimes.[221]

3. The Corporate Responsibility for Other Human Rights Violation under International Law. This standard is based on the growing national acceptance of international standards for individual responsibility, and is currently evolving.[222] The traditional view of human rights instruments in the international context is that they only impose indirect responsibilities on corporations, which is based on the state's international obligations.[223] But now it seems as if current international human rights instruments do not impose any direct legal responsibility on corporations, while at the same time, corporations are under greater scrutiny from those same human rights mechanisms.[224] More recently, some states have been extracting soft-law standards from these instruments in an attempt to develop future human rights laws.[225]

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[213] This is permitted where the actor or victim is a national, where the acts have substantial adverse effects on the state, or where specific international crimes are involved. Ibid at ¶ 15.
[214] Ibid at ¶ 16.
[215] Ibid at ¶ 15..
[216] Ibid at ¶ 18. It requires states to fulfill their duty as a key player in regulation and adjudication or risk breaching their international obligations.
[217] Ibid at ¶ 19. Liability under the ICC statute is generally in national courts within states that have adopted it into domestic law.
[218] Ibid at ¶ 24.
[219] Ibid at ¶ 28.
[220] Similarly, in the United States, the US Sentencing Guidelines take into account the corporate culture when assessing money penalties. Ibid.
[221] Ibid at ¶ 29.
[222] Ibid at ¶ 33.
[223] An alternative view is that these instruments impose direct legal responsibilities on corporations but just lack direct accountability mechanisms to make them effective. Ibid. at ¶ 35.
[224] Ibid. at ¶ 44.
[225] Ibid. at ¶ 46.

4. Soft-law Mechanisms. These regulatory instruments do not create legally binding obligations on those that are subject to the "law." Three different kinds of soft-law arrangements exist: "the traditional standard-setting role performed by intergovernmental organizations; the enhanced accountability mechanisms recently added by some intergovernmental initiatives; and an emerging multi-stakeholder form that involves corporations directly, along with states and civil society organizations, in redressing sources of corporate-related human rights abuses."[226]

The Report also described emerging multi-stakeholder systems of soft-law initiatives. Identified among others were the Voluntary Principles on Security and Human Rights, the Kimberley Process Certification Scheme, and the Extractive Industries Transparency Initiative.[227] These initiatives and those similar around the globe seek to close the gaps in regulation that contribute to, and permit, the human rights abuses. They also cross all boundaries in business and industry, host and home states, and many other kinds of institutions.[228] The developmental problem with these soft-law mechanisms is rooted in their creation. It blurs the line between what is voluntary and mandatory regulation, but soft-law initiatives are becoming a method of developing norms within the international community.[229]

5. Self-regulation. Self-regulation is comprised of the policies and practices that are adopted by companies themselves to protect human rights in a business context. These are almost exclusively voluntary initiatives by the companies who recognize that human rights are becoming a more important issue in the global economy. Three issues are considered in the accountability context in self-regulation: human rights impact assessments, materiality and assurance.[230] Impact assessments are vital in order to determine if the policies are having an effect.[231] Materiality refers to the information that is being conveyed in company reporting.[232] And assurance lets people know that the companies are doing what they should be doing with regards to human rights policies.[233]

The SRSG derived a number of important conclusions from his investigations of the five clusters of standards and practices. First he drew on history for lessons of approaches of regulatory schemes that failed.[234] The SRSG concluded that to the extent that businesses were increasingly subject to liability for bad acts under national law, the results were accidental, "largely an unanticipated by-product of states' strengthening the legal regime for individuals, and its actual operation will reflect variations in national practice, not an ideal solution for anyone."[235] Indeed, the SRSG's evidence suggested that "not all state structures as a whole appear to have internalised the full meaning of the state duty to protect, and its implications with regard to preventing and punishing abuses by nonstate actors, including business."[236] On the other hand, soft law initiatives and corporate

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[226] Ibid. at ¶ 46.
[227] Ibid. at ¶ 52.
[228] Ibid. at ¶ 54.
[229] Ibid. at ¶ 61.
[230] Ibid. at ¶ 76.
[231] Ibid. at ¶ 77.
[232] Ibid. at ¶ 78.
[233] Ibid. at ¶ 79-80. Assurance is also problematic when taking into account suppliers as they are not always required to follow the same policies and practices as the parent company.
[234] Ibid at ¶ 83.
[235] Ibid at ¶ 84. The lack of consistency and harmonization among national approaches leaves corporate regulation to other governance forms—principally, the SRSG suggests, in courts of public opinion. Ibid.
[236] Ibid at ¶ 86. "Nor do states seem to be taking full advantage of the many legal and policy tools at their

self-regulation appear innovative but not yet systematic.[237] Still, states appear unwilling to take advantage of the tools they have to meet their treaty obligations. "Insofar as the duty to the protect lies at the very foundation of the international human rights regime, this uncertainty gives rise to concern."[238] As a consequence, state inaction or partial action appears to open a space where corporations may exercise directly a duty with respect to human rights otherwise reserved to states.[239] The groundwork for the pillar structure is thus developed nicely—if there is no one silver bullet for the governance of the human rights obligations of business,[240] then it will be necessary to produce a polycontextual system of governance. It is the skeleton of that system that is unveiled in the next SRSG report.

3.2.3.2 The 2007 SRSG Report 4/35 (Mapping) *Addenda 1-4*. The 2007 SRSG Report 4/35 Mapping report included four addenda that were meant to provide conceptual and evidentiary support for the insights, arguments, suggestions, and points raised in the main report. Each is briefly described below with a focus on their potential contribution to understanding the intent/design of the drafters.

2007 SRSG Report 4/35 (Mapping) *Addenda 1 (State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries).* 2007 Addendum 1 summaries key findings and examples of the SRSG's field work. More specifically, over the course of its 95 paragraphs, it outlines the SRSG's assessment of overall trends from treaty-specific reports on the basis of which preliminary observations are offered.[241] The object is to assist the SRSG in implementing that portion of the 2006 mandate directing elaboration of the role of States in regulating the human rights effects of economic activity.[242] It attempted to summarize preliminary "information, trends and preliminary findings contained in a series of reports examining States' obligations in relation to corporate activity under the United Nations' core human rights treaties."[243]

From his examination, the SRSG gleaned a trend in treaty specific reports toward the elaboration of a *state duty to protect* against context specific interference with rights.[244] That is to say, a state duty to protect could be generalized from the trajectories of the reporting of treaty bodies charged with the protection and promotion of specific core international human rights instruments. This is treated as a substantive *positive duty* requiring that a

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disposal to meet their treaty obligations." Ibid.

[237] "For that to occur, states need to more proactively structure business incentives and disincentives, while accountability practices must be more deeply embedded within market mechanisms themselves." Ibid at ¶ 85.

[238] Ibid at ¶ 86.

[239] In a crucial paragraph, the SRSG developed this Idea and the consequence—multiple jurisdictional basis for regulation:

> Lack of clarity regarding the implications of the duty to protect also affects how corporate "sphere of influence" is understood. . . . [I]n exploring its potential utility as a practical policy tool the SRSG has discovered that it cannot easily be separated operationally from the state duty to protect. Where governments lack capacity or abdicate their duties, the corporate sphere of influence looms large by default, not due to any principled underpinning. . . . The soft law hybrids have made a singular contribution by acknowledging that for some purposes the most sensible solution is to base initiatives on the notion of "shared responsibility" from the start. . . .

Ibid at ¶ 87.

[240] "The extensive research and consultations conducted for this mandate demonstrate that no single silver bullet can resolve the business and human rights challenge." Ibid., at ¶ 88.

[241] 2007 SRSG Report Mapping 4/35 Addenda 1, Summary.

[242] Ibid., ¶ 2.

[243] Ibid., ¶ 1; generally ibid., ¶¶ 1-6.

[244] Ibid., ¶ 7.

state "take steps to prevent and punish abuse."[245] It is a duty that ought to inform other State activities, including when acting in international space.[246]

The SRSG then examined the extent to which this duty is specifically mentioned, explicitly or implicitly, "in relation to acts by business enterprises."[247] To that end the SRSG considered treaties,[248] and treaty body commentary.[249] With respect to treaties, the SRSG noted that reference were "not very common. When treaties do refer to business, they tend to mention particular sectors rather than generally referring to private business."[250] The more contemporary the treat, though, the more likely an explicit reference to business. Some treaty language require States to protect against corporate abuse by the direct regulation of the enterprise,[251] or by requiring the State to protect rights difficult to fulfill without the regulation or adjudication of third parties.[252] Treaty body commentary is also rare with a focus, if at all, as part of discussions on the need to protect especially vulnerable groups.[253] The Commentary focuses on the need to impose or devolve the duty to protect guaranteed by international or (transposed) national law onto enterprises, as well as with respect to the regulation of abusive behavior, with a focus on specific business sectors or behaviors (for example respecting marketing).[254] The extent of referencing is summarized in a table,[255] from which the SRSG extracts a trend: "the ever-increasing recognition by the treaty bodies of States' obligations to protect against human rights abuses arising from corporate activities, especially in the last five to ten years."[256]

The SRSG then considered the extent of the measures States are required to take when their duty to protect is triggered.[257] The treaty bodies require that abuse be prohibited by law, that violations are investigated, that the State bring abusers to justice, and that those whose rights have been violated are afforded remedy.[258] To those ends, "consistent, independent monitoring by States of third party compliance" is considered important.[259] Each of the components of effective measures is then considered. First the SRSG determined that treaty bodies treat the transposition of human rights duties into national legal orders is a minimum obligation; the content of the regulation is rarely specified in any detail; the role of legislation in relation to corporate activities is most frequently the object of employment related regulation; legislation extending protection to the potentially affected local communities is significant in the extractive sectors.[260] In addition, the SRSG considered the provision for balancing tests, and temporary special measures.[261] With respect to adjudication, the SRSG noted a preference for investigation and sanction by some sort of body, including judicial bodies.[262] The common position includes an

[245] Ibid., ¶ 8.
[246] Ibid., ¶ 10.
[247] Ibid., 11.
[248] Ibid., ¶¶ 12-17.
[249] Ibid., ¶¶18-38.
[250] Ibid., ¶ 12.
[251] Ibid., ¶ 16.
[252] Ibid., ¶ 17.
[253] Ibid., ¶ 18.
[254] Ibid., ¶¶ 19-27.
[255] Ibid., ¶ 30.
[256] Ibid., ¶ 37.
[257] Ibid., ¶¶ 39-62.
[258] Ibid., ¶ 39.
[259] Ibid., ¶ 40 (including by National Human Rights Institutions; ibid., ¶ 41).
[260] Ibid., ¶¶ 42-46.
[261] Ibid., ¶¶ 47-49.
[262] Ibid., ¶ 50.

expectation of investigation, and the sanctioning of those who produce harm, though there is less effort to regulate sanctions by type.[263] However, all speak to the *right to an effective remedy*, including reparation.[264] The SRSG also noted a lack of consensus respecting the object of sanctioning—that is about the question of the identity of the obligation bearer, but with an inclination to reach legal as well as natural persons.[265] The extent of the encouragement of promotional measures is also considered—including awareness raising, capacity building, and policies intended to nudge behavior.[266]

The SRSG also considered the rights most commonly discussed by treaty bodies when elaborating a duty to protect against corporate abuse.[267] Lastly, the SRSG considered issues of extraterritorial responsibility.[268] These are particularly relevant, especially to the ultimate position of the ARSG reflected in the UNGP's approach to extraterritorial duty.[269] At this stage, the SRSG noted that "What is difficult to derive from the treaties or the treaty bodies is any general obligation on States to exercise extraterritorial jurisdiction over violations by business enterprises abroad."[270] The discussion, though, suggests that the issue does not lend itself to categorical rules.

The addendum ends with three preliminary observations. The first is that the SRSG's research has convinced him that treaty bodies ae increasingly focusing on State protection against corporate abuse.[271] The second is that the SRSG welcomed the increasing role of treaty bodies as a mechanism for international accountability and monitoring of the state duty.[272] This serves as an underlying premise of what emerges as the UNGP's state duty to protect principles—that is the premise that State duty flows from and must be monitored by international institutions whose task it is to hold States to account (at least to the extent that is possible under international law).[273] Third, the monitoring and assessment role of treaty bodies might be augmented within the confines of the contemporary State system; the SRSG noted that "States could also make greater efforts to include such information in their periodic reports to the treaty bodies, and to consult business representatives and civil society in this respect."[274]

2007 SRSG Report 4/35 (Mapping) *Addenda 2 (Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops).*[275] The SRSG here summarizes the fruits of two of four international workshops convened to assist the SRSG to clarify issues raised by this mandate.[276] The key issues considered by stakeholders representatives invited to each were (1) the extent of corporate responsibility

[263] Ibid., ¶¶ 51-55.
[264] Ibid., ¶¶56-62.
[265] Ibid., ¶¶ 63-67.
[266] Ibid., ¶¶ 68-71.
[267] Ibid., ¶¶ 72-80 (including state owned enterprises, ibid., ¶¶ 78-80).
[268] Ibid., ¶¶ 81-92.
[269] For an introductory discussion, see Chapter 2, supra, at Section 2.2.2.
[270] 2007 SRSG Report Mapping 4/35 Addenda 1, ¶ 84.
[271] Ibid., ¶ 93.
[272] Ibid., ¶ 94.
[273] For some of the complexities, see, e.g., Alexander Thompson. "The rational enforcement of international law: solving the sanctioners' dilemma," (2009) 1(2) International Theory 307-321; Julia C. Morse, and Robert O. Kohane, 'Contested Multilateralism,' (2014) 9(4) The Review of International Organizations 385-412.
[274] 2007 SRSG Report 4/35 (Mapping) Addenda 1, ¶ 95.
[275] 2007 SRSG Report Mapping Addenda 2.
[276] The four workshops were identified in the Introduction to Addendum 2 at ¶¶ 1-5.

under international law,[277] and (2) issues of extraterritoriality in the regulation of multinational enterprises.[278] These, in turn, were described as expanded discussion of what had been raised at the initial meeting in Chatham House on 15 June 2006.[279] Neither could be read in a vacuum, but instead each was linked to the discussion in Addendum 1[280] and its consideration of the State duty to regulate.[281] But where the analysis in Addendum 1 centered on the state ; Addendum 2 focused on the enterprise. That dialectic between Addenda 1 and 2 would eventually be formalized in the interlinking of the State duty and the corporate responsibility pillars of the UNGP. But the principled conceptualization that awaited the 2008 SRSG Report in the form of "Protect, Respect, Remedy" Framework, required first the pragmatics of facts based descriptive analysis. The workshops were conducted on the basis of the "Chatham House Rule" in which free discussion as long as the identity and affiliation of participants were masked.

The summary of the input by those in attendance at the New York workshop, and what insights the SRSG drew form them constituted the first half of the text of Addendum 2.[282] The question around which the workshop proceeded was this: "in the absence of States acting to attach direct obligations for human rights to corporations, are there any potential grounds under international law for doing so?"[283] The question was broken down, in turn, into four parts: framing the issue, transposing state obligations, exceptional cases and state responsibility. At first blush the organization might appear curious, but it was meant to provide a pathway from state duty to corporate responsibility—that is from a purely legalistic approach to the problem of managing the human rights impacts of economic activity, to one that also opened a space for private governance. Indeed, that invitation was explicit.[284]

The "Framing the Issue" discussion was wrapped around a question: "are there already inherent obligations on TNCs, at minimum, to respect human rights in international law?"[285] Note that the question might be approached in different ways depending on whether the word "inherent", "already", "TNC", or "international law" was the key focus of interpretation. *Inherence* suggests a focus on the breadth of interpretation of human rights and international law, or the freedom to consider inherence beyond either. *Already* suggests a limitation to what is available at a single point in time rather than what may be considered as the trajectory of development. *TNC* suggests a focus on a specific, and quite narrow, band of economic actors, one that might otherwise distort a broader analytics (and a conceptual problem that later dogged the development elaboration of an international instrument for business and human rights.[286] *International law* suggests a limitation of the scope of legality with any authoritative effect in the conceptualization and analysis of the issue. It also suggests, at its narrowest, the marginalization of international norms in favor of law (and its limits as a consequence of the law of reception ads transposition into domestic legal orders), as well as the secondary importance, if at all, of domestic constitutional orders.

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[277] Ibid., ¶¶ 7-34.
[278] Ibid., ¶¶ 35-74.
[279] Ibid., ¶ 6.
[280] 2007 SRSG Report 4/35 (Mapping) Addenda 1.
[281] Discussed immediately above.
[282] 2007 SRSG Report 4/35 (Mapping) Addenda 2, ¶¶7-34.
[283] Ibid., ¶ 7.
[284] Ibid., ¶ 8.
[285] Ibid., ¶ 9.
[286] See, e.g., Larry Catá Backer and Flora Sapio (eds), 'Commentary on the U.N. Inter-Governmental Working Group (Geneva) 2019 Draft "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Corporations and Other Business Enterprises,2 (2019) 14(2) *Emancipating the Mind in the New Era: Bulletin of the Coalition for Peace & Ethics* 149-351.

The SRSG did not start there. Instead he sought to "stimulate debate" by considering "the classic view of States in international law as the human rights duty holders."[287] That classic view produced no surprises: a general agreement of State supremacy with carefully developed exceptions generally falling within the field of international crimes. The principal duty of the State is to develop and enforce their duty to protect, respect, and fulfill human rights by regulating private actors producing human rights harms and by controlling their own actions. Direct corporate responsibility is impeded by the core premises of the state system itself: a lack of state practice supporting this development, resistance by states to the corruption of the traditional state system framework, compliance incoherence, and the normative issue of corporate international legal personality.[288] The counterarguments were also put forward. These emphasized the perceived trajectory of legal development, exemplified by international labor and environmental law, the growing power of soft law as an indirect means of hardening international law through the power of custom, tradition, and practice, and the influence of multi-lateral organizations on expectations and practice. Others suggested the contribution of regional organizations, and the role of administrative law in creating a new sensibility for the alignment of public and private bureaucracies.[289]

This, then, serves as the set up for a discussion of regulatory approaches between the realities of the classic approach and the possibilities of its further development. Here the SRSG takes the opportunity to begin to consider what eventually will be referenced as polycentric systems. Many of these had been developed at least in academic circles by prominent and influential members of the academy since the fall of the Soviet Union: – regulation by intergovernmental organizations, network governance, hybrid-public-private regulatory structures, and purely private regulation.[290] The issue, then, was framed around the centrality of the state duty under international law, and at its peripheries, an exploration of the possibilities of alternative, supplementary, or private ordering systems that might mimic legalities.

This framing then, opens a door passing through which proves irresistible to the SRSG—the possibility of transposing state obligations from the state (and public) apparatus to that of the enterprise (and private) apparatus.[291] A number of proposals were proffered by participants. The point of all of them was to construct a means of effectively burdening enterprises with direct responsibility around the substantially unmovable premises of state supremacy in law. These proposals were given more immediately by considering corporate huma rights states of exception (*Ausnahmezustand*).[292] *The notion here, and replicated across the arc of the SRSG's work, was to envision the corporate responsibility to respect as a state of exception that that becomes a prolonged state of being, that is, that becomes unexceptional.*

These exceptional cases that then produce the unexceptional institutional and normative responses are built around the "exceptional" case of state collapse. These are "weal governance zones" and perhaps as well conflict zones, where the traditional power of the State is absent.[293] The participants, however, were united in a consensus that the conceptual vehicle of weak governance zone was too frail a vessel; as was the hope to convert

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[287] 2007 SRSG Report 4/35 (Mapping) Addenda 2, ¶ 10.
[288] Ibid., ¶¶ 10-11.
[289] Ibid. ¶¶ 12-14.
[290] Ibid., ¶¶ 15; and of course, the notion of corporations as moral agents (ibid., ¶ 16). The moral duty perspective was useful, certainly, as evidence of the possibility of regulatory structures, perhaps with teeth, that did not relay on state based legality.
[291] Ibid., ¶¶17-21.
[292] The underlying premises of Giorgio Agamben, *State of Exception: Homo Sacer II* (University of Chibcao Press, 2003).
[293] 2007 SRSG Report 4/35 (Mapping) Addendum 2, ¶¶22-25.

national courts of home states as transnational human rights courts through the development of a jurisdictional jurisprudence of extraterritoriality.

That left for discussion the issue of "State Responsibility."[294] The discussion first flowed through the potential of using customary international law as the instrument for this objective and as a way of developing a coherent global basis for the human rights for which the enterprise would be responsible. Eventually, this discussion would mature into the separation of fractured State international legality, from a unified legal basis for the corporate responsibility.[295] But not here; and not yet. The discussion then turned back to the potential of multi-lateral organizations, national and regional human rights mechanisms, along with international investment treaties.

For his part, the SRSG offered his own summary and insights gleaned from the workshop in eight points.[296] First, litigation based strategies, while important, are insufficiently robust on which to build systems of respect for human rights. Second, it was important to describe as least some identifiable baseline of international human rights with respect to which enterprises ought to be responsible. Third, except in the context of remedial obligations, enterprises ought not to be subject to a duty to fulfill human rights in the manner of States. Fourth, weak governance zone concepts was an insufficient basis for grounding regimes of extraterritorial application of law. Fifth, the nexus between an enterprise and an affected population remains unclear. Sixth, systems creating incentives for enterprise compliance ought to be further considered. Seventh, the United Nations might be a useful venue for further consideration of these issues. And eighth, the SRSG was particularly taken by notions of shared responsibility (and eventually from there to polycentric systemicity), that he had drawn from a work by Iris Young distributed as a backgrounder for the workshop.[297]

The summary of the input by those in attendance at the Brussels workshop, and what insights the SRSG drew form them constituted the first half of the text of Addendum 2.[298] It also followed well-worn paths—but paths less well known to those who had come to the issue principally from the human rights side.[299] The discussion was divided int three parts: extraterritorial jurisdiction under international law, specific challenges of the current legal order to TNCs, and the scope of available sanctions,[300] with discussion facilitated by a detailed background paper prepared by Olivier de Schutter.[301] The focus was narrow—prescriptive jurisdiction "which involves a State regulating persons or activities outside its territory."[302] The SRSG sought advice on the feasibility, which he appeared to have in mind at the time, of using prescriptive extraterritoriality as a tool "for overcoming weaknesses in corporate accountability.[303] The objective then, went to the challenge of governance gaps by bridging these gaps with the domestic law of states willing to extend their legal orders across the gaps and into the jurisdiction of other states.

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[294] Ibid., ¶¶ 26-30.
[295] UNGP Principle 12. Discussion at 2007 SRSG Report 4/35 (Mapping) Addendum 2, ¶ 27.
[296] 2007 SRSG Report 4/35 (Mapping) Addendum 2, ¶¶ 33-34.
[297] Iris Marion Young, "Responsibility and global labour justice" (2004) 12(4) *Journal of Political Philosophy* 365-388.
[298] 2007 SRSG Report 4/35 (Mapping) Addenda 2, ¶¶35-73.
[299] On the issue of the analytic and political challenges caused by the fracturing of academic and policy silos, see, Larry Catá Backer, Multinational Corporations,
Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law, (2006) 37 *Columbia Human Rights Law Review* (2006)
[300] 2007 SRSG Report 4/35 (Mapping) Addenda 2, ¶ 35.
[301] Ibid., ¶ 36.
[302] Ibid., ¶ 37.
[303] Ibid., ¶ 38.

The participants were fairly comfortable with the idea of extraterritoriality, especially where there was a fetish that served as an object of nationality traveling beyond the borders of the projecting state. While there appeared to be no prohibition, to their minds, of the projection of a domestic legal order abroad, including when it touched on human rights, there was a principle of non-interference that suggested at least a conceptual limit of reasonableness and avoidance of coercion. Interestingly there was little discussion, in Brussels, of legal historical or moral limits tied to functional colonialism that might be a functional effect of the extraterritorial impulse, nor issues of North-South sensibilities in that context.

The participants then considered the question flipped—are states under certain circumstances required to exercise extraterritorial jurisdiction. Some considered that such a duty might be implied "from commentary from United Nations treaty bodies (namely the Committee on Economic, Social, and Cultural Rights), and regional human rights bodies" but that was met in part by skepticism.[304] That moved the conversation to universal jurisdiction, at the time becoming a more popular concept among intellectuals and academics and some members of national administrative organs. But there was no consensus on its availability or use.[305] Nor was there consensus around the elaboration of the concept in and through law and judicial doctrine.[306] The fractured nature of corporate nationality (unregulated at the international level) and the challenges of asset partitioning, which, as has been the aspiration of those who oppose the autonomy of legal persons to advance other political and policy ends, was also discussed.[307] Far more interesting was the compliance related conversations around human rights impacts assessments across supply chains as a way around the impediments of legal personality.[308]

Sanctions and remedies were last considered. "The aim was to discuss whether States are obliged to ensure that their transnational corporations operating abroad are subject to effective, proportionate and dissuasive sanctions, whether criminal or civil, for human rights abuses"[309] presumably attributable to them under the law of some domestic legal order. The conversation turned notions of double indemnity (*non bis in idem*), intrusions on sovereignty deemed acceptable enough, and the nature of palatable penalties. Of interest was a discussion of the possibility of deriving liability from private law arrangements within corporate groups, including contractual arrangements tied to export insurance and other government services.[310] The European participants were skeptical about the common law principle of *forum non conveniens*, and jurisdictional bases for courts willing to try a case with little purported connection to the state in which the action was interposed was also discussed. The issue of home state remedies were supported and the role of civil society emphasized. But there was also discussion of the presumption that home state as the best forum for remedies was a useful assumption.[311]

In summarizing the results of this consultation, the SRSG noted the complexity of the issues, or at least the lack of consensus. He noted that any incorporation of insights discussed would "need to reflect the concerns of

[304] Ibid., ¶ 46.
[305] Ibid., ¶¶ 48-49.
[306] Ibid., ¶¶ 50-52.
[307] Ibid., ¶¶ 53-56.
[308] Ibid., ¶ 56.
[309] Ibid., ¶ 58.
[310] Ibid., ¶ 62.
[311] Ibid., ¶ 72 ("However, there was also a sense that home States might have a role to play where remedies in the territorial State are unlikely to be effective." Ibid.).

multiple stakeholders to be successful."[312] He urged a focus as much on improving state institutions as on improving corporate conduct.[313]

2007 SRSG Report 4/35 (Mapping) *Addenda 3 (Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms).* This long Addendum was meant to respond to the SRSG's mandate by collecting and analyzing survey data touching on state and corporate practice. "Accordingly, the SRSG sent a questionnaire to all Member States inviting Governments to provide him with the background information required to respond fully to these provisions of the mandate. Similarly, the SRSG conducted a survey of the Fortune Global 500 companies (FG500)."[314] The study was divided among a state survey[315] and a survey of Global 500 companies.[316] These were chosen in part because they "tended to be "best in class," leaders in corporate social responsibility including human rights."[317]

With respect to the State survey, the SRSG noted that the results ought to be approached with care. The response rate of about 15% was low, and heavily tilted toward Western Europe and North America.[318] The SRSG reviewed and analyzed responses to the survey questions. He came away with a number of concluding insights. The first was that there appeared to be a gap between State enthusiasm for the project and State willingness to act on that enthusiasm.[319] Despite the low response rate the SRSG determined that he was able to discern some patterns. The first insight was that though all States claim to play a role in the field of human rights, human rights appeared to be subsumed within more general corporate social responsibility (CSR) programs.[320] The second insight was that States tended to rely on the OECD framework, though that might well have been a function of the fact that a substantial number of responding states were OECD members.[321] The third insight was that human rights played a limited role in bilateral and investment treaties, even when incorporated into the instruments.[322] The fourth insight was that States except for conditions imposed on the export of specific military goods, States rarely tied human rights to export and foreign investment promotion policies.[323] The fifth, insight was that States were "only somewhat active" in human rights capacity building to promote human rights in economic activity.[324] The sixth, that very few states provided within their domestic legal orders for prosecution of legal persons for human rights violations.[325] The SRSG concluded that the focus on CSR detracted from the State duty to address human rights "specifically."[326]

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[312] Ibid., ¶ 73.
[313] Ibid., ¶ 73.
[314] 2007 SRSG Report 4/35 (Mapping) Addenda 3, ¶ 2.
[315] Ibid., ¶¶5-64.
[316] Ibid., ¶¶ 65-103.
[317] 2007 SRSG Report 4/35 (Mapping) Addenda 4, ¶ 6. This played a role in the analysis of the more generalized but mission critical data presented in the succeeding Addendum 4.
[318] 2007 SRSG Report 4/35 (Mapping) Addenda 3, ¶ 2, ¶¶ 8-10.
[319] Ibid., ¶ 57 ("The low response rate means that the results of the survey may not be representative. It also may mean that despite the importance that many States claim to place on the issue, very few have acted upon their political commitments. ").
[320] Ibid., ¶ 58.
[321] Ibid., ¶ 59.
[322] Ibid., ¶ 60.
[323] Ibid., ¶ 61.
[324] Ibid., ¶ 62.
[325] Ibid., ¶ 63.
[326] Ibid., ¶ 64.

With respect to the corporate survey, the SRSG noted that presuppositions of corporate practice might be misplaced.[327] Again the survey was heavily toward North American, European and Japanese enterprises, which represented the Fortune Global 500 firms by revenue. Again, the SRSG warned of sampling bias;[328] his team augmented survey results by "collated information on nearly 300 companies."[329] After a description of the collected data and some analytics, the SRSG was able to offer some concluding observation,[330] again based on his observation of "clear patterns."[331] The first is that virtually all companies responding have human rights principles or management practices in place.[332] This, of course, serves as critical practice evidence supporting what would be an essential element of what would become the 2d Pillar human rights due diligence system. The motivation was interesting—not human rights in general but labor rights appeared to be the motivation. These policies are aligned with compliance and reporting systems. The second is that these policies and practices are new and thus indicate a trajectory toward more human rights sensitive practices. The trajectory is subject to further study.[333] The third insight is not unexpected—that there are "evidence of sectoral and regional variations around the overall patterns."[334]

The variations suggested something more important—a rift between the discourse of human rights, understood in the discourse to be universal, interdependent, and indivisible—and the practices of enterprises that recognize broader or narrower spectrum of rights and their application. And yet that is precisely what one might expect of enterprises that reflect the human rights approaches of the home States. Here one finds the gulf that divides the spectrum of rights States undertake as a duty and the broader and unform spectrum that the SRSG presumes enterprises ought to be subject, one closer to the ideal conception of the broadest spectrum of a State duty. The fourth insight focuses on the elasticity of rights and rights standards.[335] Effectively, enterprises may rank order or center only those rights most relevant to their operations—something that decades later appears to be the approach with respect to the UN Sustainability Development goals. Enterprises also embed human rights impacts in decision making not as absolute concepts but as factors that are valued as a function of risk, opportunities, social expectations, and return.[336] That also runs counter to the discursive premise of human rights, though aligns with the values based functional premise of economic decision-making, limited only by compliance. Last, the SRSG noted patterns around accountability mechanisms.[337] There was a concentration on internally generated mechanisms and reporting protocols. The SRSG noted the need to meet "two core conditions must be met: the information must be broadly comparable across companies, and there needs to be some external assurance as to its trustworthiness and materiality."[338] This will also find its way into the UNGPs.[339]

2007 SRSG Report 4/35 (Mapping) *Addenda 4.* This Addendum picks up where Addendum 3 left off—by analyzing data gathered by the SRSG's team about "the policies of three types of business organization: a cross-

[327] Ibid., ¶ 65. "The leading global companies report having core elements of human rights policies or management practices in place." Ibid., ¶ 66.
[328] Ibid., ¶ 68.
[329] Ibid., ¶ 69, the results appearing in 2007 SRSG Report 4/35 (Mapping) Addenda 4.
[330] Ibid., ¶¶ 99-103.
[331] Ibid., ¶¶99.
[332] Ibid., ¶ 99.
[333] Ibid., ¶ 100.
[334] Ibid., ¶ 101.
[335] Ibid., ¶ 102.
[336] Ibid.
[337] Ibid., ¶ 103.
[338] Ibid.
[339] See, e.g., UNGP Principles 16, 19.

section of more than 300 companies from all regions of the world; 8 collective initiatives; and 5 socially responsible investment (SRI) indices."[340] The data collected was publicly available at the time.[341] The analytics and assessment were undertaken against the International Bill of Human Rights.[342] It is important to note that as early as this survey//in 2006, there was already a strong sense, tested more specifically in this analysis, that this cluster of basic international human rights law/norms might serve as the unifying normative framework to be applied to enterprises (but not to states).[343] Two caveats were noted; first that the study did not incorporate non-public information; the second that the analytics focused on formal, textual, representation of effort and policy—there was no assessment of effectiveness.[344]

Part I of the study considered company policy and practices. The data suggested the centrality of labor rights in the human rights policies and practices of data providing enterprises. Other rights were recognized in contextually relevant ways. Accountability and assessment also varied across firms, locations, and sector of economic activity.[345] Part II of the study considered collective initiatives using the same structure—labor rights, non-labor rights, accountability and engagement and anti-corruption, along with management and implementation systems.[346] The structure reveals intention—*probing*. The SRSG was probing for evidence of a means of reframing then current traditional CSR based approaches toward one that centered human rights. To that ends, identifying a human rights element in CSR policy and practices would be crucial—from there it would be possible to generalize, and in generalizing, transform the focus and practice of corporate CSR. From there, two objectives emerged as possible. The first was to create a generalized and coherent internal mechanism for embedding human rights risks in economic decision making; the second was to then transpose this micro-system template into collective initiatives. To those ends data of current practice and future potential was mission critical. *These four 2007 Addenda and this Addendum 4, especially, appear to have provided that pragmatic foundation crucial for the elaboration of principle that by this point was already beginning to take recognizable shape.* In a sense, the patterns extracted by the SRSG from the company data in Addendum 3 was used as a standard toward which the company data presented in Addendum 4 suggested that the rest of the collective participants in economic production could be brought.

The conclusions extracted from the company data presented underlined these objectives. First, the data suggested regional legs in the recognition of fundamental labor rights—the leg presenting by both sector and region.[347] In particular, Latin America, Asia and the Pacific were identified as laggard regions as against developed markets, with recognition of a "the right to a minimum wage and rights pertaining to work/life balance is low irrespective of region."[348] Lower levels of rights recognition were more strikingly evidenced in non-labor human rights, though it was recognized that some of those rights (e.g., the right to a fair trial) were not ones in which an enterprise would have a substantial amount of impact.[349] The data on reporting human rights commitments was

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[340] 2007 SRSG Report 4/35 (Mapping) Addenda 4, Summary p. 2.
[341] Ibid., ¶ 3. It differed from the data and analysis in Addendum 3 because it was based on actual documentation, included a broader cross/section of companies, and provided human rights based information of a larger variety of business firms. Ibid., ¶ 2.
[342] Ibid., ¶ 4.
[343] See, UNGP Principle 12.
[344] Ibid., ¶ 5.
[345] Ibid. Labor rights data were considered ibid., ¶¶ 17-44; non-labor rights at ¶¶ 45-67; and accountability and external engagement at 68-95. Anti-corruption efforts were considered at ¶¶ 96-99.
[346] Ibid., ¶¶119-202.
[347] Ibid., ¶ 113.
[348] Ibid., ¶ 114.
[349] Ibid., ¶ 115.

similarly varied.[350] Here, of course, the data reflected the strength of traditional approaches to CSR, and thus to corporate social obligation, which tended to emphasize philanthropy, either self- and state guided. In the context of the objectives toward which the data was deployed, however, this signaled deficiency (as a function of the measuring standard), rather than anything else. It also signaled the potential strength of resistance toward changing context and orientation. More importantly, it ought to have suggested the power of a perspective that might, later, be interpreted into whatever standard would be established. Here one encounters pragmatic evidence of the possibility of ranges of plausible interpretation of human rights based frameworks. That was suggested, in small part, by the recognition of the range of sources for human rights normative standards.[351]

Part II of the study then turned to voluntary collective initiatives. There were at least two important reasons for this. The first was to explore the possibility that regulatory systems could viably exist beyond the regulatory structures of public institutions. That would become crucial for the legitimation of an autonomous corporate responsibility to respect human rights. The second was to suggest that such systems were already viable enough to support the weight of that corporate responsibility.[352] The focus was on eight collective initiatives—third party private standards crafters, monitoring, and assessment organs.[353]

The conclusions extracted suggested an alignment between corporate approaches to human rights impacts assessments and the development of third party standards. But that alignment also provided evidence of emerging social/markets based consensus. "Business recognition of human rights is indicative of what the business community itself believes society expects with regard to such standards."[354] But that also accounts for regional differences that lie beneath emerging global consensus of the enterprise leaders examined in Addendum 3.[355] The unevenness is then explained—an insight that is then carried forward toad the drafting of the UNGP:

> This uneven pattern of uptake suggests that companies may be unsure which human rights they should recognize, and of the meaning of certain rights. Moreover, while there is some congruence between the obligations expressed by individual companies versus collective initiatives and SRI indices, substantial differences also exist, again possibly suggesting confusion regarding corporate responsibility for human rights.[356]

Confusion can be corrected through appropriate guidance and leadership from the international public institutional top. For the rest, collective initiatives parallel self-administered policies and practices—a focus on labor rights and greater diversity along with less emphasis on other rights, along with great variation in accountability and reporting standards.[357] There is also great variation in the extension of policy and practice down

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[350] Ibid., ¶ 116.
[351] Ibid., ¶¶ 117-118.
[352] On these points, see, e.g., Larry Catá Backer, 'Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.,' (2013) 20(2) *Indiana J. Global L. Stud.* 805-879 (2013); 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) *Ind. J. Global L Stud* 751-802 (2011); Larry Catá Backer, 'Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator,' (2007) 39(4) *U. Conn. L Rev* 1739-1784.
[353] 2007 SRSG Report 4/35 (Mapping) Addenda 4, ¶¶120-123.
[354] Ibid., ¶ 209.
[355] Ibid.
[356] Ibid., ¶ 210.
[357] Ibid,, ¶¶ 211-213.

supply chains, along with an emphasis on the impacts to traditionally vulnerable groups.[358] The SRSG then offers two main conclusions: The first is the need for the provision of greater and more authoritative certainty regarding "which rights pertain" to enterprises.[359] The second is the need for greater authoritative clarity for enterprises around "any hierarchy of duties they may have and to whom they have them."[360] *With these two conclusions, the SRSG declared the nature and extent of his marching orders for developing a set of guidance for enterprises autonomously of the State and the legal apparatus of the state system, but one tied to international legality.*

3.2.3.3 The 2007 SRSG Report 4/74 *(HR Impacts Assessments*). This report was prepared to satisfy one of the mandate requirements set out in UNHRC Resolution 2005/69,[361] and the undertaking imposed under UNHRC Decision 1/102[362] which extended the mandates and the mandate holders of all special procedures, including that of the SRSG, for one year coinciding with the transition from a Human Rights Commission to a Human Rights Council institutional framework. During that period the special procedures were to undertake the preparation of reports for UNHRC consideration. The object of the report was "to develop materials and methodologies for undertaking human rights impact assessments for business activity." To that end, the SRSG divided his discussion in three parts. The first part[363] identified and framed the key methodological issues. The next two parts attempted to apply the principled pragmatism work style to develop a way forward first by considering similarities with impacts related issues already undertaken in environmental and social impact assessments,[364] and then what makes human rights impacts assessments different,[365] as a means of then developing a context appropriate approach, that is grounded on "an analysis of the rights-holders and their needs and entitlements and the corresponding duty-bearers and their obligations."[366] Again, examining the situation through the lens of principled pragmatism, the SRSG ends the report with a consideration of current initiatives around which the proposed balancing approach could be developed.[367] The last section, on outlooks, suggests that the trajectory of business practice and markets expectations are already moving in the direction of assessment that can be extended to issues of human rights.[368]

The SRSG started with two points that framed the analyses that followed. First, fuller treatment was beyond the mandate's time and resources; and second that the report on human rights impacts would necessarily have to be descriptive and comparative.[369] Each is discussed in turn.

Framing the Issue: Human Rights Impact Assessments - Resolving Key Methodological Questions.[370] The Report starts with the core normative driver: it is important to understand business impact on human rights because that is the only way that "those who are most directly involved and affected"[371] can protect their interests, That is undertaken in one of three ways: by enhancing positive effect, avoiding or mitigating negative impacts and

[358] Ibid., ¶ 214.
[359] Ibid. ¶ 216.
[360] Ibid., ¶ 217.
[361] Discussed infra at Section 3.3.1.
[362] 2007 SRSG Report 4/64, Summary.
[363] Ibid., ¶¶ 1-9.
[364] Ibid., ¶¶ 10-21.
[365] Ibid., ¶¶ 22-29.
[366] Ibid., ¶ 29.
[367] Ibid., ¶¶ 30-36.
[368] Ibid., ¶¶ 37-40.
[369] Ibid., Summary.
[370] Ibid., ¶¶ 1-9.
[371] Ibid., ¶ 2.

risks, and contribute to the fulfillment of human rights.[372] Anticipation of changes brought on by business activities is considered more effective and cost-efficient than reacting to them. That fulfillment function applies to all actors—including business entities—and thus the need to focus on impacts. The SRSG emphasized that this was nothing new—merely a transposition of what had already emerged as the public policy/norm based compliance regimes in the areas of "environmental and social impact assessments (ESIAs), which are now considered routine for projects with a significant physical footprint and are often required by national law or financing institutions, particularly in the extractive industries.[373] *That is the template for transposition: (1) a normative objective--environmental and social harm defined in law or norm; (2) the development of a metrics (qualitative or quantitative) for impacts as measured against the legal/normative definitions or customary expectations, etc.); (3) the obligation to assess impacts on that basis imposed on/devolved to those who may be deemed to produce/control/influence such impacts; (4) along with the obligation to identify impacts, a consequential obligation to prevent, mitigate or remedy the identified impacts; and (5) more generally use impacts to shape the way that economic decisions and business behaviors are shaped (and valued).* And, indeed, it is this insight, already understood in 2007 that will shape what eventually emerges as the UNGP.

The problem for the SRSG is that as valuable as the economic and social impact analysis form is, they are less helpful in identifying and appropriately valuing human rights impacts.[374] That is a problem already identifies in practice by organizations seeking to transpose the mechanisms into a human rights environment, and, of course, was also recognized as a core part of the SRSG's mandate.[375] The SRSG concludes that though it is too early to offer a definitive evaluation of human rights based impacts assessments transposed form the fields of economic and social impacts assessment practices, the idea is worth pursuing.[376]

Similarities to Environmental and Social Impact Assessments.[377] The SRSG starts by noting that environmental and social impacts assessments are relatively well established. In that sense, *one speaks here only of adapting and extending, rather than of transforming, business practices*—the essence of the application of principled pragmatism in the way in which principles are implemented. The overlap between environmental/social impacts assessments and human rights based impacts assessments are described.[378] From this the SRSG draws an important insight that informs future work: human rights impacts assessments are not ends in themselves but tools that clarify pathways to action.[379]

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[372] Ibid.
[373] Ibid, ¶ 3.
[374] Ibid., ¶¶ 3-5.
[375] Ibid, ¶¶ 6-8.
[376] Ibid., 8-9 (noting the developments in the field).
[377] Ibid., ¶¶ 10-21.
[378] Ibid., ¶¶ 11-20. These include identifying the activity or practice from which impacts emerge; using legal. Regulatory and administrative standards and private law as a baseline against which impacts may be measures; the assessments must be context specific; impacts ought to be understood as a "delta" concept the change produced by the activity; human rights impacts are prioritized in the assessment; recommendations are made on the basis of that prioritization that is grounded on prevention as the highest goal; those recommendations then serve as a basis for changing the proposed activity; provisions for monitoring implementation should be developed and applied; a measure of transparency is required, and experts may be utilized; and they should serve as the basis for generalizing the approach so that it may eventually harden into custom, practice or rule.
[379] Ibid. ¶ 21.

Distinctiveness of Human Rights Impact Assessments: A Different Approach.[380] The SRSG emphasized, that while the forms and sensibilities of environmental/social impacts assessments were usefully transposable, the two fields of impacts analysis were not aligned. The differences included sources of law/norms; most important in this respect was the identification of the core sources of international law that would find their way into UNGP Principle 12.[381] The SRSG noted as well that human rights impacts analysis should be treated as an additional section of an environmental/social impacts exercise but requires its own approach.[382] The SRSG suggested that the scope and focus of human rights impacts assessments must necessarily be broader– for which the techniques of scenario planning might prove useful; they might also draw on international institutional practice that incorporates both law and norms into its assessment strategies.[383] The later raised an issue of normative significance for the SRSG, who noted that guiding principles for such incorporation might include "principles such as empowerment, participation, non-discrimination, prioritization of vulnerable groups, and accountability.[384] The consequence is clear—impacts assessments in the human rights and business field are not meant to be narrow compliance based instruments, but rather they are meant to serve as a basis for transposing policy at the public institutional level into action at the level of granular private activity through the mechanism of responses to impacts assessments. At its limits, that suggests a manifestation of what the SRSG later described as the transformational aspects of the UNGP framework.[385] At its limits it makes plausible the possibility of understanding economic activity as legitimate only as a means of giving expression to core principles of public policy. Lastly, the juxtaposing of rights-holders and duty-bearers introduces another key element of the framing element of the UNGP[386]--entitlement and obligation, the point at which they meet, serves as a core structural element that emerges in the second pillar corporate responsibility to respect in later reports and then in the UNGP.

The 2007 SRSG Report 4/74 ends with a consideration of then initiatives and outlook. [387] It describes human rights impacts assessment projects then in development.[388] Each is proffered as evidence of the pragmatic feasibility of human rights impacts assessments as described in the report. They are evidence of the possibility of data based (qualitative in large part) impacts assessments and their effects in incorporating (and thus changing the trajectories of economic activity) these impacts into the business practices of enterprises. The Report notes that the genesis and development of human rights impacts assessments have been driven by the largest global enterprises.[389] The SRSG expressed the expectation that the practices would be normalized more deeply as the practice experiences of the leading group of enterprises reduced the operational costs of such impact assessments.[390] Looking forward, perhaps unconsciously, the SRSG noted that such impacts assessments are not a legal requirement anywhere, but appear to be more accepted as a practice expectation in markets.[391] Still, the SRSG leaves open the door to the legalization of human rights impacts assessments in some form, with the private

[380] Ibid., ¶¶ 22-29.
[381] Compare UNGP Principle 12 (described in Chapter 2, supra, and discussed in Chapter 8.1, infra, with 2007 SRSG Report 4/74 ¶ 22. Both include the core principle that the identification of the foundational applicable standards does not otherwise limit the application of other context relevant human rights law/norms.
[382] 2007 SRSG Report Mapping 4/35, ¶ 25.
[383] Ibid., ¶¶ 26-27.
[384] Ibid., ¶ 28.
[385] See discussion Chapter 2, supra, Section 2.2.
[386] Ibid., ¶ 29.
[387] Ibid., ¶¶ 30-40.
[388] Ibid., ¶¶ 30-36.
[389] Ibid., 37.
[390] Ibid., ¶ 38 (as they become "more common, both the costs and the benefits of the exercise should become clearer, hopefully leading other business enterprises to experiment with HRIAs" ibid.).
[391] Ibid., ¶ 39.

sector and civil society leading the way.[392] He ends by suggesting that even at this preliminary stage, and given the ubiquity of environmental/social impacts assessments, "there is no excuse for any company, lender or investor to claim to be unaware that their investments could impact human rights."[393] It lacks only an authoritative framework.

3.2.4. The 2008 Reports.[394]

The SRSG produced five reports in 2008, the first with two substantive addenda. The critical report introduced the Protect, Respect, Remedy three pillar framework on which the UNGP would be developed.[395] This Report included two Addenda, one summarizing the insights gleaned from multi-stakeholder consultations,[396] and the other considering the scope of corporate abuse with adverse human rights impacts.[397] An additional Report, clarifying concepts of "sphere of influence" and "complicity", which had proven contentious at the time, was produced.[398] Lastly the SGSR produced a Report for the UNGA.[399] Each is discussed in turn.

3.2.4.1 The 2008 SRSG Report 8/5 (Protect/Respect/Remedy). Conceptually, this is likely the most important of the reports produced by the SRSG. It served as the first of the "synthesis" reports. Drawing regulatory conclusions from the empirical and normative work of the prior two reports, the SRSG now introduces the Protect-Respect-Remedy Framework. The report pattern follows earlier efforts. The report first identifies that the gaps in governance around the world, which are caused by globalization, are the catalysts that have resulted in human rights being violated through a permissive atmosphere with little repercussion from authority figures.[400]

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[392] Ibid., ¶ 40.
[393] Ibid., ¶ 40.
[394] 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), available http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.
[395] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 (7 April 2008); available [https://undocs.org/en/A/HRC/8/5]; last accessed 25 February 2024 (2008 SRSG Report 8/5 (Protect, Respect and Remedy)).
[396] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 Addendum 1 A/HRC/8/5/Add.1 (23 April 2008); available [https://undocs.org/en/A/HRC/8/5/Add.1]; last accessed 25 February 2024 (2008 SRSG Report 8/5 (Protect, Respect, Remedy) Addendum 1 (Consultation Reports)).
[397] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 (23 May 2008); available [https://undocs.org/en/A/HRC/8/5/Add.2], last accessed 25 February 2024 (2008 SRSG Report 8/5 *Protect, Respect, Remedy(Addendum 2 (Corporate Abuse)).
[398] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Clarifying the Concepts of "Sphere of influence" and "Complicity" A/HRC/8/16 (15 May 2008); available [https://undocs.org/en/A/HRC/8/16]; last accessed 25 February 2024 (2008 SRSG Report 8/16 Clarifying Concepts).
[399] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Report to the UN General Assembly: Human rights and transnational corporations and other business enterprises A/63/270 (12 August 2008); available [https://undocs.org/en/A/63/270]; last accessed 25 February 2024 (2008 SRSG Report GA 63/270).
[400] Mr. Ruggie has pointed out that there are three governance gaps. The first is structural as the global economy is comprised of globally integrated businesses while there is a territorially fragmented system of public governance. This limits the ability of any government from having a significant effect on business and human rights. The second stems from the fragmentation within governments, or a lack of policy coherence. This is comprised of the vertical and horizontal incoherence contained in the report. The last gap is capacity related; the state never implements the law or adopts the necessary legislation because it lacks the means

This gap has been created between economic actors and forces on one side and the capacity of societies to manage the adverse consequences on the other.[401]

Within this context, the SRSG can consider and eliminate potential approaches to the construction of a governance framework, an effort that recalls the analysis and rejection of the Norms in the 2006 Report. Among the approaches considered and dismissed are ones that require the production of a specific list of human rights affecting businesses. The SRSG took the position that businesses affect all areas of human rights;[402] thus, if the list were not all encompassing it would leave out essential areas of human rights that are affected, leaving those specific rights unprotected. Rather than the certainty of lists and rules based approaches, the SRSG instead framed governance around three core principles.

1. State Duty to Protect. For instance, under the State Duty to Protect, corporate culture is a decisive issue as it can be used to determine liability and can use market pressures to force companies to act in ways that are not harmful to human rights. Policy alignment is an issue to consider where the government has developed or endorses certain human rights commitments, but then does nothing to implement them (vertical incoherence); and when various groups within government are unable to work together to fulfill their obligations to protect human rights (horizontal incoherence).[403] This imbalance is greatest in developing countries and should be addressed to ensure that host states are following their human rights obligations.[404] Effective guidance and support at the international level is also a serious consideration. This can help not only one country, but may spread effective ideas around the globe through the active encouragement to share information about challenges that are faced and the solutions that are used to deal with them.[405]

Additionally, conflict zones, areas with civil and economic strife, are important to keep in mind as they usually contain the most human rights violations.[406] The best policy would be to prevent harmful corporate involvement in conflict areas.[407] A way to deal with this is to identify possible triggers for companies that may indicate potential abuses.[408]

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or fears the consequences in the global economy. John Ruggie, UN Special Representative for the Secretary General for Business and Human Rights, Keynote Address at the 3rd Annual Responsible Investment Forum (Jan. 12, 2009) at 2.

[401] 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*, at ¶ 3, U.N. Doc. A/HRC/8/5 (April 7, 2008).

[402] "No industry, and no region, has a monopoly on corporate abuses; all have been implicated. Moreover, it is clear that companies can have adverse effects on virtually all internationally recognized rights, not only a relatively narrow range of labor standards or issues related to communities in the proximity of a business operation." John Ruggie, UN Special Representative for the Secretary General for Business and Human Rights, Remarks at the Royal Institute of International Affairs, Chatham House (May 22, 2008) at 2.

[403] *Supra* note 75 at ¶ 33-40. Horizontal incoherence is present at two places, when dealing with host states and with home states. For host states, the problem develops when there are groups within the government trying to attract foreign investment and do not balance the need for foreign investment with an interest in human rights.

[404] Ibid at ¶ 36.

[405] Ibid at ¶ 44.

[406] This also includes challenges present in low income countries, countries that have just emerged from, or are still in, conflict, and where the rule of law is weak and corruption is high. *Supra* note 5???????????????? Chatham house speech.

[407] SRSG notes that 'States need to do more to "promote conflict-sensitive practices in their business sectors"'. Ibid.

[408] "They could then provide or facilitate access to information and advice ... to help businesses address the heightened human rights risks and ensure they act appropriately when engaging with local actors." Ibid at ¶ 49.

2. Corporate Responsibility to Respect. The great innovation of the 2008 Report was the elaboration of a corporate responsibility to respect human rights. The issue is to determine which rights companies have the responsibility to bear. Current ideas surrounding this principle include forcing companies to shoulder *specific* responsibilities for all aspects of human rights, which is in contrast to the idea that companies are responsible for *all* areas of specific human rights – an idea that would exclude many important aspects of human rights.[409] Respecting rights is the baseline responsibility for all companies, not just simply complying with national laws. This responsibility is separate from the state duty to protect and there is no primary state and secondary company obligation.[410] Also, doing no harm does not mean that companies can sit back passively and not violate human rights, what is required is a positive act by the company such as standards it must follow to protect human rights.[411]

Due diligence is also considered.[412] This must take the form of an entire process that includes policies,[413] impact assessments,[414] integration,[415] and tracking performance.[416] Ruggie also defines 'Sphere of Influence' and 'Complicity' in this context. Sphere refers to the actors and parties that surround a company and influence refers to two things, impact and leverage.[417] These considerations are essential when determining liability and responsibility for companies.

Complicity also has to do with determining liability and can act hand-in-hand with corporate culture (if the corporate culture does enable complicit behavior). If a company is complicit in a violation of human rights they can be held liable as actors in the violation. Though this may seem easy to prove in many situations, the standards that must be developed will set the bar higher to prove corporate liability. For example, simply deriving a benefit for human rights violations is not sufficient to impose liability on a company.[418] Additionally, if a company does perform a due diligence analysis, it is much easier to avoid charges of complicity and thus, liability.[419]

3. Access to Remedies. This final pillar of the framework is used to ensure that the protection of human rights is carried out. The purpose of this element is to point out that grievance mechanisms must be effective for the two other principles to mean anything at all.[420] The SRSG included information and considerations on various avenues to remedies to explore the different options for victims of human rights violations. Judicial mechanisms are looked at first, but as is shown, it is often difficult to realize any remedies from this avenue – reasons for this include: poor knowledge of the law by victims, few resources in developing countries to pursue charges,

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[409] *Supra* note 75 at ¶ 51.
[410] Ibid at ¶ 55.
[411] Ibid.
[412] The scope of due diligence should include not only a company's own activities, but also the relationships connected with them—relationships with governments and other non-state actors. Ruggie Chatham House Remarks CITE.
[413] adoption of human rights policies with detailed guidance in specific areas to give meaning to it. Supra note 75 at ¶ 60.
[414] companies must take proactive steps before conducting any activities to determine if there will be any impact on human rights. If there will be an effect, companies should refine their plans to avoid or mitigate the human rights harms. Ibid at ¶ 61.
[415] companies must integrate the human rights policy they develop into their overall policy. They must be integrated into the entire company and not just one department. Ibid at ¶ 62.
[416] monitoring and auditing performance is important as it allows companies to track the performance of ongoing developments in human rights policies. Ibid at ¶ 63.
[417] *Supra* note 75, at ¶ 66.
[418] Ibid at ¶ 78.
[419] Ibid at ¶ 73.
[420] Ibid at ¶ 82. For if the grievance mechanism is ineffective, or even non-existent, there is no incentive for states or companies to protect or respect human rights.

jurisdictional issues, and State matters.[421] Victims usually lack a basis in the law to interpose a claim, and even if they do bring a claim, it might be hindered by political, economic, or legal considerations. The law is beginning to evolve to allow claims where the acts or omissions of a parent company are related to the harm that was caused by their subsidiary.[422] But some companies defend themselves using *forum non conveniens* to show that there is a more appropriate forum for the claim.[423]

Non-judicial mechanisms are also considered. However, the SRSG was concerned about establishing the legitimacy of such systems. For that purpose, it was pointed out that they must meet a certain criteria before they will be found credible. This criterion requires the mechanism to be legitimate, accessible, predictable, equitable, rights-compatible, and transparent.[424]

Company-level mechanisms must address issues before they even evolve to larger disputes, though there may be problems if the company acts as both defendant and judge.[425] A company can provide a grievance mechanism directly and also be involved in its administration; this may include the use of external resources, sometimes shared with other companies, such as hotlines, advisory services, and expert mediators; though it can also include external mechanisms.[426]

State-based non-judicial mechanisms are also important because they hold companies accountable in some circumstances. In any case they can provide advice and direction so victims can obtain redress.[427] The main organizations in this category are national human rights institutions (NHRIs). These are very important; where they are able to address grievances involving companies, they can begin to hold companies accountable.[428] Where they cannot handle grievances on their own, they can provide direction and advice on the avenue to obtain redress.[429]

Grievance mechanisms can also help check the performance of companies for human rights abuses when multi-stakeholder or industry initiatives and financiers are involved. But because there are few formal standards for companies to follow when integrating mechanisms, there is concern that most will just be tokenistic and not effective at the operational level.[430] As more initiatives are created, it is important that they become collaborative to streamline the process for remedies while making them more effective for complainants.[431]

Gaps in access are another issue considered in this context. Many potential victims still do not have access to any mechanisms, nor do they have any knowledge of such mechanisms. This can be remedied by using various institutions, governments and other actors to improve the information flow to potential victims.[432] One proposal includes a global ombudsman that addresses all complaints, but there is also a large amount of

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[421] Ibid at ¶ 88-89.
[422] Ibid at ¶ 90.
[423] Ibid.
[424] Ibid at ¶ 92.
[425] Ibid at ¶ 93. The mechanism should focus on a direct or mediated dialogue.
[426] Ibid. at ¶ 94.
[427] Ibid. at ¶ 97.
[428] Ibid. at ¶ 97.
[429] Ibid.
[430] Ibid at ¶ 100.
[431] Ibid at ¶ 101.
[432] Ibid at ¶ 102.

consideration to be undertaken before something of this magnitude is implemented.[433] The criteria would be accessibility (though not the first step for complaints), effective processes without undermining the development of national mechanisms, timeliness for responses (though they will likely be far removed from complainants), and provide appropriate solutions that take into account different sectors, cultures and political contexts.[434]

The SRSG ends the 2008 SRSG Report 8/5 by contextualizing the framework as emerging from and aligned with the critical evidentiary findings of the 2006 and 2007 reports. He notes that both the public and private sectors have been seeking to find ways to better internalize human rights obligations within their respective systems. Reflecting on the underscored insights and conclusions from the Addenda to the 2007 SRSG Report (Mapping) 4/35, the SRSG noted:

> Without in any manner disparaging these steps, our fundamental problem is that there are too few of them, none has reached a scale commensurate with the challenges at hand, there is little cross-learning, and they do not cohere as parts of a more systemic response with cumulative effects. That is what needs fixing. And that is what the framework of "protect, respect and remedy" is intended to help achieve.[435]

This does not require the development of a singular global law, but rather the expansion of the scope of governance responses to include both public and private actors.[436] Systematization, coordination and collaboration between the governance systems of states and corporations becomes a necessary requisite to the incorporation of human rights within the legal systems of states and the social systems of corporations.

3.2.4.3 The 2008 SRSG Report 8/5 (Protect/Respect/Remedy) Addenda. The 2008 SRSG Report 8/5 (Protect, Respect, Remedy) included two Addenda. The first summarized the fruits of five multi-stakeholder consultations. [437]The second surveyed the scope and patterns of alleged corporate related human rights abuse.[438]

2008 SRSG Report 8/5 Addenda 1 (Summary Multi-Stakeholder Consultations). This Addendum summarized five international consultations that were hosted in 2007, and co-convened with a non-governmental organization. They addressed the broad range of issues addressed to specialists in the 2007 SRSG Report (Mapping) 4/35 Addenda[439] but this time addressed to the civil society sector. The core questions on State duty focused on the obligations of home states.[440] The core questions touching on corporate responsibility focused on the meaning of that responsibility (doing no harm) applicable in all situations and with respect to all human rights.[441] The tensions with the perspectives from enterprises specified in the 2007 Report addenda are clear. [442]

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[433] Ibid at ¶ 103.
[434] Ibid.
[435] Ibid at ¶ 106.
[436] With a nod, again, to what the SRSG Identifies as the fatal flaw in the conceptualization of the Norms, the SRSG acknowledges that the "UnitedNationsisnotacentralizedcommand-and-controlsystemthatcanimpose its will on the world - indeed it has no "will" apart from that with which Member States endow it. But it can and must lead intellectually and by setting expectations and aspirations." Ibid., at ¶ 107.
[437] 2008 SRSG Report 8/5 Addenda 1 (Summary Multi-Stakeholder Consultations).
[438] 2008 SRSG Report 8/5 Addenda 2 (Corporate Abuse).
[439] 2008 SRSG Report 8/5 Addenda 1 (Summary Multi-Stakeholder Consultations), Summary, p. 2.
[440] Ibid., p. 3, ¶¶ 1-3, 4-67.
[441] Ibid., pp. 3-4, ¶¶ 100-152.
[442] See discussion, supra, § 3.2.3.

The issue of human rights in conflict zones was also considered.[443]Lastly the focus on accountability mechanisms focused in substantial part on non-judicial grievance mechanisms.[444]

Part II, on the role of States,[445] had as its goal "full and frank discussion . . . under non-attribution rules"[446] that "aimed to generate key ideas concerning the legal and policy dimensions of home as well as host State duties and their implications for the SRSG's mandate."[447] The consultations offered an opportunity to preview the insight—one that would make its way into the UNGP and the 211SRSG Report, that "he saw no "single silver bullet" solution to the many issues raised in his mandate, including States' roles."[448]

The SRSG extracted *two principle insights* from the consultations. Both served as intimations of permissions of sorts. In the first, the SRSG noted that the consultations "indicated how much progress had been achieved in the business and human rights debate since the beginning of the mandate."[449] That progress is borne on the backs of "an emerging community of actors who, while approaching the challenges from different perspectives, nevertheless are working to improve current practices."[450] The SRSG then suggests that these factors contribute to a growing recognition that the status quo "provides neither sufficient guidance to companies and Governments, nor sufficient protection to individuals and communities."[451] In the second, the SGSG concluded that given the pace and nature of international law making, "all available options must be pursued."[452] These options include regulatory mechanisms that are not international law instruments. In the short and medium term, however, there was always the State that might explore concrete steps "to improve corporate respect for human rights."[453]

Part III, on business and human rights in conflict zones,[454] has as an object fulfilling the SRSG's mandate to consider the role of States in effectively regulating, including through international cooperation. Since, the SRSG noted that since the most egregious human rights violations occur in conflict zones, it seemed an appropriate focus for a consultation.[455] More specifically, the SRSG sought to focus on the role of home States when "their" companies operate in conflict zones abroad.[456] The questions for consideration centered on what home States could do to prevent or deter abuses by their enterprises operating in conflict zones, what, if anything States could do to prevent or deter such abuses, and how might States deal with wrongdoing by their companies in conflict zones.[457] The participants appeared dissatisfied with the role of States in addressing business and human rights concerns in conflict zones.[458] States lag behind other institutions in confronting conflict zone issues, and are more interested in promoting trade than in preventing adverse human rights impacts, and that some form of

[443] Ibid., ¶¶ 68-99.
[444] Ibid., pp. 4-5.
[445] Ibid., ¶¶ 4-67
[446] Ibid., ¶ 8.
[447] Ibid., ¶ 9.
[448] Ibid., ¶ 10.
[449] Ibid., ¶ 66.
[450] Ibid.
[451] Ibid.
[452] Ibid., ¶ 67.
[453] Ibid.
[454] Ibid., ¶¶ 68-99.
[455] Ibid., ¶ 68.
[456] Ibid.
[457] Ibid., ¶ 69.
[458] Ibid., ¶ 70.

State due diligence ought to be developed before encouraging their enterprises to operate in conflict zones.[459] Proposed "next steps" included better engagement between home and host states, specific guidance for enterprises interacting with military forces and belligerents,, better provision of information and advice for business people, identification of simple triggers for home State engagement, better policy alignment in home States, and cooperation among home States.[460]

Part IV, on the corporate responsibility to respect human rights,[461] continued consultations reported in the Addenda to the 2007 SRSG Reports. The consultation provided a number of insights that reflected their particular perspectives. It was assumed that society expects corporations have to respect human rights and that in these societies corporations believe they must; the essence of respect means "non-infringement" and "do no harm" which encompasses positive obligations; the scope of respect may increase where the enterprise performs governmental functions (undefined) and voluntarily; and lastly that philanthropy was rejected as a mechanism for offsetting harm.[462] The consultation focused on due diligence as a means of implementing the "do no harm" principle.[463]The SGSG took from this consultation the understanding that "there was broad acceptance of the underlying premise of the consultation, that companies have a responsibility to respect human rights, and of due diligence as a useful overarching concept enabling companies to operationalize the responsibility to respect."[464] And the consultation provided an important contribution for the work of the SRSG in fleshing out the three pillar framework he introduced in his 2008 SRSG Report 8/5 (Protect, Respect, Remedy).

Part V, "Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes,"[465] was the second of two events in which selected experts were brought together to advise on means to improve "effectiveness of grievance/dispute resolution mechanisms "in the business and human rights arena."[466] All sorts of representatives were assembled from a broad range of stakeholder groups with an interest in this project.[467] Again, grievance mechanisms were split between internal mechanisms and external private or hybrid mechanisms.[468] The discussions were built around a set of core assumptions;[469] these assumptions provided the normative structures within which the UNGP were to be developed. To aid that development in this context, a draft document "Principles for Effective Human Rights-Based Grievance Mechanisms" was circulated.[470]

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[459] Ibid., ¶¶ 71-73, 77.
[460] Ibid., ¶ 99.
[461] Ibid., ¶¶ 100-152.
[462] Ibid., ¶¶ 104-107.
[463] Ibid., ¶¶ 11-115. The SRSG noted the use of due diligence in the United States, it connection to fiduciary duty, and the need for further research. Ibid.
[464] Ibid., ¶ 152.
[465] Ibid., ¶¶ 153-218.
[466] Ibid., ¶ 153. The allusion to sporting venues was interesting and perhaps illuminating.
[467] Ibid., where their institutional affiliations or vocations were identified.
[468] Ibid., ¶ 154. See also SRSG Report 4/35 (Mapping) Addenda 4.
[469] Ibid., ¶ 156.
[470] Ibid., ¶ 157. Also made available was Caroline Rees, Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes. Report of 2nd Multi-Stakeholder Workshop, 19-20 November, 2007." Corporate Social Responsibility Initiative, Report No. 27 (2008) (Cambridge, MA: John F. Kennedy School of Government, Harvard University); available [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/report_27_accountability%2Bmechanisms2.pdf], last accessed 12 March 2024..

Four principles were articulated: First is the principle of judicial process supremacy as a means of building accountability structures into non-state based grievance processes. Second, the connection between grievance processes and judicial oversight is underdeveloped, and in any case judicial processes as a substitute may be too drawn out and expensive to serve as a viable avenue for remedy. Third, all parties share an interest in avoiding escalation that makes litigation a viable venue for remedy. Fourth, these "extra-judicial mechanisms" then can be understood to play *an important complementary role* in the business and human rights context, in the way, perhaps, that markets play an important complementary role in Marxist-Leninist political-economic systems. Complementarity beyond internal enterprise based grievance mechanisms[471] were then divided into three broad categories, each occupying a more generalized jurisdictional space: (1) national level mechanisms; (2) multi-stakeholder and industry initiatives; and (3) multi-lateral initiatives.[472] With respect to these, SRSG noted consensus on four strategic themes that emerged from the discussion: "going beyond monitoring, increasing local ownership, exploring strategic and operational integration with one another, and paying greater attention to actual drivers of operational effectiveness.[473]

2008 SRSG Report 8/5 Addenda 2 (Corporate Abuse). This Addendum presented the results of a survey of the scope and patterns of alleged corporate-related human rights abuse. Allegations of abuse were assessed against the International Bill of Human Rights, though environmental harms were assessed for their adverse human rights impacts.[474] The Summary highlighted the finds of greatest impact on its authors, and thus provide some indication of intent /design in crafting and reading the UNGPs. First, corporate abuse allegations included the "full range of human rights." Second, instances of abuses often generated impacts on more than one identifiable human right. Third, adverse human rights impacts there were not remedied often produced adverse impacts on other rights. Fourth, there was a connection between environmental harms and adverse human rights impacts. Fifth, corruption was both a cause and contributor to adverse human rights impacts. Sixth, impacts on individuals and communities appeared to occur at equal rates. Seventh, more than a majority of the alleged abuses considered directly involved the enterprise. Eighth, indirect corporate involvement involved third parties with whom the enterprise had a relationship.[475]

The SRSG offered a set of conclusions divided into six parts.[476] First, the traditional assumption of an identity between human rights abuses and the workplace "does not appear to hold. . . it seems just as common for corporations to face accusations of impact on the rights of communities as it is for them to face accusations of impact on the rights of workers."[477] Second, the SRSG noted the occurrence of adverse impacts domino effects; " While some company conduct does indeed have an immediately identifiable and discrete impact on human rights, . . . abusive conduct more frequently indicates -or even creates - an environment where abuses multiply."[478] Third, it is difficult to extract enterprise conduct from the "social struggles" whose operations may sometimes magnify adverse impacts that leak from those struggles.[479] The consequence may be to drag the enterprise into those struggles. Fourth, complicity remains a substantial issue, even where the complicity does not rise to the level

[471] Considered 2008 SRSG Report 8/5 Addenda 1 (Summary Multi-Stakeholder Consultations), ¶¶ 179-207.
[472] Ibid., ¶ 158. Considered, ibid., ¶¶ 219-259.
[473] Ibid., ¶ 260.
[474] Ibid., Summary.
[475] Ibid.
[476] Ibid., ¶¶ 95-100.
[477] Ibid., ¶ 95.
[478] Ibid., ¶ 96.
[479] Ibid., ¶ 97.

of legal culpability in the states where it occurs.[480] Fifth, the link between environmental and human rights adverse impacts is now beyond question, at least in context.[481] Lastly, the failure to respond to allegations of adverse human rights impact, abuse, may augment efforts to seek remedy and might impact corporate operations.[482] The SRSG had his evidentiary support for what would emerge as the framework for the application a the prevent, mitigate, remedy principle, through the accountability measures to be built into human rights due diligence systems, in the UNGPs.

3.2.4.4 *2008 SRSG Report 8/16 Clarifying Concepts.*[483] The issue of spheres of influence and complicity had arisen in the 2007 Reports. The SRSG thought it important to provide a further clarification in the context of the now interposed "Protect, Respect, Remedy" framework put forward in the 2008 SRSG Report 8/5 (Protect, Respect, Remedy). This Report was written to justify rejection of the concept of "sphere of influence" as too broad to work within the emerging framework of human rights due diligence, and to justify the inclusion of a broadened concept of complicity within that framework.[484] The basis of these conclusions were derived, in part, from their value to the corporate due diligence system that was becoming a focal point of the corporate responsibility in action.[485] Drawing on some of the insights from the empirical work disseminated in the Addenda to the 2007 and 2008 Reports, the SRSG offered a contextual and relational approach in lieu of the "spere of influence" concept.[486] These are built around the core premise of the mandate, and ultimately, of the UNGP: to "respect rights essentially means not to infringe on the rights of others, put simply, to do no harm."[487] That core premise is not absolute—it is understood in the context, also eventually embedded in the UNGP, of "prevent, mitigate, and remedy."[488]

The discussion of "sphere of influence" was organized in three parts.[489] The first considered the concept as a function of its origins and current usage.[490] The second explained the way in which the concept no longer served its purpose, in part because of the changes in the way that enterprises now seek to determine, re precisely, their social responsibilities.[491] The key weaknesses were imprecision and ambiguity; also problematic was the way in which the term leverage was used. The third outlined an alternative approach that was more intimately aligned with the emerging concept of human rights due diligence as a system of accountability within the broader

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[480] Ibid., ¶ 98.
[481] Ibid, 99. It ought to be noted that this connection has now been memorialized more generally. See, UNHRC Resolution: The human right to a clean, healthy and sustainable environment A/HRC/RES/48/13 (18 October 2021); The UNGA adopted a similar resolution in July 2022.
[482] Ibid. ¶ 100.
[483] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Clarifying the Concepts of "Sphere of influence" and "Complicity" A/HRC/8/16 (15 May 2008); available [https://undocs.org/en/A/HRC/8/16]; last accessed 25 February 2024 (2008 SRSG Report 8/16 Clarifying Concepts).
[484] Ibid., Summary.
[485] Ibid., ¶ 4.
[486] Ibid., ¶ 19.
[487] Ibid., ¶ 3.
[488] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Business and human rights: Towards operationalizing the "protect, respect and remedy" framework A/HRC/11/13 (22 April 2009); available [https://undocs.org/en/A/HRC/11/13]; last accessed 25 February 2024 (2009 SRSG Report 11/13 (Operationalizing)); ¶ 49.
[489] 2008 SRSG Report 8/16 Clarifying Concepts, ¶ 6.
[490] Ibid., ¶¶ 7-9.
[491] Ibid., ¶¶ 10-18.

understanding of corporate responsibility.[492] Within the concept of due diligence, it was possible to subsume the objectives of spheres of influence and leverage (the latter term did survive and found its way into Principle 19 of the UNGPs) within a contextual, and relational analysis, one that reflected the fundamental inductive nature of the framework and analytics that would eventually be memorialized in the UNGP.

> The process inevitably will be inductive and fact-based, but the principles guiding it can be stated succinctly. Companies should consider three sets of factors. The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context, for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances.[493]

Complicity was another matter. The SRSG developed two principles. The first was that complicity was an inherent concept within the corporate responsibility to respect human rights,[494] understood as avoiding adverse human rights impacts from corporate economic activity.[495] The second was that complicity had two quite different manifestations. One spoke to legal complicity and suggested the spaces where State duty and corporate responsibility aligned.[496] The second spoke to complicity as understood within the customs, traditions, and expectations of the communities within which the enterprise operated. These arose not merely from the market, but also from the expectations that were expressed in public and private international soft law instruments. [497] While complicity in this sense did not rise to a matter of legal compliance de jure; it had the de facto effect of legal compliance, at least within the sphere of corporate responsibility under the emerging second pillar. Both ought to be understood as essential elements of the due diligence systems of enterprises.[498] With this as a general framework, the SRSG concluded that complicity operated within a dynamic and messy reality.[499] But the unifying concept was the resulting pr aligned abuse. "In short, both operating in contexts where abuses occur and the appearance of benefiting from such abuses should serve as red flags for companies to ensure that they exercise due diligence, adapted for the specific context of their operations."[500] With respect to both spheres of influence and complicity, then, and what defines the scope of due diligence function, enterprises "should focus not only on the company's own business activities, but also on the relationships associated with those activities, to ensure that the company is not complicit, or otherwise implicated in human rights harms caused by others."[501]

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[492] Ibid., ¶¶19-25.
[493] Ibid., ¶ 19.
[494] Ibid., ¶ 71.
[495] Ibid., ¶¶ 26-32.
[496] Ibid., ¶¶ 33-53.
[497] Ibid., ¶¶ 54-69
[498] Ibid., ¶¶ 70-72.
[499] Ibid., ¶ 70.
[500] Ibid.
[501] Ibid., ¶ 72.

3.2.4.5 The 2008 SRSG Report 63/270 GA.[502] This Report was submitted pursuant to the requirements of the extension of the SRSG's mandate[503]that the SRSG report annually to the UNGA. This report outlined generally the Protect, Respect, and Remedy framework, which had been welcomed by the UNHRC at the time that the SRSG's mandate had been extended.[504] It also outlined the SRSG's the anticipated work streams to operationalize the framework.[505] The Report to the General Assembly does not add much substantively. It does, however, provide a window on intent, which might be gleaned from the text. The Report is divided into three parts. The first focused on a description of the Protect, Respect, and Remedy framework.[506] The SRSG then describes his "Next Steps" divided among the three pillars.[507] Lastly, the SRSG provided the UNGA with an update on activities.[508] The SRSG ends on a somewhat dramatic note: "The business and human rights agenda is enormously complex and much hangs in the balance: the rights of individuals to enjoy lives of dignity, the role of business in achieving economic development and the social sustainability of globalization itself."[509] The SRSG underscored the value added of his data based inductive approach[510] to the challenges of embedding human rights impact into the calculus of economic activity, and the normalization of principles of prevent-mitigate-remedy in the risk calculus of choices in the way enterprises undertake business activity.

With respect to the three pillar framework's development, the SRSG provided his sense of the historical developments of the Norms and its abandonment that led to his mandate.[511] He spoke to the knowledge acquired after extensive consultation over three years.[512] From this the SGSG drew *a common theme: a sustained demand* across stakeholder groups for "a common framework of understanding of the complex business and human rights challenges, a foundation on which thinking and action could build in a cumulative fashion."[513] The common theme is quite interesting for what it says and what it doesn't. First the SRSG suggested that the common framework was demand driven. He suggested that the *Norms* failed to satisfy that demand because it was ultimately unresponsive. The object of desire was not a code, or law—it was a framework. And it is the construction of that object toward which the SRSG moved—to meet demand. The purpose of the object was not to provide answers but rather a common framework for understanding—effectively what was demanded was a collective language which could serve

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[502] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Report to the UN General Assembly: Human rights and transnational corporations and other business enterprises A/63/270 (12 August 2008); available [https://undocs.org/en/A/63/270]; last accessed 25 February 2024 (2008 SRSG Report GA 63/270).
[503] UNHRC Resolution 8/7 2008–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 2008 Resolution), discussed infra, §3.3.
[504] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Business and human rights: Towards operationalizing the "protect, respect and remedy" framework A/HRC/11/13 (22 April 2009); available [https://undocs.org/en/A/HRC/11/13]; last accessed 25 February 2024 (2009 SRSG Report 11/13 (Operationalizing)).
[505] 2008 SRSG Report GA 63/270, ¶¶ 1-2.
[506] Ibid., ¶¶ 3-14. The SRSG then described his "Next Steps."
[507] Ibid., ¶¶ 15-29.
[508] Ibid., ¶¶ 30-40.
[509] Ibid., ¶ 41.
[510] Ibid., ("he fully intends to continue to employ the methodology that has served the mandate so well to date: objective research, inclusive consultations and the engagement of a wide range of actors whose expertise and influence can turn principles into practice." Ibid.).
[511] Ibid., ¶ 3.
[512] Ibid., ¶ 4.
[513] Ibid., ¶ 5.

as a basis of normative and communicative solidarity among a widely diverse set of stakeholder groups within the wider collective. The purpose then, was semiotic collective meaning making through conceptual objects strung together by a common language.[514] That meaning, inductively derived, is meant to be dynamic; it is meant to serve as a platform where consumers and producers of this framework might think and act in a cumulative fashion to continue the evolution of the framework in accord with the times. That was the intention/design the SRSG conveyed to the UNGA.

That common theme required a framework; and the framework developed through the SRSG's inductive, data based, process of principled pragmatism was Protect-Respect-Remedy.[515] The State duty brought the State back into the business and human rights equation.[516] The corporate responsibility advanced the core principle that economic activity ought to do no harm—at least harm with adverse human rights impacts.[517] The right to remedy provides the methodologies where human (public or private) activity produces adverse human rights impacts. [518] The SRSG then noted that the three pillar framework (unlike the Norms) appeared to satisfy demand.[519]

For Next Steps, the SRSG offered a seven point list.[520] These were built around operationalization of the three pillar framework. To achieve these objectives the SRSG promised wide consultations would continue, and that "a high-level leadership group from diverse sectors and regions" would be convened "to provide ongoing strategic and substantive advice.[521] The inter-relationship between both groups was unspecified. More specifics on goals for fleshing out the three pillars was then offered.[522] It is here, in the context of the corporate responsibility, that the SRSG notes that he is "embarking on a process to elaborate a set of guiding principles on the scope and content of the corporate responsibility to respect human rights, including due diligence requirements and the related accountability measures."[523] *It is the only place in the Report that the term appears*. Lastly, the SRSG updates on activities[524] describes the SRSG activities. They might be read as aligning with the objective of meeting and knowing consumer demand to inform the construction of the promised framework operationalization instrument.

3.2.4. 2009 Reports.

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[514] Cf., Robert Hodge and Gunther Kress, *Social Semiotics* (Cornell University Press, 1988); Jan M. Broekman and Larry Catá Backer, *Signs In Law - A Source Book: The Semiotics of Law in Legal Education III* (Dordrecht, Switzerland, Springer, 2015); Charles Kurzman, Introduction: Meaning-Making in Social Movements,' (2008) 81(1) *Anthropological Quarterly* 5-15.
[515] Ibid., ¶¶ 5-7.
[516] Ibid., ¶ 8.
[517] Ibid., ¶ 10.
[518] Ibid., ¶ 12.
[519] Ibid., ¶ 14.
[520] Ibid., ¶ 15.
[521] Ibid., ¶¶ 16-17.
[522] Ibid., ¶¶ 18-29.
[523] Ibid., ¶ 23.
[524] Ibid., ¶¶ 30-40.

For 2009, the SRSG produced two reports. One, the 2009 SRSG Report 11/13 (Operationalizing),[525] also included an Addendum on the State obligation to provide access to remedy for human rights abuses by third parties.[526] The other was a required annual report to the UNGA related to the SRSG's work for the year.[527]

3.2.5.1 2009 SRSG Report 11/13 (Operationalizing).[528] This Report outlines the strategic directions of the SRSG's efforts to operationalize the Protect-Respect-Remedy Framework. This direction is in part a product of prior reports as well as of the sentiments expressed on the renewal of the SRSG's mandate. "This marked the first time the Council or its predecessor had taken a substantive policy position on business and human rights."[529] To effectuate these objectives, the 2009 Report began the process of considering methodologies and structures for converting framing principles into governance orders, that is, "to translate the framework into practical guiding principles."[530] For that purpose, states are assumed to act "through appropriate policies, regulation and adjudication."[531] Corporations are assumed to act "with due diligence to avoid infringing the rights of other."[532] The remedial aspect of the framework are to lead to "greater access by victims to effective remedy, judicial and non-judicial."[533] The 2009 Report provides "an update on steps the Special Representative has taken towards operationalizing the framework, and it addresses of issues related to it that have emerged from ongoing consultations."[534]

To get to operationalization issues, the SRSG first had to consider the impact of the financial crisis of 2008 on the regulatory project represented by the Protect-Respect-Remedy framework. The SRSG suggested that the economic crisis proved his point of the consequences of a regulatory or governance gap. [535] More than that, the crisis suggested the importance of the framework for ameliorating the worst effects of economic crisis on the most vulnerable populations.[536] Indeed, the economic crisis itself appeared to present an opportunity, which the SRSG

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[525] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Business and human rights: Towards operationalizing the "protect, respect and remedy" framework A/HRC/11/13 (22 April 2009); available [https://undocs.org/en/A/HRC/11/13]; last accessed 25 February 2024.
[526] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Addendum: State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions A/HRC/11/13/Add.1 (15 May 2009); available [https://undocs.org/en/A/HRC/11/13/Add.1]; last accessed 25 February 2024 (2009 SRSG Report 11/13 (Operationalizing) Addendum 1).
[527] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Report to the UN General Assembly: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/64/216 (3 August 2009); available [https://undocs.org/en/A/64/216]; last accessed 25 February 2024 (2009 SRSG GA Report 64/216).
[528] Ibid.
[529] Ibid., at ¶ 1.
[530] Ibid., at ¶3.
[531] Ibid., at ¶ 2.
[532] Ibid.
[533] Ibid.
[534] Ibid at ¶ 6.
[535] Ibid at ¶ 7.
[536] "However painful the near-term may be, going forward elements of the business and human rights agenda should become more clearly aligned with the world's overall economic policy." Ibid., at ¶ 10. "Because the business and human rights agenda is tightly connected to these shifts, it both contributes to and gains from a successful transition toward a more inclusive and sustainable model of economic growth." Ibid.

aims to identify "in the business and human rights domain and demonstrate how they can be grasped and acted upon."[537]

1. State Duty to Protect. The object of the 2009 Report was "to provide views and recommendations on strengthening the fulfillment of the State duty to protect against corporate related human rights abuse."[538] For this purpose, the SRSG summarized the duty's content and identified relevant business-related policy areas relevant to that duty.[539]

The SRSG embraces the assumption that "Governments are the most appropriate entities to make the difficult decisions required to reconcile different societal needs."[540] The state duty to protect, for the SRSG, is bound up in the supremacy of international law obligations of states over domestic legal considerations.[541] The State duty is grounded in international law, which both creates substantive rules and imposes on States a duty to transpose those substantive commands into domestic law.[542] Thus transposed, these legal requirements ought to protect individuals against abuses by any person or entity operating within a national territory.[543] On the other hand, the "extraterritorial dimension of the duty remains unsettled in international law."[544] But neither does international law and legal principles proscribe the practice either, so long as there is some jurisdictional basis for it and the reasonableness test is satisfied.[545]

States "have long been aware of the range of measures required of them in relation to abuse by State agents."[546] But they have failed to enact the broad range of measures necessary to transpose all of the requirements of international law into their domestic legal orders. The result is what the SRSG describes as broad ranging horizontal and vertical legal and policy incoherence that substantially detracts from the State's duty.[547] Incoherence at all levels is a significant issue when considering the adoption of human rights standards. Vertical incoherence exists when states sign on to human rights obligations but then never implement them.[548] Horizontal incoherence exists when different departments and agencies conduct their operations in isolation and know nothing about the government's obligations.[549] "Domestic policy incoherence is reproduced at the international

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[537] Ibid., at ¶11.
[538] Ibid., ¶ 12.
[539] Ibid.
[540] Ibid ¶ 44.
[541] Ibid at ¶ 13.
[542] Ibid.
[543] Ibid.
[544] Ibid., at ¶ 15.
[545] Ibid. "Within these parameters, some treaty bodies encourage home states to take steps to prevent abuse abroad by corporations within their jurisdictions." Ibid. , citing to International Convention on the Elimination of all forms of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, CERD/USA/CO/6 (2008), available http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf.
[546] 2009 Report, supra, at ¶ 17.
[547] Ibid., at ¶ 17.
[548] Ibid at ¶ 18. It would normally seem as if there should be some accountability mechanism that requires countries that do adopt any obligations to actually fulfill those obligations without the adopted human rights program simply being viewed as tokenistic.
[549] Ibid. This is more difficult to address as it deals with the internal workings of a state government and policy makers. This is a difficult area to consider for operationalizing the framework as it then gets into the area of domestic policy creation which may be seen as an affront to sovereignty.

level. This results in ambiguous and mixed messages to business and Governments and international organizations."[550]

The challenges to the realization of the State duty to protect has begun to be addressed by four legal developments studied in prior reports—the harmonization of international standards for global crimes, an emerging standard of corporate complicity in human rights abuses, the use of deviations from conventional corporate culture for determination of criminal responsibility, and a rise in civil cases brought in the courts of developing states against corporations for human rights abuses.[551] Policy developments have focused on the elaboration of increasingly complete corporate social responsibility projects.[552] These policy developments might provide a useful source for improving the state duty to protect.[553]

The SRSG continues to look to other policy domains that are closely related to the States' duty to protect; these include corporate law, investment and trade agreements, and international cooperation, for the most part with respect to conflict affected areas.[554] Each is described in turn.

Corporate law shapes what corporations do and how they do it; but there are always serious implications of it with respect to human rights.[555] There is now a shifting trend as governments and courts are introducing more public interest considerations into law.[556] Recent innovations in English and Danish law were highlighted, as were proposed legislation in India and caselaw in the United States were highlighted.[557]

Investment and Trade Agreements remain important engines of economic growth, but the hard part is to avoid the back and forth protectionist policies that will simply hinder any future growth.[558] Other problems arise when governments cannot fulfill certain policy obligations if they are constrained by treaties. This problem is exacerbated when investors have "stabilization provisions" or "host Government agreements" that give investors more predictability and other legal safeguards.[559] There is a difference in these cases if the country is an OECD or not. The SRSG has found that in recent agreements, OECD countries do not allow exemptions from new laws for investors, with minor exceptions that allowed the clauses to be tailored to preserve public interests.[560] In non-OECD countries, there is generally some protection from compliance with new environmental or social laws, or even provide compensation for compliance all to promote greater investment in that jurisdiction.[561] Ruggie is still consulting with experts on whether and how trade regimes can limit or enable the state duty to protect.

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[550] Ibid., at ¶ 19.
[551] Ibid., at ¶ 20.
[552] Ibid. at ¶ 21.
[553] Ibid. at ¶ 21.
[554] Ibid. at ¶ 23.
[555] Ibid. at ¶ 24.
[556] Ibid. One example is publicly traded companies in the United States now being required to have programs that assess, manage, and report on material risks, which includes many human rights issues, even though not mentioned specifically. Ibid at ¶ 26.
[557] Ibid., at ¶¶ 25-26.
[558] Ibid at ¶ 28.
[559] Ibid at ¶ 32.
[560] Ibid.
[561] Ibid.

International Cooperation "involves States working together through awareness raising, capacity building and joint problem solving."[562] But several factors currently limit the effectiveness of international cooperation efforts. States are not using existing forums as effectively as they could so it won't be possible to enhance peer learning as required.[563] The SRSG is reaching out beyond UN Human Rights mechanisms and welcomes new ideas. Capacity-building within states is an important issue since most states do not put human rights high on the priority list.[564] This cooperation for joint problem-solving is important in conflict resolution areas, though this cannot be expected in societies with civil war or strife, which is why the most egregious human rights violations occur in countries torn apart.[565]

2. Corporate Responsibility to Respect. Companies know that they must comply with laws to maintain their legal license to operate, but some have realized that that is not enough to maintain their social license to operate, especially if the local law is weak.[566] Social license is based on prevailing social norms which can be just as important as legal norms. Many of these social norms vary by region and industry, but one has near universal recognition – the corporate responsibility to respect human rights, or to not infringe on the rights of others.[567] The corporate responsibility to respect exists independently of any state duty or variation of national law.

The SRSG asked companies if they had systems in place which would aid them in demonstrating claims of respect for human rights with a degree of confidence. What is required of companies "is an ongoing process of human rights due diligence, whereby companies become aware of, prevent, and mitigate adverse human rights impacts."[568] There are three essential ranges of factors necessary for a company's human rights due diligence process, including: the country and local context in which the business activity takes place; what impacts the company's own activities may have within that context, in its capacity as producer, service provider, employer and neighbor, and understanding that its presence inevitably will change many pre-existing conditions; and whether and how the company might contribute to abuse through the relationships connected to its activities, such as with business partners, entities in its value chain, other non-State actors, and State agents.[569] The SRSG announced more consultations to further operationalize the corporate responsibility to respect human rights and other due diligence issues.

Two issues have arisen in understanding the corporate responsibility to respect human rights: demystifying human rights and the understanding of due diligence. The main problem is that States have developed human rights concepts for states, and not for companies, thus making it difficult for companies to understand them. As the Protect, Respect and Remedy Framework is being used to split the complementary responsibilities of both states and companies, it is difficult to determine where each actor stands in the human rights agenda.[570] The SRSG considers "Positive Acts" – acts by a company that require the use of due diligence to

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[562] Ibid., at ¶ 38.
[563] Ibid at ¶ 39.
[564] Ibid at ¶ 41.
[565] Ibid at ¶ 43. Ruggie has found that all stakeholders want some more guidance on how to prevent human rights abuses by companies in conflict affected areas.
[566] Ibid at ¶ 46.
[567] Ibid.
[568] Ibid at ¶ 49.
[569] Ibid at ¶ 50. All internationally recognized human rights should be included in the substantive content of the due diligence process known to companies. Ibid at ¶ 52.
[570] Ibid at ¶ 57-58.

become aware of, prevent, and address adverse human rights impacts.[571] These underlying principles must always be considered, regardless of varying situational factors.

The SRSG then considered what is beyond respect. Though the responsibility to respect human rights is a baseline responsibility for all companies in all situations, companies can undertake greater responsibility voluntarily or in a philanthropic sense.[572] At this point it is still unclear which responsibilities should be attributed to companies. A dilemma exists for companies when national law contradicts and does not offer the same level of protection as international human rights standards.[573]

With respect to due diligence, on the other hand, the SRSG addressed four issues in the context of human rights. The first touched on life cycle issues. Due Diligence is commonly defined as 'diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."[574] But Ruggie used the term more broadly: "a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire *life cycle* of a project or business activity, with the aim of avoiding and mitigating those risks."[575]

The second set of issues touch on business role and size. The SRSG starts from the assumption that companies of all sizes should internalize human rights principles, though the methods employed can be different and are not yet fully understood.[576] Small and medium sized companies must consider their human rights impacts as well, but the scale and complexity of their due diligence cannot compare with that of a larger company.[577] Suppliers must also be considered as companies want to avoid charges of complicity due to their suppliers' violations.[578] Ruggie has continued to explore how businesses of different sizes and roles can affect human rights due diligence and is working to create an elaboration of human rights due diligence that can apply to all businesses.[579]

The SRSG next considers issues of methodology, which he labels: Free Standing? The issue considers whether human rights policies be integrated into company conventional monitoring processes or whether it should be free standing.[580] A single policy is unlikely to fit all situations, but two principles are critical: 1- companies must realize that human rights demand meaningful engagement with all parties affected within and beyond the company; and 2- oversight of the compliance method must have direct access to the company's leadership.[581] As most due diligence policies would likely be similar for all companies, the use and integration of a human rights policy within companies would probably be similar. Thus a standard would likely emerge that all companies could follow successfully.

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[571] Ibid at ¶ 59. This includes the requirement that a company have a forum for complaints to be brought.
[572] Ibid at ¶ 61. What is required from companies is not what is desired from them, though at the same time, if a company does what is desired of them, it does not offset what is required of them.
[573] Ibid at ¶ 66. National authorities may demand compliance with national law, while stakeholders and the company itself may prefer, due to principle or company policy, adherence to international standards.
[574] Ibid at ¶ 71.
[575] Ibid. This definition of life cycle is important as the due diligence process will be more accurate and considerate of all factors that may take place over the entire life of a business activity that affects human rights.
[576] Ibid. at ¶ 72.
[577] Ibid. at ¶ 74.
[578] Ibid. at ¶ 75.
[579] Ibid. at ¶ 76.
[580] Ibid. at ¶ 77.
[581] Ibid. at ¶ 79.

The last set of issues concerned liability: whether companies, through following human rights due diligence requirements, could expose themselves to potential liability because it could provide other parties with information they could use against the company that they would not otherwise have had.[582] A prudent company will follow the due diligence process outlined by the SRSG which "encourages robust risk assessment that is... highly advisable from a business perspective in today's highly visible and transparent environment."[583] "[D]one properly, human rights due diligence should create opportunities to mitigate risks and engage meaningfully with stakeholders so that disingenuous lawsuits will find little support beyond the individuals who file them."[584]

3. Access to Remedies. The third pillar of the Framework is integral to the entire framework as it is used to enforce the other duties and responsibilities. Four segments exist in this pillar that must be considered when determining how to operationalize.

State Obligations: States are required to take steps to investigate, punish and redress corporate-related abuses of human rights within their jurisdiction.[585] "[T]he State obligation applies to corporate abuse of all applicable human rights, it is unclear how far the individual right to remedy extends to non-State abuses."[586]

Interplay between Judicial and Non-Judicial Mechanisms: These two mechanisms are sometimes thought of as mutually exclusive, but in fact, they are more interactive, even complementary, reinforcing, sequential, or preventive.[587] Non-judicial mechanisms can be used earlier and faster than judicial processes and where there is no cause for legal action. But each mechanism has its own advantages and disadvantages which must be considered in the wide range of options based on needs and circumstances.

Judicial Mechanisms: The legal systems of States are not enough to investigate, punish and redress abuses as significant barriers still exist.[588] Ruggie focused on barriers that are prominent for victims of corporate related human rights abuses. Some problems included: insufficient capacity to deal with complex claims, costs of filing claims, loser pays policies, and receiving judgments.[589] When making claims against the subsidiaries of foreign parent companies it is even more difficult as there are jurisdictional standards to be used while parent companies use their leverage over governments.[590] With criminal proceedings, even if it is a valid claim, the state may not be willing, or able, to commit resources to the claim.[591] The SRSG is continuing to research and conduct consultations on barriers to judicial remedy, while also looking at possible options to redress them.[592]

Non-judicial Mechanisms: six grievance mechanism principles were considered from the 2008 report: legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency. The newest principle

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[582] Ibid. at ¶ 80.
[583] Ibid. at ¶ 81.
[584] Ibid. at ¶ 83. Additionally, other social actors can determine if a company facing criticism has undertaken a good faith effort to avoid human rights violations, which would limit the harmful effect that following the due diligence requirements may expose the company to.
[585] Without these steps, the access to remedy would be weak or even meaningless. Ibid. at ¶ 87.
[586] Ibid. at ¶ 88.
[587] Ibid. at ¶ 91.
[588] Ibid. at ¶ 93.
[589] Ibid. at ¶ 94.
[590] Ibid at ¶ 95.
[591] Currently, there is very little that victims can do about this situation. Ibid at ¶ 96.
[592] Ibid at ¶ 98.

maintains that the company should operate through dialogue and mediation as opposed to the company itself as an adjudicator. Mechanisms exist at the company level, the national level and the international level.

At the company level, effective grievance mechanisms play an important part in the corporate responsibility to respect. They complement monitoring of human rights compliance and provide a channel for early warning signs.[593] A number of influential companies have begun experimenting with grievance mechanisms and related methodologies. The SRSG also welcomed efforts to craft principles for the operation of such systems by non-state transnational actors.[594] At the national level, national human rights institutions (NHRIs) and the National Contact Points (NCPs) of states that adhere to OECD Guidelines are potentially important avenues for remedies at the national level.[595] NCPs stress the need for flexibility in its operation that reflects the circumstances.[596] But governments have not given these efforts sufficient support, despite treaty obligations that appear to compel a greater level of support and institutionalization.[597]

Lastly, at the international Level, many "voluntary industry codes, multi-stakeholder initiatives and investor-led standards have established grievance mechanisms."[598] A major barrier to access of grievance mechanisms is lack of information about them. The SRSG has launched a wiki (BASESwiki.org) to address this issue. A number of other proposals are outlined within the report. "[C]reating a single, mandatory, non-judicial but adjudicative mechanism at the international level poses greater difficulty", though an alternate option would be to look at an existing body with international standing that could offer mediation of human rights disputes.[599] Currently, no solid plan has been identified that could be used to address the issues raised here.

For the SRSG, then, grievance mechanisms serve as the heart of any remedy scheme. "They are essential to ensuring access to remedy for victims of corporate abuse."[600] Again, the distinction between states as law-system organs and corporations as social-system organs drives the analysis. States enforce through the elaboration of laws and standards enforced through its courts. Corporations enforce through the elaboration of governance systems that are grounded in surveillance and non-judicial remedies.[601] "But too many barriers exist to accessing judicial remedy, and too few non-judicial mechanisms meet the minimum principles of effectiveness."[602]

3.2.5.2 The 2009 SRSG Report 11/13 (Operationalizing) Addendum. The Addendum to the SRSG's 2009 Report 11/13 focused on the narrow question of "the scope of State obligations to provide access to remedy for third party abuse, including by business"[603]under a number of international human rights treaties. The Addendum is interesting for a number of reasons, beyond its interpretation of the state of the law with respect to the question interposed. The first was the use of the word "endorsed" by the SRSG in reference to the UNHRC's reception of his "Protect, Respect, and Remedy" framework.[604] Second, the SRSF presumes that the State duty is grounded in international human rights law, but makes no mention of the constitutional or general laws of the

[593] Companies can even track complaints to Identify systemic problems to prevent future harms. Ibid at ¶ 100.
[594] Ibid., at ¶ 101.
[595] Ibid at ¶ 102.
[596] Ibid at ¶ 104. To ensure credibility, flexibility should be limited by certain performance criteria outlined by the SRSG.
[597] Ibid., at ¶ 104.
[598] Ibid. at ¶ 106.
[599] Ibid. at ¶ 111. Arbitration is also an option that is being given serious consideration.
[600] Ibid., at ¶ 115.
[601] Ibid.
[602] Ibid.
[603] 2009 SRSG Report 11/13 (Operationalizing) Addendum 1, summary p. 2.
[604] Ibid., Summary ("and unanimously endorsed by the Human Rights Council").

domestic legal orders which traditionally have played some role. Third, the SRSG concedes that the remedial principle tends to play a leading role in the characterization of the remedial right. Prevention and mitigation do not, though the SRSG seeks to read something of a prevention, mitigation practice in the operations of UN treaty bodies. However, "there remains a lack of clarity as to the steps they should take to hold companies accountable."[605]

A similar predicament applies to extraterritorial application of law or jurisdictional power of home states. Here again, the SRSG relies on the operations of the international apparatus to read an arc of development that favors a more flexible approach to the projection of State power abroad—in the service of remediation of adverse human rights impacts and grounded in a sufficient quantum of relationships.[606] The SRSG recognized the gap between domestic jurisprudence of access to remedy and the right to remedy recognized in international instruments.[607] Again, the SRSG would resort to international law to bridge the gap. He reads the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[608] as a restatement of existing State obligations and thus as an opening for moving toward a broadening of State duty to provide access to justice in some circumstances. On this basis, the SRSG affirmed an intention to "continue to follow developments" and their implications for the framework.[609] To that end, the SRSG promised more dialogue with UN treaty bodies, among others, " as he examines existing barriers to accessing such remedy and how States can best address them."[610]

3.2.5.3 The 2009 SRSG Report GA 64/216. The 2009 mandatory Report of the SRSG to the UNGA provides a small window on the alignment of intent with the construction of the framework guiding principles, framed as "an overview of the main developments" related to the SRSG-s work in implementing his mandate.[611] The Report started with noes of thanks for the support of influential stakeholders, including states, underscoring the relevance of the extensive consultations from out of which the operationalization of three pillar framework would emerge, eventually, as the UNGP.[612] The Report then summarized each of the three pillars and their basic characteristics.

The essence of the state duty to protect pillar was premised on "both legal and policy dimensions but is grounded in international human rights law."[613] Two points of generalized international law were noted extracted from the basic character of the relationship between States and their (human rights related) treaties. The first was centered on negative rights: that these treaties commit States to refrain from violating enumerated rights. The second was centered on positive rights: that treaties required States to "ensure" the enjoyment to realization of

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[605] Ibid., p. 3.
[606] Ibid., pp. 3-4; ¶¶ 10-101.
[607] Ibid., ¶¶ 102-110.
[608] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law A/RES/60/147 (21 March 2006). See also General Assembly resolution 40/34 of 29 November 1985 (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power); General Assembly resolution 56/83 of 12 December 2001 (Responsibility of States for internationally wrongful acts); Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1).
[609] Ibid., ¶ 111.
[610] Ibid., ¶ 113.
[611] 2009 SRSG Report GA 64/216, ¶ 2.
[612] Ibid., ¶¶ 3-6.
[613] Ibid., ¶ 7.

enumerated rights.[614] Calling on the authority of international human rights bodies, the SRSG added the premise that these positive and negative obligations applied to all rights which could be affected by all actors. That matrix of obligation served as the basis for characterizing the State duty to protect as a "standard of conduct" built into international law by international law. The international law basis then serves to recharacterize projections of State power extraterritorially merely as an act of agency—State are not projecting power extraterritorially; they are merely acting as the agents, r servants, of international law and its twin obligations. [615]

The rest follows and shapes the organization and deployment of State power toward those ends. States must overcome the policy and legal incoherence of their domestic legal orders as a function of their human rights duties.[616] The trajectories of legal developments noted and privileged by the SRSG would aid in this effort to enhance policy and legal coherence.[617] These include the convergence of national criminal law with the emergence of international criminal law developed through the Rome Statue; the development of a standard of corporate complicity respecting human rights abuses; State focus on corporate culture and its reform as a factor in developing their law of criminal responsibility; and the development of a jurisprudence of corporate responsibility for the actions of their subsidiaries emerging from (mostly English) case law.[618] Lastly, the SRSG noted what he called "four core areas on which to focus in relation to the State duty to protect."[619] The first touched on State self-impeding actions through systems of investment treaties;[620] the second touched on State activity as market participants;[621] the third focused on issues of human rights culture reflected in law and policy;[622] and the last focused on the development of State guidance mechanisms, especially those with regulatory effect.[623]

The essence of the corporate responsibility to respect pillar re-centers the role of economic activity, from one built on adding value, to one was built on avoiding adverse human rights impacts "as the baseline expectation for all companies in all situations." [624] It is operationalized in two principal ways: legal compliance combined with human rights due diligence measures.[625] The task for the SRSG, then, was to institutionalize these premises in text around international soft law expectations,[626] and operational instructions for the construction and maintenance of diligence systems.[627] "To that end, he aims to produce a set of guiding principles that both address the processes through which a company should perform its human rights due diligence and provide guidance for the complex dilemmas that businesses may face in fulfilling their responsibility to respect, such as what to do when international
human rights standards conflict with domestic law."[628] *It is useful to underscore here that the initial impulse toward the drafting of guiding principles was focused on the 2nd Pillar corporate responsibility, and more specifically in the*

[614] Ibid.
[615] Ibid.
[616] Ibid., ¶ 8.
[617] Ibid., ¶ 9.
[618] Ibid.
[619] Ibid., ¶ 10.
[620] Ibid., ¶ 11.
[621] Ibid., ¶ 12.
[622] Ibid., ¶¶ 13-14
[623] Ibid., ¶ 15.
[624] Ibid., ¶ 17.
[625] Ibid.
[626] Ibid.
[627] Ibid., ¶ 18.That, in turn, would fulfill the core expectations around the SRSG mandate. Ibid., ¶ 19.
[628] Ibid., ¶ 21.

constitution and operation of a human rights due diligence system to institutionalize mechanisms for effectuating the corporate responsibility to avoid adverse human rights impact.

For the rest, the SRSG noted framing issues. The most valuable, for purposes of textual commentary for the UNGP, was the SRSG's announced approach to the general principles themselves. For the SRSG, " the focus of the Special Representative will be on providing guiding principles that are enduring and of broad application to business, . . . while also offering clear benchmarks to help individual companies carry out this due diligence in practice."[629] The other was the challenge for this guiding principles project built around human rights due diligence in the face of the incoherence and heterogeneity of potentially applicable law and norms.[630] Expert consultations was offered up as a means to the resolution of those challenges.[631]

The essence of the remedial pillar focused on the organization of the ecologies of remedial mechanisms as a function of the fundamental principle of State centrality in the international system.[632] The focus was on barriers to accessing remedy.[633] Also a matter of concern were the special situation of vulnerable groups.[634] The problem of providing non-state non-judicial remedy remained an issue in search of a resolution.[635] The results of the work on this issue would be presented in a report presented with the definitive version of the UNGP.[636]

Lastly, and perhaps most importantly, the SRSG confronted the issue of what he called "mandatory versus voluntary" measures; the fighting around which he called an "impediment to progress."[637] These are the positions that eventually will produce the great schism between those favoring an international treaty basis for imposing a mandatory human rights compliance regime on economic activity and those who had a higher tolerance and greater hope for multi-systemic approaches that included private law based (so-called voluntary from the perspective of public law) systems, as against those who saw no role for public law. It is from tat discussion that the SRSG again elaborates his compromise "smart mix of measures" position.[638]

3.2.5 2010 Reports[639]

In 2010, the SGSG produced two reports. The first spoke to further steps toward the operationalization of the protect/respect/remedy framework and served as the final stage before the distribution of the first daft UNGP in late 2010. The second report was directed to the UN GA provided an update, along with a discussion of the consultative process that the SRSG intended to pursue in elaborating the guiding principles while addresses some of the challenges of moving from concept to principles.

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[629] Ibid., ¶ 22.
[630] Ibid., ¶ 23.
[631] Ibid., ¶¶ 24-25.
[632] Ibid., ¶ 26.
[633] Ibid., ¶¶ 27-29.
[634] Ibid., ¶¶ 30-31.
[635] Ibid., ¶¶32-36.
[636] 2011 SRSG Report 17/31 Addendum 1 (Piloting Principles), discussed supra at Chapter 2.2.2.1.
[637] 2009 SRSG Report GA 64/216, ¶¶ 38-41.
[638] Ibid., ¶ 41.
[639] John G. Ruggie, Report of the SRSG: "Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework," UN Document A/HRC/14/27 (9 April 2010); available [https://www2.ohchr.org/english/issues/trans_corporations/docs/a-hrc-14-27.pdf] (hereafter "2010 Report").

3.2.5.1 The 2010 SRSG Report 14/27.[640] The 2010 SRSG Report 14/27served as a sort of summing up of the substantive work of the SRSG reflected in the 2006-2009 Reports. Its introduction summed up the overall framework within which the guiding principles to be reduced to text would be produced. That framework was straightforward, though not without substantial controversy among those who did not share the underlying ideology on which it was grounded.[641] It rested on what was at the time characterized as the three part policy framework: protect, respect, and remedy, "for better managing business and human rights challenges."[642] The object is to bridge the gap "between the scope and impact of economic forces and actors and the capacity of societies to manage their adverse consequences."[643] The character of the three pillars and their inter-linking was emphasized:

> Its three pillars are distinct yet complementary. The State duty to protect and the corporate responsibility to respect exist independently of one another, and preventative measures differ from remedial ones. Yet, all are intended to be mutually reinforcing parts of a dynamic, interactive system to advance the enjoyment of human rights.[644]

It remained, then, to complete the SRSG's mandate, to reduce these threads to a set of guiding principles "on the practical meaning and implications of the three pillars and their interrelationships."[645]

The basis of that transition, from investigation, to textual reduction, was meant to serve as the concrete manifestation of the principled pragmatism that had guided the SRSG's work from its inception.[646]

3.2.5.2 The 2010 SRSG Report 65/310 GA.[647] This Report provided a summary overview of the final stages of the work of the SRSG before the presentation of the finalized text of the UNGP. He reiterated the now evolved fundamental premise ar0und which his work product would be developed: "that business and human rights challenges reflect a broader institutional misalignment between the scope and impact of economic forces and actors and the capacity of societies to manage their adverse consequences" now synthesized as the protect, respect and remedy framework.[648] To those ends the SRSG reiterated the plan to "provide a set of guiding principles on the implementation of the protect, respect and remedy framework at the end of his mandate in June 2011."[649] *The expressed intent* was to make them "general enough to be universally applicable, thus recognizing the diversity of country and business contexts, but specific enough to have practical utility."[650] As requested by the

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[640] John G. Ruggie, Report of the SRSG: "Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework," UN Document A/HRC/14/27 (9 April 2010); available [https://www2.ohchr.org/english/issues/trans_corporations/docs/a-hrc-14-27.pdf] (hereafter "2010 Report").
[641] For a then contemporary taste of the gap as advanced by academics and intellectuals see essays in
[642] 2010 Report, infra, ¶ 1.
[643] Ibid., ¶ 2.
[644] Ibid.
[645] Ibid., ¶ 3 (along with the promotion of the guidance and its coordination with relevant institutional stakeholders).
[646] Ibid., ¶¶4-15 ("an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people" Ibid., ¶ 4).
[647] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Report to the UN General Assembly Human rights and transnational corporations and other business enterprises A/65/310 (19 August 20210); available [https://undocs.org/en/A/65/310]; last accessed 25 February 2024.
[648] Ibid., ¶ 4.
[649] Ibid., ¶ 6.
[650] Ibid.

UNHRC, the SRSG was also to "present options and recommendations to the Council regarding possible successor initiatives to his mandate."[651] From these will emerge both the Working Group on Business and Human Rights, and the annual Forum established at the time of the endorsement of the UNGP by the UNHRC.[652]

The bulk of the 2010 SRSG Report 65/310 GA described efforts to finalize the broad contours of each of the three pillars,[653] adhering to the methodological parameters drawn from the SRSG's initial mandate:[654] (1) identifying and clarifying standards; (2) elaborating roles; (3) researching and clarifying concepts; (4) developing materials and methodologies; and (5) compiling lists. The SRSG drew special focus on the issue of extra-territoriality;[655] and related to that discussion, the reach of corporate responsibility throughout supply chains.[656] Both suggested the application of principled pragmatism[657] applied to these issues, the results of which were eventually reflected in the UNGP, as well as elaborated in SRSG guidance reports annexed to the 2011 SRSG Report 17/31 presenting the final form of the UNGP.[658] Of special note here are the discussions around the concept of leverage, which finds its way in substantially condensed form into UNGP Principle 19,[659] along with the associated concepts of mapping supply chains, and what emerges as severity as the basis for balancing approaches to meeting adverse human rights impacts. Some of this will then find its way into the more elaborate guidance provided through the OHCHR respecting the second pillar corporate responsibility to respect human rights distributed in 2012 in the form of an "interpretive guide."[660]

3.3 UNHRC Pre-Endorsement Resolutions

Two pre/endorsement resolutions of the UNHRC are considered here. The first is the UNHRC 2005 Resolution establishing the SRSG-s mandate. The second is the UNHRC 2008 Resolution extending the mandate of the SRSG. The UNHRC 2011 Resolution Endorsement is discussed at Chapter 2.1. Pre/mandate resolutions are discussed in Chapter 4.

3.3.1 UNHRC Resolution 2005/69.

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[651] Ibid.
[652] 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).
[653] 2010 SRSG Report 65/310 GA, ¶¶ 8-21.
[654] UNHRC Resolution 2005/69; discussed infra, Chapter 3.3.1.
[655] 2010 SRSG Report 65/310 GA, ¶¶ 22-31.
[656] Ibid., ¶¶ 32-49.
[657] Discussed supra, Chapter 3.1.
[658] These are discussed supra Chapter 2.2.
[659] Ibid., ¶¶ 37- 46.
[660] Office of the High Commissioner for Human Rights, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (HR/PUB/12/02, New York & Geneva, United Nations, 2012).

The mandate for the SRSG was adopted by the then Commission on Human Rights on 20 April 2005.[661] The preambular materials recalls the trajectory of the Norms project.[662] That served as both a marker of transition and a description of the foundation on which the mandate would be built. In UNHRC Decision 2004/116, the UN Commission on Human Rights expressed its thanks "for the work it has undertaken in preparing the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, which contain useful elements and ideas for consideration by the Commission."[663] Beyond that, the Commission on Human Rights affirmed that it had not requested the draft Norms, and that, consequently, the draft "has no legal standing, and that the Sub Commission should not perform any monitoring function in this regard."[664] The "useful elements" statement would serve as a reminder that the Norms project might not be entirely abandoned—at least with respect to its conception of the challenge and the need to meet it. And that was precisely the elements preserved from the Norms project. First was the priority and importance of the question of the responsibilities of enterprises with regard to human rights.[665] Second was the need to take stock of initiatives relating to that responsibility to be undertaken by the OHCHR.[666]

The UNHRC 2005/69 Resolution also welcomed the requested mapping exercise undertaken by the OHCHR.[667] The UNHRC 2005/91 OHCHR Report concluded that "there are gaps in understanding the human rights responsibilities of business with regard to human rights."[668] It noted an interest in the establishment of "a United Nations statement of universal human rights standards applicable to business."[669] And the Report encouraged taking "useful elements" from the Norms, to the ends of which the OHCHR "recommends to the Commission to *maintain the draft Norms among existing initiatives and standards on business and human rights*, with a view to their further consideration."[670] At the same time, the report noted the need for the development of tools to assist business, and greater study and clarification of key concepts.[671] Most importantly, perhaps, the preambular materials drew the single critical insight from the prior decades of work leading to the now failed Norms project: "that transnational corporations and other business enterprises can contribute to the enjoyment of human rights, inter alia through investment, employment creation and the stimulation of economic growth."[672]

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[661] UNHRC Resolution 2005/69-- 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.
[662] Ibid., Preamble, recalling United Nations Commission on Human Rights, Decision 2004/116 on the Responsibilities of transnational corporations and related business enterprises with regard to human rights chap. XVI, E/2004/23 – E/CN.4/2004/127 (20 April 2004) (hereafter UNHRC Decision 2004/116). The Norms project is discussed infra at Chapter 4.2.2. For the Norms, see, Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
[663] UNHRC Decision 2004/116; referenced in UNHRC Resolution 2005/69, Preamble.
[664] Ibid., ¶ (c).
[665] Ibid., ¶ (a).
[666] Ibid., ¶ (b).
[667] UNHRC Resolution 2005/69, Preamble, referencing United Nations Office of the High Commissioner for Human Rights, Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights E/CN.4/2005/91 (15 February 2005); available [https://digitallibrary.un.org/record/542041?ln=en&v=pdf]; last accessed 2 April 2024 (hereafter UNHRC 2005/91 OHCHR Report).
[668] UNHRC 2005/91 OHCHR Report, ¶ 52(a).
[669] Ibid., ¶ 51(b).
[670] Ibid., ¶ 51(d) (emphasis supplied).
[671] Ibid., ¶¶ 51 (e) – (f).
[672] Ibid., Preamble.

This serves both as the foundational animating signifier of the SRSG's project, and subsequently as the originating premise, and thus the core signifier,[673] of the spirit of the UNGP. In this sense the process of the social production of standards, laws and social-legal norms is both a process of signification and of the interpretation of its own significance manifested by the further production or application of norms, rules, and related text.[674] In this instance the signification of the Norms project produced the SRSG's mandate, carrying forward its essence, that is its "useful elements"—the need to institutionalize the premise that enterprises can contribute to the enjoyment of human rights.

From those premises the construction of the SRSG mandate followed. First, the Secretary General was directed to appoint a special representative.[675] Then the mandate was specified. These focused on *identifying and clarifying* of standards of corporate responsibility and accountability;[676] *elaborating* of the role of States in effectively regulating and adjudicating corporate responsibility; [677] *researching and clarifying* implications for enterprises of key concepts (among them "complicity" and "sphere of influence"; [678] developing materials and methodologies for human rights impacts assessments; [679] and *compiling* a list of State and enterprise best practices.[680] The action words in that mandate—(1) identifying and clarifying standards; (2) elaborating roles; (3) researching and clarifying concepts; (4) developing materials and methodologies; and (5) compiling lists—these became the central elements that together would cluster around the concept of principled pragmatism that marked the work of the SRSG and the framing of the SRSG's final definitive product, the UNGP.

To those ends, the SRSG was to take into account the work of the OHCHR reflected in the UNHRC 2005/91 OHCHR Report) referenced above.[681] It also set the template for the working style of the SRSG: [682] substantial consultations with identified key stakeholders and actors; [683] OHCHR administrative support; and annual economic sector specific meetings.[684]

3.3.2 UNHRC 2008 Resolution.

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[673] Signification suggests the way that text is read, understood, and given weight within social collectives. In the context of international law and norm creation the insights from legal semiotics are helpful. "First, signs and codes are present all over in law and legal discourse. Second, law is not a fixed object or thing but a social process through which meaning is presented. Third, the social process of law conditions how lawyers, legal scholars, and ordinary people, willingly involved in legal affairs or not, interpret and make meaning out of legal text." Tomonori Teraoka, "A Court as the Process of Signification: Legal Semiotics of the International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons," (2017) 30 International Journal for the Semiotics of Law 115-127, 117; drawing on Jan M. Broekman and Larry Catá Backer, *Lawyers making meaning: The semiotics of law in legal education II* (New York: Springer, 2013), p. 6.

[674] Andrés Saenz De Sicilia, and Sandro Brito Rojas 'Production=signification: towards a semiotic materialism,' (2018) 70 *Language Sciences* 131-142.

[675] UNHRC Resolution 2005/69, ¶ 1.

[676] Ibid., ¶ 1(a)

[677] Ibid., ¶ 1(b).

[678] Ibid., ¶ 1(c).

[679] Ibid., ¶ 1 (d).

[680] Ibid., ¶ 1(e).

[681] Ibid., ¶ 2.

[682] Ibid., ¶ 3.

[683] Ibid., ¶ 4.

[684] Ibid., ¶ 5.

The mandate for the SRSG was renewed June 18, 2008 to continue for an additional three years.[685] The UNHRC 2008 Resolution first welcomed the three pillar framework as well as the process utilized to develop the framework,[686] including the form and extent of consultations undertaken to date.[687] It the recognized the need to operationalize the framework, and in the process to "contribute to the consolidation of existing relevant norms and standards and any future initiatives, such as a relevant, comprehensive international framework."[688] With respect to the revised mandate the UNHRC encouraged governments, relevant UN organs, and stakeholders to cooperate with the SSRG,[689] and to seek the SRSG's views respecting related policy development.[690] It requested that the OHCHR organize a two day consultation to bring together States, business representatives and other relevant groups to discuss operationalization,[691] and provide necessary assistance for effective fulfillment of his mandate.[692]

The UNHRC 2008 Resolution then elaborated the specifics of the revised SRSG mandate. The revised mandate included a number of objectives[693] with respect to which the SRSG was to report annually to the UNHRC and the UNGA.[694] First it directed the SRSG to provide "practical recommendations", "elaborate further," and "make recommendations respecting strengthening the fulfillment of the State duty to protect human rights,[695] elaborating the scope and content of the corporate responsibility to respect human rights,[696] enhancing access to effective remedies for those whose human rights are impacted by corporate activities.[697] Additionally the SRSG was instructed to integrate a gender lens to his work and give special attention to vulnerable groups, in particular children.[698] The SRSG was to continue to develop best practices,[699] in coordination with public international organizations,[700] and to promote the framework and consult with "all stakeholders."[701]

All of this was to be undertaken within a set of constraining principles set out in the preambular materials.[702] The first was the principle that the obligation and primary responsibility to promote and protect human rights lies with the State. The second was that enterprises have a responsibility to respect human rights. And the last was that proper regulation of enterprises can contribute to the promotion, protection and fulfillment of respect for human rights. However, recognizing that—at least at the moment—states cannot effectively and uniformly exercise their duty through legislation and its implementation, it was necessary to "bridge the gaps at

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[685] UNHRC Resolution 8/7 2008—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 2008 Resolution)
[686] Ibid., ¶ 1.
[687] Ibid., ¶ 3.
[688] Ibid., ¶ 2.
[689] Ibid., ¶ 5.
[690] Ibid., ¶ 7.
[691] Ibid., ¶ 6.
[692] Ibid., ¶ 8.
[693] Ibid., ¶ 4.
[694] Ibid., ¶ 4(h).
[695] Ibid., ¶ 4(a).
[696] Ibid., ¶ 4(b).
[697] Ibid., ¶4(c).
[698] Ibid., ¶ 4(d).
[699] Ibid., ¶ 4(e).
[700] Ibid., ¶ 4(f).
[701] Ibid., ¶ 4(g).
[702] Ibid., Preamble.

the national, regional and international levels."[703] The focus appears to lean toward the formal regulatory spectrum of smart mixes. And that, in turn, might have some consequence for the application of the UNGP, and more importantly, for the understanding of its spirit, or signification.

3.4 Generalizing Intent/Design from the Travaux Préparatoires

Over the course of his mandate, the SRSG, his team, countless volunteers and participants produced a tremendous amount of text, representing research, surveys, case studies, practicums, informal and formal reports. All contributed to, and effectively manifested the operation of principled pragmatism built on an iterative inductive dialectics attached to and propelled by an animating objective the ideological perspectives that gave that objective meaning. These contributions were given form, direction, and substance through the formal communication of the SRSG, again manifested in text, that moved the project from principle, through pragmatic dialectics grounded in descriptive and predictive analytics, from which the SGSG was able to construct a plausible arc of development given form, eventually, by the UNGP. For this reason alone, the travaux are worth careful study for those seeking either to interpret and apply the UNGP (its text or spirit), or to use the UNGP as a basis for advancing the project in accordance with the times.

It is possible, at this point to suggest that a substantial amount of principled pragmatism stands between the "Protect, Respect and Remedy" Framework[704] and the final version of the Guiding Principles.[705] The Guiding Principles, as finally endorsed, represent a substantial aggregation of compromises and choices made to avoid the fate of the *Norms* in 2005.[706] The UNGP permit but do not directly implement a broad reading of the "Protect, Respect and Remedy" Framework. Likewise, the UNGP is grounded in a traditional reading of the role and functions of States as apex political authorities, enterprises as "specialized organs" operating within and omg States, and an international order (including its administrative organs) in which States seek to make coherent or at least coordinate the relations among them. But it does not lock that ordering in place, space, or time. These compromises, and their potential effect on the way one approaches the interpretation and application of the UNGP emerges from a consideration of the movement from draft to final version of the Guiding Principles. The Guiding Principles preserve the essence of the "Protect, Respect and Remedy" Framework; principled pragmatism[707] produced a framework quite sensitive to the preservation of the current ordering of hierarchies of collective political relations, including a differentiation between public and private regulatory spaces. The pathways toward the objectives of that effort that produced the UNGP can be reached in a variety of ways—the UNGP do not choose among them. That, perhaps, is the key insight from a close examination of the travaux préparatoire and their relationship to the UNHRC's intentions for this project as memorialized in its resolutions.[708]

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[703] Ibid.
[704] Discussed Chapter 3.2, supra.
[705] Discussed Chapter 2.3, supra.
[706] Discussed Chapter 4, infra.
[707] Discussed Chapter 3.1, supra.
[708] Discussed Chapters 2.1 and 3.3 supra.