Chapter X

"Respect" Human Rights: Concept and Convergence

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Abstract

The Guiding Principles on Business and Human Rights ('GPs') were unanimously endorsed in 2011 in the UN Human Rights Council and also recorded an unprecedented level of stakeholder support. Does this watershed signify a genuine convergence of expectations? Is the GPs' conceptualization of the corporate 'responsibility to respect' (RtR) truly able to persuade and provide that focal point around which stakeholders can come together in a notoriously polarized debate? The main thesis is one that the UN Special Representative John Ruggie expressly denies: contrary to its name, the responsibility to 'respect' has a 'protect' component. The analysis examines why and how Ruggie constructed the RtR in the way he did. The 'why' is explained by the fundamental challenge coming from the separation of entities principle, unavoidable when the RtR is applied to multi-entity business enterprises. The 'how' reveals that Ruggie systematically reframed concepts, employed ingenious drafting techniques, used silence strategically, and fully capitalized on the strength and appeal of the 'due diligence' approach. The analysis exposes the strategy of change animating Ruggie's efforts and the GPs attempt to facilitate the convergence of stakeholder expectations and the emergence of a polycentric governance regime.

Table of Contents

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Introduction

If one were tempted to affix labels on the field of business and human rights, a few words would come immediately to mind: contestation, distrust, illegitimacy, polarization, stalemate, incompatibility. Few moments pinpoint more eloquently the diversity of stakeholder expectations than the making—and demise—of the UN Norms on the Responsibilities of Transnational Corporations (Norms), shelved in 2004. The reasons for that demise were diverse, but one of them surely had to do with the way corporate responsibilities were conceived. According to the Norms, businesses were expected "to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights" within their spheres of activity and influence (U.N. Commission on Human Rights, 2003, art. 1).

The mandate of the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG), entrusted to Professor John Ruggie, began in 2005, with one of its goals being explicitly to reduce polarization and find some common ground (U.N. Special Representative of the Secretary-General, 2011). In 2011, only seven years after the UN Norms debacle, the UN Guiding Principles on Business and Human Rights (GPs) simply reference "respecting" human rights: "the corporate responsibility to respect [human rights] is the basic expectation society has of business in relation to human rights" (Ruggie, 2011b, p. 4). This notion of corporate responsibility carries the weight of a document unanimously endorsed in the UN Human Rights Council and benefits from an unprecedented level of (declaratory) support coming from businesses, states, intergovernmental organizations, and numerous civil society groups.

Now that the UN has agreed for the first time in its history on a comprehensive business and human rights instrument, some questions arise. Does this watershed signify a genuine convergence of expectations that has eluded the field of corporate social responsibility (CSR) for so long? More narrowly, do we finally witness a real convergence around the corporate responsibility to respect (RtR) human rights as conceived in the GPs? Indeed, by his own account, the SRSG aimed to construct an "authoritative focal point around which the expectations and actions of relevant stakeholders could converge" (Ruggie, 2011b, p. 3).

That diverse parties in the business and human rights debate have held wider or narrower expectations about the extent of businesses' responsibility comes as no surprise, particularly in the case of multinational enterprises (MNEs), which have large concentrations of wealth and span the globe with their operations. With the positive and negative social, environmental, and economic impacts of MNEs, the widespread concern voiced by the corporate accountability movement is that MNEs are allowed to externalize risks, not least through the multitude of subsidiaries, contractors, and other affiliates. Indeed, the complex structures of these business groups and networks, operating transnationally or nationally, which are integrated economically but separated legally, have raised serious challenges for generations of lawyers in terms of how to regulate them effectively in a jurisdictionally divided world of national states (Blumberg, 1993). Furthermore, MNEs, which have been at the center of UN debates on CSR since the 1970s, have garnered even more attention recently, as MNEs have benefited handsomely from the wave of globalization since the 1990s.

This chapter subjects the corporate responsibility to respect human rights, as elaborated in the GPs, to a hard look. What do the GPs actually mean by *respect* human rights as *the* responsibility of businesses, that baseline, minimum expected from all companies in all situations? What are the implications and difficulties raised by applying this responsibility to MNEs, and how did the SRSG handle them? This chapter engages in an analytical and taxonomical effort to highlight a simple issue that gets often and surprisingly obscured: what types of responsibilities do we really have in mind when we say, like the GPs do, that MNEs and corporate groups in general, like all other businesses, have a responsibility to respect human rights? What does respect entail under the GPs when it is applied to a specific subject, that is, the MNE, for the entities composing it?

Companies pursue strategies of subsidiarization and outcontracting to grow their operations and reach new markets. The interest in analyzing how the RtR applies to MNEs is to determine what is actually expected from those entities having the capacity, exercised or not, to influence or control affiliates. This inquiry is therefore relevant to parent companies in their relations with subsidiaries as well as to companies that contract out to entities in their value chains production or distribution functions. So the term 'MNE' covers both equity-based and contract-based enterprises in this chapter.

The analytical focus herein is therefore on influential companies, companies with leverage over other entities in the enterprise. It should not be assumed, however, that influence (leverage) is concentrated in one or a handful of entities at the top of a hierarchically organized group (for example, the parent company based in an industrialized country with numerous fully owned subsidiaries in less-developed countries) or at the center of a business network (for example, the large retailer or brand with suppliers and distributors contracted to supply or distribute goods and services worldwide). It is true these are the parent companies and large buyer companies of the classic CSR cases of the 1990s (for instance, Nike, Shell, Chiquita)[1]; we could call them "core companies" that are archetypal of influential companies. However, influence and leverage are distributed throughout the business enterprise; companies placed closer to the periphery of the enterprise might have real leverage in their small universe over their several local business partners. So, our inquiry into the meaning of RtR under the GPs is equally applicable to all types of influential companies—core companies dominating the enterprise or peripheral entities. It is the existence of a company's genuine leverage rather than its size or position in the enterprise that counts for the purposes of the present analysis. Therefore, the argument is not dependent on the existence of the archetypal core company and is applicable to a wide variety of business structures. Some display more integrated, hierarchical relationships among entities. Others are flatter leaving more autonomy to diverse entities in the enterprise. It is important to keep this in mind because any discussion of the RtR applied to MNEs will immediately trigger in mind the 'core company' association.

The companies with capacity to influence their partners might or might not have chosen to actually exercise their leverage. Indeed, the corporate accountability movement has challenged MNEs in both situations, either for exercising that capacity irresponsibly or for irresponsibly failing to exercise it when affiliate operations infringed human rights. Then the study of the GPs' treatment of MNEs and influential companies should answer the question, Do the GPs envisage an additional responsibility for influential companies that is different in nature from the baseline RtR that applies to all types of companies, influential or not? If yes, how do the GPs justify this responsibility?

Finally, the analysis pursued in this chapter applies equally to business groups irrespective of their national or transnational character. Operations might span national borders or be more localized and confined to the borders of one state. Clearly, whether a responsibility deriving from leverage exists is relevant in both cases. Nevertheless, victims of corporate abuses have tried to reach corporate entities as well as audiences (courts, consumers, investors) abroad. It is this transnational dimension of rightholders seeking help and access to justice abroad that makes a distinct focus on MNEs justified and important. The MNEs, and influential entities within such multinational business groups or networks, are thus a distinct subject of RtR, and at times the analysis herein will be adjusted to reflect this distinctiveness. Perhaps here a reference to the core company concept is helpful, to distinguish the influential company based abroad, which might well respond to a different set of stimuli, from the nationally influential company.

The thesis of this chapter is that a careful reading of the GPs reveals that the RtR contains a clear responsibility to *protect* human rights included stealthily in the RtR. By *stealthily* I mean not only that a special and additional responsibility for influential companies exists despite that it was never labeled as such in the GPs, but also and more importantly that. Ruggie has rejected any inference that something more than respect is asked from companies under the GPs. This chapter aims to prove that the nature of RtR in the GPs is not invariable as the drafters insist but that the GPs display a clear variation that encompasses both *respect* responsibilities grounded in the "do no harm" imperative and *protect* responsibilities grounded in the "reach out and help" proposition. Furthermore, the chapter aims to explain Ruggie's conceptual stance in the context of the GPs playing a decisive role in facilitating the convergence of stakeholder expectations and the emergence of a polycentric governance regime for CSR.

I. Responsibility to Respect Human Rights in the Guiding Principles: Merits and Difficulties

This section concentrates the analysis of the GPs on the situation of influential companies as distinct subjects of RtR. How did the SRSG account for corporate responsibilities in general? In particular, how does the RtR concept in the GPs handle business groups and this special entity, the influential company? And what responsibilities do the GPs actually place on it? As will be documented, the GPs propose a more extensive set of responsibilities than meets the eye.

First, this section summarizes the RtR concept in the GPs. Second, it pinpoints the uneasiness generated by the GPs concept.

C. SRSG's responsibility to respect human rights

Principle 11 lays down a corporate responsibility to respect human rights, which "means that they [business enterprises] should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved." (Ruggie, 2011b, p. 13)

What the GPs expect from companies, including the influential companies and core companies in MNEs, is straightforward. GP 13 indicates that a responsibility exists in three broad situations: when a company causes, contributes to, or is associated through its business relationships with adverse human rights impacts (Ruggie, 2011b, p. 14). The first two of the three situations—namely, cause or contribute—are not the focus of this chapter. Thus, the analysis herein focuses on the third situation in which a company's RtR arises not from its causing or contributing to harm but from its dealings with an affiliate who has adverse impacts on human rights.

Reading GP 13b and the commentary to GP 19 together clarifies the options a company has related to its business relationships, when it did not directly cause or contribute to harm. The responsibility is spelled out by GP 13b: "The responsibility to respect human rights requires that business enterprises . . . [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts" (Ruggie, 2011b, p. 14). The content of the RtR in this scenario is provided in the commentary to GP 19, which indicates three ways in which a company can act: by exercising leverage, by terminating the business relationship, and by continuing the relationship while being ready to pay a price and still making mitigation efforts (Ruggie, 2011b, p. 19). In a nutshell, under GP 13b there is a responsibility to act (i.e., the company cannot legitimately be a bystander as affiliates infringe rights), and under the commentary to GP 19 the "appropriate action" is specified.

Through GP 13b and the commentary to GP 19 the existence and content of RtR for a company that did not cause or contribute to harm are elucidated. The existence and content of the RtR still leave open the matter of its subject. In the SRSG vision, the subject of RtR is the business. According to GP 11, "Business enterprises should respect human rights" (Ruggie, 2011b, p. 13). No distinctions are needed for purposes of RtR. The applicability of RtR does not vary with different types of companies. Whether a core company with vast resources and influence over the entire multinational enterprise or smaller affiliate with a handful of its own contractors at the periphery of the enterprise, both of these companies have the RtR and have to take appropriate action as described in the commentary to GP 19. Variations in the type of company are irrelevant for RtR purposes.

In the SRSG thinking, variations are only relevant when it comes to the implementation of the RtR. Adaptations are necessary, and it is here in which all variations of subjects and means of discharging responsibilities are factored. As GP 14 indicates about the means of discharging the RtR, "the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors [(i.e., size, sector, operational context, ownership and structure)] and with the severity of the enterprise's adverse human rights impacts.' (Ruggie, 2011b, p. 14). About the subjects of RtR, the commentary addresses directly the interest taken in this chapter: "The means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually" (Ruggie, 2011b, p. 14). Further variations and adaptations are inherent in the concept of human rights due diligence, which is at the heart of operationalizing the RtR. *Due* implies variation of effort and resources necessary to address effectively adverse impacts in a particular context.[2]

D. The Problem

Surely this picture has much going for it. It is highly stable as the RtR remains the same (in existence and content) and does not vary with the subjects of the RtR. The coverage of companies is comprehensive (applicability is universal),[3] the content of the RtR is sound (appropriate action to be taken),[4] and the variations of the means used to implement the RtR show high adaptability to diverse contexts. There is even a unique term, or label, *responsibility to respect human rights*, encompassing it all. The label put on the corporate responsibility is also stable. It is about respecting human rights and only that. There is no mention of anything else, including a responsibility to protect, fulfill, secure, or realize rights even for the most influential companies.[5] As explained by the SRSG, companies respect human rights while states respect-protect-fulfill human rights. Furthermore, the *respect* label reflects a limited expectation fully in tune with "[t]he role of business enterprises as specialized organs of society performing specialized functions, [which are] required to comply with all applicable laws and to respect human rights" (Ruggie, 2011b, p. 6).

The RtR as constructed in the GPs seems to display great content with an appealing label. Is then the RtR concept beyond reproach? The content of the RtR (with its taxonomy and responsibility to take "appropriate action") as spelled out in GP 13b and the commentary to GP 19 is valuable. The label of *respect* seems appropriate and appears vindicated by the broad endorsement the GPs have received. In the same time, after reading closely the GPs, one is left reflecting on two issues. Is Pillar 2 strictly about business respecting rights or something more than that? How compatible truly is this RtR concept with lasting considerations of business organization and public policy? In other words, the preoccupation is whether the RtR concept is able to really withstand a challenge based on the organizational and legal separation of entities in a business group.

The issue of the RtR content and label is of much broader importance than just limited academic interest. Indeed, understanding the concept of RtR is consequential on three counts. First, a closer look at the label and content of RtR warns the GPs advocates of a potential charge of misrepresentation coming from CSR skeptics. The analysis below explains the problem by showing the nature of the RtR in GP 13b as being something different from respect, and by problematizing the SRSG's claim of no-variation in the nature of RtR.

Second, grasping the ways in which the SRSG built the container deepens our understanding of the GPs and the intricacies of Pillar 2 by revealing the techniques and methods Ruggie used so skillfully. The chapter pinpoints instances where the GPs reframe key concepts, use emphasis and de-emphasis strategically, and engage in complex drafting. Such instances demonstrate that the ingenious ways in which the GPs managed to deliver an RtR more expansive than meets the hurried eye and to shelter it from a devastating blow. These insights will follow from a textual analysis of the GPs as well as a comparative analysis of the GPs included in the SRSG's final report in 2011 and previous versions (especially the 2008 Framework).

Third, understanding the purposes for which the GPs built the RtR container in the way they did opens a window into the very strategy of change that guided the SRSG in his acclaimed search for common ground, from polarization to a more effective governance regime protective of human rights. In a way this analysis gives a new meaning to the *principled pragmatism* term Ruggie used to define his approach as SRSG (U.N. Special Representative of the Secretary-General, 2006, p. 20; Ruggie, 2013, pp. xlii-xlvi). By understanding more fully the strategy displayed by the GPs one is better positioned to reflect on the evolution and dynamics of the emerging CSR regime and to assess the relative and genuine value of the GPs in time and context. The analysis below achieves this by refusing to lose sight of some lasting considerations of business organization and public policy, with emphasis on *lasting*. It is crucial to weigh in as accurately as possible obstacles in the RtR path that reflect more than legal technicalities and idiosyncrasies of all sorts.

II. Application of Responsibility to Respect to Business Groups in the Guiding Principles

The remainder of this chapter is structured around the intricacies of the RtR concept in the GPs. The chapter discusses three building blocks that allowed the *protect* component to become rather stealthily part of the RtR and be accepted by stakeholders. In each block, the analysis will reveal the methods that the SRSG used. The first block, addressed in Part II.A., is about respect for human rights as defined by the SRSG and, based on that, about the charges of misrepresentation that can be levied against the RtR. The second block, discussed in Part II.B, is about the subjects of RtR and, based on that, about the ascendency of due diligence against 'responsibility' (RtR) as the concept doing the heavy lifting in the GPs. The third block, addressed in Part II.C., is about the separation of entities as a towering obstacle that the SRSG had to deal with when applying the RtR to business groups.

Only after the three building blocks are explicated can the worth of the RtR concept be evaluated. Such assessment of RtR has to be done on two counts: its ability to deal conceptually with the separation of entities principle and its capacity to facilitate convergence of stakeholders' expectations. We come closer to the dilemma of justification that the SRSG confronted regarding the protect element: try to justify now conceptually (and clash head-on into the separation-of-entities principle) versus try to stimulate convergence and evolution of the field (if convergence occurs, the clash with the separation of entities principle will happen in a new and more favorable context) on which justification would eventually draw. The dilemma of justification that the SRSG faced on the *protect* component of RtR and the strategy of change animating the SRSG efforts is discussed in Part III.

D. Building Block 1: Respect Human Rights

Part I.A. introduced the concept of the RtR developed by the SRSG. This Part is devoted to clarifying what *respect* really means in the GPs. Furthermore, this chapter insists that there is a clear responsibility to protect human rights included in the RtR. The following subsections take a closer look at both of the concepts of respect and protect to show where the responsibility to protect can be found in the GPs.

1. Respect

In tune with GP 11, the introduction to the GPs refers to "the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved" (Ruggie, 2011b, p. 4).

Here are three aspects worth pondering. First, the definition of respecting human rights in the GPs is different from the 2008 Framework. Second, the definition is rather loosely formulated. And third, the definition is different from the international human rights law's (IHRL) use of the term *respect* as applied to the obligation of states to respect human rights.

Regarding the first aspect, comparing two key documents in the SRSG mandate—the final report containing the GPs from 2011 and the Respect, Protect, Remedy Framework from 2008—reveals a shift in explanation. Actually the SRSG redefined altogether what *respect* means. The 2008 report explained respect as follows: "To respect rights essentially means not to infringe on the rights of others—put simply, to do no harm" (U.N. Special Representative of the Secretary-General, 2008, p. 9). The 2011 GPs explain that to respect human rights companies "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved." (Ruggie, 2011b, p. 13). On reflection, the 2011 definition is significantly more expansive than the 2008 definition and makes space for a protect aspect. While the 2008 concept of respect was single-pronged (*i.e.*, not to infringe) the 2011 concept of respect is double-pronged (*i.e.*, to avoid infringing and to address impacts with which they are involved). And *involve* is an expansive term indeed.

Regarding the second aspect, the reference to involvement (*i.e.*, "adverse impacts with which they are involved") raises the question of what conduct of a company is not covered. Being involved could require that the company make some type of contribution to harm. Or it could envisage a mere association with a perpetrator of such harm. *Involve* is a comprehensive term, or one can say, an inherently ambiguous one.

Regarding the third aspect, the GPs use of *respect* is meant to resonate with the classic respect-protect-fulfill terminology used in international human rights law. However, IHRL distinguishes precisely between responsibility of the state when its state organs and agents cause harm versus when third parties' activities (such as the activities of private actors) generate harm. For example, the definition offered by the UN Committee on Economic, Social and Cultural Rights reflects the classical understanding in IHRL:

> The obligation to respect requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life (U.N. Committee on Economic, Social and Cultural Rights, 2009, p. 12).

Thus, in IHRL, *respect* refers to the harmful conduct of the state while *protect* refers to the harmful conduct of third parties. Protect is based on the failure of a state to adopt legislative and other measures to prevent and hold third parties accountable when they harm others. Thus, the way in which the GPs use *respect* in GP 13b covers responsibility for third parties' conduct, which is precisely what IHRL covers with its use of *protect*.

Notably, the redefinition of *respect* during the SRSG mandate cannot be explained as a result of operationalization, the new and different task entrusted to the SRSG in 2008 by the Human Rights Council after his first mandate was completed successfully. Neither can one say that the GPs superseded the former report, at least not on such a fundamental definitional issue as the definition of *respect*.

The 2011 expansive definition creates difficulties for the justification of the RtR provided in 2008. The 2008 definition was grounded squarely in a do-no-harm ethic and was in tune with rather uncontroversial ethical imperatives and tort laws. Respect as do no harm had a taken-for-granted quality. Nevertheless, in his first mandate the SRSG justified the respect requirement in multiple ways. For example, the SRSG severely criticized the UN Norms for going beyond a responsibility to respect, reasoned that "can does not imply ought," and emphasized the specialized function of business in society (U.N. Special Representative of the Secretary-General, 2008, pp. 16, 19-20; Ruggie, 2013, pp. 47-55). He still argues the latter, but the 2011 RtR is not consistent with the rest of the justification offered in 2008. Indeed, it is plainly contradictory to that justification. Apparently, the 2011 GPs quietly redefined and expanded respect., The SRSG acted as if the respect justification was settled in 2008 and there would be no need to again justify the RtR in 2011. So, between 2008 and 2011, the SRSG kept the respect label but stealthily moved the posts.

Interestingly, one searches in vain the GPs for the *do no harm* phrase. It has disappeared. How can this disappearance be explained? From the feedback that the SRSG received it is clear that the negative formulation in do no harm has unwarrantedly created the understanding that the RtR is a purely negative responsibility to avoid or to refrain in order not to harm, and thus would not require affirmative steps from the company. This perception by stakeholders reflects a misunderstanding. That the SRSG never contemplated such a refrain-type of RtR flows directly from the text of the 2008 Report, which expressly indicated that "'doing no harm' is not merely a passive responsibility for firms but may entail positive steps—for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes" (U.N. Special Representative of the Secretary-General, 2008, p. 17). Nevertheless this type of clarification by providing examples did not suffice. Therefore the SRSG preferred to change the terminology and renounce *do no harm* to dispel any potential misunderstandings that would shortcut the very idea of employing human rights due diligence as the way to address adverse impacts. That impresses beyond doubt that companies indeed have to act, to take positive steps, in order to respect human rights. Due diligence requires steps for "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed" (Ruggie, 2011b,, p16). Furthermore, the 2012 Interpretative Guide directly addressed the question, "Why are policies and processes required if this is just a question of avoiding harm?" It answered, "Respecting human rights is not a passive responsibility: it requires action on the part of businesses" (U.N. Office of the High Commissioner for Human Rights, 2012, p. 23).

What started as a necessary clarification created an opportunity to expand the RtR without generating internal inconsistencies in the RtR. Not only did the removal of do no harm solve a misunderstanding of the RtR as a 'negative', refrain-from-action responsibility, but also it offered a golden opportunity for the RtR to grow and encompass a protect component.[6] The do no harm reference invited the reader of GP 13b to ask the obvious question: how could a company's responsibility to act to address third parties' (affiliates') impacts be based on a do-no-harm basis when one did not cause or contribute to the harm in any way? By renouncing do no harm, the

SRSG preempted a powerful objection that he was inviting with the 2008 do-no-harm definition of RtR. Thus, the disappearance allowed the 2011 conception of *respect* to be stretched enough to make a company responsible for what its affiliates do and to accommodate without internal inconsistencies the responsibility to act with due diligence in GP 13b and the commentary to GP 19.

2. Protect

GP 13b clearly states that companies must act when affiliate operations have adverse impacts on human rights, even when the company did not cause or contribute to that harm. So the company cannot legitimately be a bystander. GP 13b fulfills important functions in clarifying the corporate responsibility. It sets the expected conduct towards the purpose of prevention or mitigation and also places limits on this responsibility to act. What is most important for understanding the nature of this responsibility to act, however, is laid out not in GP 13b or its commentary. The nature of responsibility becomes clear only in the commentary to GP 19. Only there will the reader find what type of action is required and will the reader be able to determine whether a respect or protect type of responsibility accrues. Under the commentary to GP 19, the company has three choices. Only two of those choices are truly fundamental: disengaging and exercising leverage. When dealing with an abusive affiliate, the company can either stay in a business relationship but exercise leverage or separate itself from the harm by ending the relationship.

Protect is an appropriate label for the option of exercising leverage, but it is surely not satisfactory for disengagement as a course of action. Indeed, the termination of relationship does not protect the rightholder but rather only separates the company from the abuse. On the contrary, exercising leverage has the purpose and the potential to increase protection for rightholders. So the RtR in GP 13b does not necessarily or exclusively have the character of a responsibility to protect, as the GP 19 allows for ending the relationship. Nevertheless, the protect element is of overwhelming importance. Indeed, according to the GPs, if the company has leverage, or the possibility to increase it, the company has to exercise it. As a result, the choice is not equal between leverage and disengagement. The former must be ineffective before disengagement becomes a legitimate choice.

While the SRSG is right to insist that the character of RtR in GP 13b cannot be reduced to protect, neither could he deny that a responsibility to protect exists. Moreover, the possibility cannot be downplayed conceptually given its great significance in the text of the commentary to GP 19 and from a human rights perspective. That means GP 13b lays down a responsibility to act with an irreducible and essential protect component, indeed a responsibility to protect human rights.

GP 19, in its guidance on appropriate action expected for a GP 13b situation, merges two prescriptions of appropriate action. One prescription resonates with do no harm, by instructing a company to separate from an abusive affiliate at the risk of being seen as contributing by enabling or benefiting the affiliate perpetrator otherwise. The other prescription resonates with reach out and help, by instructing a company to exercise leverage over an abusive affiliate at the risk of being seen as an inactive bystander refusing to extend help otherwise. This merging of prescriptions is able to obscure the nature of the responsibility in GP 13b, not to mention the entire GP 13 where GP 13a is clearly based in a do-no-harm ethic. The SRSG indicates there is anything more in RtR than the *respect* label, but if one has a proper taxonomy of situations and types of conduct covered by the RtR, the respect or protect nature of RtR appears clearly. What GP 13b establishes as RtR is a responsibility to act[7] when one could otherwise have been a legitimate bystander, and comprises both respect and protect components.

As discussed above, the SRSG treats all companies the same for purposes of RtR; RtR is meant to apply to all companies without distinction. The SRSG did not fall into the trap of defining the RtR by pairing additional responsibilities to certain positions in the enterprise—like powerful core companies in vast transnational enterprises—while assuming noncore companies have no influence and therefore a limited, if any, RtR. While this unitary treatment of RtR subjects solves the applicability of RtR, it does not settle questions about the nature of RtR. Actually, through the SRSG's context-driven approach to clarifying the RtR, which allows variations only in the means of discharging it, Ruggie insists that the respect nature of the RtR does not change. However, based on the analysis herein, what is presented in GP 14 as variation in the means is actually a variation in the nature of responsibility when GP 13b and GP 19 are read together: a protect responsibility to exercise leverage is a responsibility not based in do no harm, but in reach out and help.

Why insist so much on the nature of RtR? A responsibility to reach out and help (or protect) is not the same as a responsibility to do no harm (or respect). The former is exceptional in law for good reasons, and because of its nature, it has to be justified way more carefully than a do-no-harm obligation. We know from jurisprudence that this type of responsibility—the duty to act regarding third party misconduct—is an exceptional one; therefore, its existence always needs to be justified and limited carefully. Otherwise there is no responsibility to act,[8] and remaining passive as harm unfolds is a legitimate course of action that rightly leaves it to others to prevent, mitigate, or remedy that harm. The GPs, however, display no reinforced justification for the protect situations, and this gives reason for concern. The GPs treat both types of responsibilities under the same banner of RtR. There is a ticking bomb under this part of RtR that has the potential to blow apart the apparent convergence of stakeholder expectations around RtR. It remains to be seen in the following sections how the SRSG attempted to defuse this bomb: what strategy he seems to have adopted and what methods he used.

There is a misalignment within the concept of RtR between its contents and the label. What appears to GPs supporters as a good enough approximation might well appear to GP skeptics as disturbing misrepresentation. The CSR proponents will hardly be disturbed given that the content—appropriate action—is right. However, the skeptics of CSR could take advantage of misalignment to score points against the RtR and possibly the GPs more generally. Mindful of these possibilities, this chapter, whose author counts himself among the GPs' supporters, reflects on the RtR intricacies in the context of convergence of stakeholder expectations (i.e., how it has been used to defuse potential objections to the RtR) and to explain how the methods through which the SRSG managed to avoid criticism (i.e., by employing a series of reframing and drafting techniques). Before continuing that analysis we could pause to reflect on whether the RtR is a satisfactory approximation or potential misrepresentation.

3. Far reaching misrepresentation or satisfactory approximation?

Telling companies and governments that businesses are expected only to respect rights puts at ease such audiences that have been wary of expansive corporate responsibilities. The *respect* label on the RtR sends a reassuring message and is one of the selling points of the GPs as a reasonable, limited, realistic, pragmatic (and numerous other adjectives) approach to CSR. The elaborations through the concept of due diligence about how this RtR is to be implemented add indispensable guidance as well as familiarity, risk-management and process-friendly connotations to wary audiences. However, if there were a mismatch between the content of the RtR container and its label, the GPs would be subject to a significant critique; namely, the *respect* label on the container misrepresents the content of RtR.

The way GP 13 and GP 19 are drafted is interesting. There is not much in GP 13b that invites the reader to apply the ‘protect’ label. On the contrary, the responsibility in GP13b is framed non-threateningly as an obligation of conduct (“Seek to”), it waives the remedy component of the RtR (prevent-mitigate-remedy[9]), it raises the threshold of relationship with affiliates to those with which the company is “*directly* linked,” and it is formulated in the reassuring language of due diligence (“prevent or mitigate”) (Ruggie, 2011b, p. 14). The protect element of the RtR comes into focus only when one notices the discussion of leverage. Still, leverage is treated under the due diligence title (GPs 17-21) and hidden in the body of the commentary to GP 19. One could wonder whether the SRSG drafted the GPs in this way to put such protect-related provisions as far out of the way as possible from the principles laying down the key parameters of the RtR (GPs 11-14).

For the sake of the argument, to preempt a charge of misrepresentation, the drafting of the GP 13b could have made the required action explicit. It would have sounded like this, if GP 13b and the commentary to GP 19 were merged: The responsibility to respect human rights requires that business enterprises: . . . (b) Exercise leverage, end relationship, or be prepared to pay the price for staying in the crucial relationship in order to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. Not only would such a formulation be clearer about the nature of the RtR and expected conduct, but it would also have been more consistent with the language of GP 13a, which requires companies to “[a]void causing or contributing to human rights impacts . . . and [to] address such impacts when they occur” (Ruggie, 2011b, p. 14).

GP supporters might perceive the problem of misalignment between content and label in the RtR concept as inconsequential misrepresentation or good enough approximation. Even so, it might still be worth understanding the problem and maybe then be able to localize the damage if skeptics charge that the GPs display conceptual sloppiness and/or unacceptably far-reaching strategizing. For this reason a taxonomy effort is necessary, and this chapter takes a step in that direction. Furthermore, understanding why the SRSG was inclined to deliver his concept of RtR in this way requires from us to understand the role of approximation in the process of facilitating convergence of stakeholder expectations in the CSR regime. Not only does this approximation have a role in facilitating the evolution of the CSR regime, but as described in Part III, it can also be corrected and vindicated retroactively once the convergence of expectations and regime-building will have advanced enough.

The redefinition of respect between 2008 and 2011 and the renouncement of do no harm constitute the first building block that will be consequential in expanding the responsibilities of influential companies. While the renouncement created space for a protect component, the redefinition that went unobserved included obliquely the protect component in the very definition of RtR with which Pillar 2 begins. The now-expanded definition meant there would be no internal inconsistencies if GP 13b was added and supplemented by the commentary to GP 19. That however would be insufficient if the companies having to protect human rights—influential companies—were shielded by the separation-of-entities principle. The next section provides a closer look at how the SRSG accounted for the subjects of RtR and the situation of influential companies.

E. Building Block 2: Subjects of the Responsibility to Respect Human Rights

Under the GPs, the RtR applies to all companies irrespective of their characteristics. No variations in the subject can render the RtR inapplicable to some companies, not even the smallest, least resourceful, and least influential. Core companies and entities located at the periphery of the multinational enterprise alike must respect human rights and take appropriate action. By this treatment of the subjects, the content and applicability of the RtR are not problematized by jurisdictional or organizational boundaries, the latter being notoriously amenable to legalistic manipulation to preclude liability through legal separation strategies. The way the SRSG conceived the RtR is truly important and consequential: responsibility should follow the negative impacts of decisions even where such impacts occur in other jurisdictions and in the operations of other entities. Responsibility should follow operations. There are a number of methods through which the SRSG tried to promote this message.

1. Strategic ambiguity around subjects of RtR when applied to MNEs

Even after reading attentively the GPs one cannot say directly whether the subject of the RtR—'business enterprises'—refers to a business group or network in its entirety as a unitary actor or not. Only by reading GP 13b's references to business partners and relationships can one conclude that treating MNEs as a unitary actor (as proposed by theories of enterprise liability) might be contrary to the GPs. So GP 13 treats the company and its business partners as separate entities and separate subjects of RtR. But this treatment in GP 13b might not be determinative of how the entire GPs treat business groups because the SRSG reports nowhere define the term *business enterprise*; not even the 2012 Interpretative Guide offers such a definition in its special section explaining key concepts. Thus there is a strategic ambiguity on the subject of RtR when it comes to business groups and MNEs.

This ambiguity becomes even more evident when the reader searches to see how the GPs refer to subsidiaries[10] as subjects of RtR. Again, subsidiaries are nowhere mentioned in the GPs and are conspicuously absent from the list of example "business relationships" in the commentary to GP 13, which states that "'business relationships' are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services" (Ruggie, 2011b, p. 14). One has to guess whether the GPs account for subsidiaries as a company's "own activities" or in terms of "business relationships." Still the result of this choice is of real practical significance for a company given that impacts resulting from own activities have to be remediated while impacts from business relationships in GP 13b do not require remediation, as GP 22 makes clear. This ambiguity regarding subsidiaries, as one type of "business partners", is no mere oversight on the SRSG's part, given that subsidiary-parent company relationship is the instance most targeted by rightholders trying to move responsibility upwards in the business enterprise and hold the parent company accountable for its subsidiaries' harmful operations.

Not only is the SRSG strategically ambiguous on the subject of RtR in the ways described above, but the SRSG also explicitly said he never intended to put forward "a robust moral theory or a full scheme for the attribution of legal liability to underpin the Framework" (Ruggie, 2013, p. 107). Ruggie wrote, "I did not set out to establish a global enterprise legal liability model. That would have been a purely theoretical exercise" (Ruggie, 2013, p. 189). The SRSG mandate was not meant to elaborate how to assign legal liability in corporate groups. Therefore, when the reader thinks of corporate groups like MNEs as the subject of RtR and seeks to apply the RtR, he or she will see that the GPs do not guide one on how to impute or attribute responsibility to precise entities in corporate groups.

It appears that the SRSG deliberately refused to take a stance on the business group or MNE as a distinct subject of RtR, a stance that would have forced him to explain whether the group is seen as unitary for RtR purposes or atomized in a collection of entities, each being subject to RtR. That stance would have pushed the SRSG in a head-on collision with the separation-of-entities principle that would have crippled the entire RtR, even in GP 13a, and would have made it far more difficult for the SRSG to advance the responsibility to act (with its protect component) in GP 13b. It would have entangled the mandate in justificatory work and endless controversies about the existence and scope of RtR as currently defined in GP 13. Not only would that have been a tough fight, as the next section will show, to justify the existence of an expansive RtR, but it also would have sidelined the work on the implementation of RtR where the GPs contribute so much through due diligence elaborations.

In sum, the GPs were drafted in a way that maintains strategic ambiguity on the subject of the RtR. As the SRSG has defined the subject of RtR generically as business enterprises, the inquiries that the violations of human rights—instead of adverse impacts on human rights—would stimulate are neither hindered nor facilitated by the SRSG's concept of the RtR. The SRSG refused to pursue such inquiry, and he was preparing to offer a different conceptual account of corporate responsibilities. The reason is clear: the separation-of-entities principle, which lies at the core of business groups composed of multiple entities, was a formidable obstacle. And the SRSG needed to find a way to relate to it.

2. Violations of human rights and adverse human rights impacts

The terminology the GPs use regarding infringements of human rights is noteworthy. Before the SRSG mandate, CSR literature recurrently referred to "violations" of human rights (obligations) to depict corporate abuses. The SRSG however speaks of "adverse human rights impacts." Actually, after searching the GPs text, *violation* is a term that appears not more than two times in the GPs, and only in relation to states; thus, the two references are about the violation by states of their obligations and not about companies violating rights, which is a loose formulation widely employed in CSR.

What the SRSG managed, in addition to a more rigorous language, was a subtle shift from *violation* (of human rights) to *adverse impacts* (on human rights). The consequences of this reframing play a part in a bigger reframing task the SRSG undertook and which is explained below. *Impacts* focuses attention on operations rather than on specific entities that are often entangled in complicatedly structured business enterprises. *Violations* directs attention to the precise entity that committed the violation in order to hold it accountable. The next subsection focuses on this entity and revisits how the subject of the responsibility to respect is dealt with in the GPs.

3. Conceptual match: not "entity-responsibility," but "operations-due diligence"

The key conceptual match in the making of the RtR concept is not entity–responsibility, but operations–due diligence. The fine elaborations, the necessary distinctions, the creativity exhibited by the GPs are all dedicated to the latter match. In contrast, the former match is unremarkable and static. In it, all types of companies have the same responsibility under the same artificial label of respecting human rights. In his recent book, Ruggie wrote that his "aim was to prescribe practical ways of integrating human rights concerns within enterprise risk-management systems. . . . [T]here had been no authoritative guidance for how to manage risks of adverse human rights impacts" (Ruggie, 2013, p. 189).

Building the RtR along the entity–responsibility match would have created problems for the SRSG on both ends of the match. Regarding the treatment of entity, he would have had to account more directly for influential companies and define their specific responsibilities. The difficulties would soon arise as RtR would have put the spotlight on core companies of MNEs; these are the companies that, in the public imagination, are the epitome of influence and private power that came to define the CSR discourse regarding globalization's negative impacts on human rights. The SRSG absolutely did not contemplate his RtR to single out core companies in this way, as it has been done from New International Economic Order in the 1970s to the UN Norms in early 2000s, for convergence of stakeholder expectations reasons. Indeed, turning core companies into an enemy would have taken the SRSG far away from what he set out to secure: unanimous endorsement by the Human Rights Council and broad support from all stakeholders groups (including business).

But also conceptually, pairing the RtR to the core company would have had two unfortunate consequences for its protect component. First, in the situation of less integrated MNEs with rather autonomous operations and affiliates, a core company, however defined, is hard to identify. This leaves the responsibility to protect without a subject and, thus, inapplicable. Second, the very assumption that leverage is placed at the top or center of corporate groups/networks where core companies' reside would leave out of the picture the leverage spread throughout the enterprise. The concept of RtR, however, should be able to harvest leverage irrespective of the amount of leverage or its location closer to the periphery of the enterprise. Therefore, from a governance perspective, this treatment of leverage would have been counterproductive. Indeed a wrongly placed analytical focus on the leverage of core companies would miss leverage present in other parts of the corporate group and, thus, would shortcut the practical possibilities to plug governance gaps and offer protection to rightholders.

Regarding the *treatment of responsibility*, a distinct focus on influential companies as subject of RtR would have brought into clear sight the uncomfortable justificatory dilemmas raised specifically by the situation of influential companies asked to act regarding abusive affiliates. These justification problems were highlighted in the previous section about the responsibility to ‘protect’. By preferring the ‘operations-due diligence’ match, the GPs strategically use soft focus for the ‘entity-responsibility’ match, and thus deflect inquiries into the nature of the RtR that would question whether ‘respect’ mutates stealthily into ‘protect’ for certain subjects of RtR.

This section argued that the conceptual focus in Pillar 2 is on *operations* that generate adverse *impacts* rather than special *entities* within a business group or network that *violate human rights*. The RtR concept in the GPs begins to show the features of a highly creative, ingenious and valuable elaboration of the ‘operations-due diligence’ match, but not of the ‘entity-responsibility’ match. However, one should remember that enterprise liability theories have, for a long period of time, explicitly drew attention to a fundamental trait of business groups: they are integrated economically but separated legally. In other words, these theories of liability that challenged mainstream theory of entity liability (committed to the legal separation of entities principle), placed the analytical focus in a very similar way to the SRSG’s: on the operations. The results however have not been encouraging, with enterprise liability confined to a few areas of law and no impact in tort law and corporate law. The SRSG argued just that – responsibility follows operations – but not bluntly through a theory of corporate group responsibility; instead he followed operations with the concept of ‘due diligence’, whose connotations we noted already and to which we return in section 4.

The SRSG made a strategic bet that the conceptual match ‘operations-due diligence’, not ‘entity-responsibility’, holds the key to the deadlock in CSR. To grasp the fuller significance of Ruggie’s choice, we need to look into how it helped him to so slightly change course to navigate around, rather than crash into, a formidable obstacle confronting the RtR when applied to business groups and MNEs: the separation of entities principle.

F. Building Block 3: Separation-of-Entities Principle

The separation-of-entities principle lies at the core of any conceptual treatment of the RtR applied to business groups. The legally inclined reader will avidly search the SRSG reports for his position on the principle of legal separation of entities. Does the SRSG mention it or wrap this key issue for the RtR in silence? Does he challenge it in order to put it aside and out of the way in search of expansive responsibilities placed on influential companies? If not, how does he exactly position it in his conceptual architecture? Those readers will be relieved that Ruggie commented on this principle explicitly. He acknowledged its role as a key organizational principle for business activity in a globalized world but also voiced his concerns.

There is acknowledgement in the SRSG work of the worldwide presence of the principle as a matter of law and policy.[11] Furthermore, in his recent book, Ruggie wrote:

> At the very foundation of modern corporate law lies the principle of legal separation between the company’s owners (the shareholders) and the company itself, coupled with its correlative principle of limited liability. . . . This raises a fundamental question for business and human rights: how do we get a multinational corporation to assume the responsibility to respect human rights for the entire business group, not atomize it down to its various constituent units? (Ruggie, 2013, p. 188).

The GPs contain only one reference to the legal separation-of-entities principle. The commentary to GP 26, when discussing State-based judicial mechanisms, refers to “legal barriers” and exemplifies: “The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability” (Ruggie, 2011b, p. 23). It is in his previous reports that the SRSG commented extensively on the principle. In one report he wrote:

> [T]he legal framework regulating transnational corporations operates much as it did long before the recent wave of globalization. A parent company and its subsidiaries continue to be construed as distinct legal entities. Therefore, the parent company is generally not liable for wrongs committed by a subsidiary, even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent that it can be seen as its mere agent (U.N. Special Representative of the Secretary-General, 2008, p. 5).

The SRSG further noted that “[i]n some jurisdictions, plaintiffs have brought cases against parent companies claiming that they should be held responsible for their own actions and omissions in relation to harm involving their foreign subsidiaries” (U.N. Special Representative of the Secretary-General, 2008, p. 23). However, there are obstacles, and “[m]atters are further complicated if the claimant is seeking redress from a parent corporation for actions by a foreign subsidiary” (U.N. Special Representative of the Secretary-General, 2008, p. 23). The SRSG took note of “challenges stemming from the complexity of modern corporate structures,” particularly the legal challenge regarding “the attribution of responsibility among members of a corporate group.” He writes that “applying those provisions [of civil or criminal law] to corporate groups can prove extremely complex, even in purely domestic cases” (U.N. Special Representative of the Secretary General, 2010, p. 20). Then he acknowledges various legal grounds for holding core companies accountable (under principles of negligence, complicity, and agency), before concluding, “In short, far greater clarity is needed regarding the responsibility of corporate parents and groups for the purposes of remedy” (U.N. Special Representative of the Secretary General, 2010, p. 21).

1. Separation of entities and shareholder limited liability principles, in context

This subsection evaluates how the GPs deal with the principles of separation of entities and limited liability. First, the precise applicability of the shareholder limited liability (‘LL’) principle to the MNE universe needs to be explained. Shareholder LL is often referred to as a corollary of the legal separation-of-entities principle; however, it is important to distinguish equity-based and networked-based enterprises, because two concepts are at play. On the one hand, shareholder LL applies to parent–subsidiary relations (equity relations) and protects the company that created and/or owns shares in the affiliate. It shields the parent company from liability despite its owning the subsidiary (or the subsidiary’s shares) through the legal privilege of LL. On the other hand, for types of affiliates other than subsidiaries (non-equity relations), the company is not liable because these are third parties for whose conduct one has no responsibility, and the fiction of LL is not necessary or applicable. In this case, the legal separation of entities is genuine, not artificially induced through shareholder LL.

Thus the LL of shareholders (parent company) principle is relevant only in a particular organizational context, that is, in equity-based enterprises where a parent company is not liable for its subsidiaries’ debts. For contract-based enterprises, it is the legal separation-of-entities principle, not shareholder LL, that shields the company from liability. Furthermore, LL is also relevant in a particular context of seeking compensation, that is, only when the assets of the affiliate appear to be insufficient to cover the damages. In that case, the plaintiff wants to access the (likely much larger) assets of the parent company (or the rest of the business group) to secure full compensation instead of being limited to the assets of the now insolvent subsidiary. In other words, the plaintiffs pursue the parent company to ensure a full compensation for the damage suffered as the affiliate folds up. Hence, among all of the types of business enterprises the GPs cover, the shareholder LL principle is relevant only in equity-based groups and only when the affiliate has insufficient assets and becomes insolvent. For contract-based MNEs and subsidiaries with sufficient assets to be executed for compensation, shareholder LL is not an issue.

Showing that shareholder LL is not the key issue for RtR in the majority of CSR cases where harmed rightholders seek to hold the wider corporate group accountable requires careful consideration of the national/domestic and international/transnational litigation contexts.[12] Such CSR cases (transnational litigation cases) often involved equity-based MNEs but also can involve contract-based MNEs.[13] However, at a closer look, only in few of these cases is shareholder LL the obstacle. The problem is not the insufficient assets of the affiliate in the vast majority of transnational litigation cases. Instead, the problem is that the plaintiff cannot hold the affiliate accountable in local courts and/or the local law provides derisory compensation or fines for serious harms. Thus, the domestic legal system is unable either to justly compensate the plaintiff or to credibly deter corporate misconduct. In other words, it is an access to justice issue that compels the plaintiffs to seek justice in the courts of other states, where plaintiffs hope to get a fair hearing and fair compensation from a workable judicial system. This forces the plaintiffs to make a case against the entity in the corporate group over which the overseas courts have jurisdiction and can hold accountable—that, is the core company, meaning the parent company, the big brand or retailer, the influential company in the business enterprise that went for a strategy of subsidiarization or outcontracting. Compounding the focus on the core company is also the reality that such companies control or influence the operations of their affiliates, or at least have the capacity to do so, with negative effects,.

Because transnational litigation arising in CSR cases has to do with access to justice and not insufficient assets of affiliates, the relevant issue is not the privilege of LL that shareholders (including the parent company) enjoy under corporate laws worldwide. Rather, the touchstone is the separation-of-entities principle. This is a fundamental principle of corporate law and business organization on which the existence of large corporate groups depends. For this reason the thrust of this section is to grasp firmly the organizational rather than the legal dimension of the separation of entities principle. Without full clarity on this aspect, the reader will not notice that the GPs skillfully framed the principle to emphasize its legal dimension with important consequences for the RtR concept; it is a skillful reductionist exercise that the SRSG performed, as will be demonstrated below. It is yet another concrete instance of reframing, a technique the SRSG used so successfully in the GPs in order to facilitate convergence of expectations.

The organizational dimension of the separation-of-entities principle is as simple to explain as it is important not to forget while discussing the RtR. The principle takes the burden off the company's managers to assess and manage the numerous risks posed by the operations worldwide and places that burden (or a significant part of it) on the managers of affiliates. The latter's managers assume risks, rights, and obligations based on the assets of the affiliate and have the responsibility and burden to manage those risks. Affiliate managers accomplish this in a number of ways, including by reducing the risks directly, by purchasing insurance, by further creating subsidiaries or contracting out risky operations, by assuming the risk and deciding not to act in any way. The result for the business enterprise is a more efficient division of managerial tasks that allow companies to grow. As the size of business enterprises increases and their operations span more jurisdictions, this managerial burden becomes self-evident in its existence, size, and significance. While it is incontestable that companies use subsidiarization and outcontracting to externalize risks that harm rightholders, it is equally true that such separation strategies are also legitimate ways that allow enterprises to pursue risky endeavors that are socially beneficial and efficient. In sum, as the GPs apply the RtR to enterprises of varying sizes, the managerial burden is an aspect that grows in importance the larger the enterprise is.

It is here that the RtR runs into difficulties linked to its compatibility with the separation-of entities-principle. The SRSG's RtR, through its risks-management orientation, captured in the notion of due diligence, reverses and re-imposes (at least partly) the burden to act regarding risks arising from affiliates' operations. Indeed the GPs ask companies to address adverse impacts, that is, for influential companies to prevent and mitigate impacts arising in affiliate operations. The entire Pillar 2, where the responsibility to act follows operations (not entities), is engaged in an elaborate, but straightforward, burden-shifting task. Pillar 2 works to the effect that part of the managerial burden that companies offloaded as they pursued subsidiarization and outcontracting strategies to operate worldwide has to come back to the company in the shape of a responsibility to act with due diligence.

This chapter is not engaged in an analysis of whether a shift of burden is desirable, under what circumstances it might be so, for which impacts a shift should occur, or to what extent. Rather, it just notices that due diligence and RtR function in this way in the GPs. It also asks an unavoidable question of whether the burden reversal is likely to be so unproblematic as the SRSG suggests. This is a question that any follower of the SRSG rooting for the success of the GPs wants to ask. This chapter depicts realistically the tension between the RtR and the separation of entities principle, documents the ingenious way in which the SRSG framed the issue, and tries to figure out why he proceeded in the way he did.

2. Shifting the risk-management burden: organizational contexts and likelihood

The analysis above placed the separation of entities and the limited liability principles in their proper organizational context and in a transnational accountability context. Both the legal and organizational efficiency dimensions of the separation of entities principle were pinpointed. The importance of the principle in any discussion about risk-management and in any attempt to (partly) shift the managerial burden as Pillar 2 proposes becomes evident. The separation of entities principle emerges as a heavyweight challenger to the RtR. This subsection analyzes the relationship of RtR and due diligence with the separation-of-entities principle. In other words, it focuses on the separation-of-entities principle as an obstacle for RtR as applied to business groups and risk management as the approach the SRSG adopted. Ruggie wrote that "[s]eparate legal personality is rarely invoked in relation to enterprise risk management" and that the GPs provide "authoritative guidance for how to manage risks of adverse human rights impacts" (Ruggie, 2013, p. 189).

Parts I.A and II.B above established that the SRSG does not distinguish among subjects of RtR and the reasons behind that choice. Here, I distinguish tightly integrated and flatter enterprises in order to assess the real chances, the real promise of the due diligence, risk-management based approach employed in the GPs. This dimension is different and should not be confused with differentiating between enterprises as either equity-based or contract-based; both types enterprises will be covered. This will be a taxonomy exercise for the subjects of RtR that will help pinpoint where the chances of success are high or low and where the tension between the RtR and the separation of entities principles is acute. Therefore, it remains realistic about what incentives (legal or not) are needed to re-impose the managerial burden on the company. For both clarity in understanding Pillar 2 and for regulatory reform, such taxonomy can help.

Both equity-based and networked-based enterprises can be tightly integrated or not, meaning that affiliates might have more or less autonomy. The company may be in the position to exercise more or less control/influence over affiliates as a result. On the one hand, in more tightly integrated enterprises, the control or influence over affiliates is a given, and victims' attempts to trigger the responsibility of the controlling companies can draw on that. However, the control can be at the strategic—or general—level as distinguished from the operational level (of operations producing harm). The kind of control —strategic or operational—affects decisively the relation to the harm. In the case of strategic control, which limits the autonomy of the affiliate, responsibility can come from actions (being arguably a cause of harm in an indirect way) and arguably even for omissions to exercise control (as failure to prevent or minimize harms that were known or foreseeable by exercising influence). In the case of operational control, which governs closer-to-the-ground decisions and, thus, extinguishes the very autonomy of the affiliate (at least in relation to the harm in question), the harm is directly linked to the decision of the company. Therefore even legal liability is currently obtainable through piercing the veil in equity-based groups otherwise protected by the shareholder LL principle or by applying agency principles in contract-based enterprises.

Thus, for the most tightly integrated enterprises, where operational control is present, separation of entities poses neither an organizational nor even a legal impediment. Here, it is very easy for the GPs to speak of responsibility for a company's own conduct and draw on a do-no-harm justification for the RtR. It appears that GP 13a is readily available to cover operational control with its *cause* or *contribute* provision. On such a solid foundation for a responsibility to act, due diligence follows without constraint by any incompatibilities, because the company has actually not offloaded the managerial burden. Indeed it chose to exercise control over affiliates' operations.

The picture changes in less tightly integrated enterprises where strategic control is present and the affiliate has a measure of operational autonomy that cannot be disregarded. The separation of entities is relevant both organizationally and legally. Indeed the corporate veil will not be pierced based solely on a company's strategic control of an affiliate. However, one can still plausibly speak of a company's responsibility for its own conduct as it still exercised (commission) or failed to exercise (omission) influence over the affiliate. A responsibility to act can still be credibly advanced, even if not in a strictly legal way. GP 13a is available to cover strategic control, most likely with its *contribute* provision, given that the affiliate retained some autonomy. However, from an organizational efficiency perspective, there is a clear tension between the responsibility to act with due diligence prescribed by the GPs and the company's decision to offload much of the managerial burden (only strategic control is retained). One could say there is a tension more than an incompatibility that could be managed by the GPs, especially with the careful way the SRSG worked out due diligence (DD) and drew limitations on the RtR. Indeed, the presence of strategic control implies there are processes and structures already in place that are needed for strategic control, and this creates a good structural opening in which human rights DD may be plugged. Furthermore, the useful guidance the GPs provide regarding DD is able to lighten somehow the managerial burden. Indeed Ruggie wrote, "My aim was to prescribe practical ways of integrating human rights concerns within enterprise risk-management systems. . . . [T]here had been no authoritative guidance for how to manage risks of adverse human rights impacts" (Ruggie, 2013, p. 189).

On the other hand, for loosely integrated enterprises (whether equity-based or contract-based), the picture begins to change in fundamental ways. First, though, one should not assume that such loosely integrated enterprises cannot feature companies (parent company, buyer companies) causing or contributing to harm. They can be, and remain within GP 13a, responsible for their own conduct. Most commonly, such companies appear as accomplices in the harm inflicted by the main perpetrator. One recalls the numerous transnational litigation cases under the U.S. Alien Tort Statute that invoke the complicity ("aiding and abetting") of U.S.-based companies with their affiliates and other perpetrators. The company is then seen as accomplice or joint tortfeasor, and this may well attract legal liability for its own misconduct. Clearly, a company does not have to exercise strategic or operational control over an affiliate in order to cause or contribute to harm. Indeed the affiliate could be highly autonomous, or it could be a completely autonomous third party (private or even public entity). Notably, in such cases, legal separation and even shareholder LL offer no protection because they are irrelevant. This is a case of a company's responsibility for its own misconduct (affirmative conduct by contributing to harm). In the GPs, this is the case of GP 13a through its *contribute* or *cause* provisions. Needless to say, DD is fully compatible with separation of entities principle and the RtR in this case draws solidly on do no harm.

The genuine problem for the RtR appears for the loosely integrated enterprise (whether equity-based or contract-based) where the company did not cause or contribute to harm, that is, a GP 13b situation. There is neither operational nor strategic control present in this case. Here, to reflect on the relation of organizational separation of entities and risk management, one has to account for the choice of the company to pursue organizational efficiencies through subsidiarization and outsourcing that reflect genuine organizational separation. The managerial burden was offloaded, and this was done deliberately for genuine risk management reasons. The responsibility in this situation is not based in do no harm. Further, the company's wrongful conduct in relation to harm cannot be pinpointed after reading the GPs' justificatory work. All these together make the DD prescriptions of the GPs fit uneasily with risk management considerations, and there is a conflict with the separation-of-entities principle. The company chose not to carry the burden of managing the risks raised by affiliate's operations. The choice of the parent (holding) company was to allow subsidiaries to operate rather autonomously, and the choice of the company (the retailer or brand) was to contract out some activities by sourcing and distributing goods and services through value chains. Thus, the legal separation reflects a genuine organizational separation.

As a way of alleviating the managerial burden, the SRSG cannot rely on pre-existing processes and structures—as was the case with strategic control—in which human rights DD could insert itself; the only real thing the SRSG can count on is the usefulness of the guidance on DD he offers. So the RtR (yet to be justified conceptually by the SRSG) and the DD (offered as mere guidance) have to confront a matter of organizational efficiency on which the existence and growth of large business groups depend. From a tension between RtR and the separation-of-entities principle that could be managed the SRSG moved perilously close to an incompatibility; the RtR might well not survive the challenge. The next section analyzes the GPs' text and uncovers the "survival strategy" the SRSG devised, the way in which he managed this near incompatibility.

Summing up, based on the last two subsections, the problem for RtR and DD has become clear (shift of managerial burden), its exact location in the universe of business organizational arrangements was pinpointed (depending of the more or less integrated nature of the enterprise), and the severity of the problem was assessed (depending on the more or less autonomy the affiliate retained). The challenge for the GPs' prescriptions on DD comes from both the legal and organizational dimensions of the separation of entities principle. The SRSG attempted to relieve the managerial burden that he has just shifted by offering guidance on DD and by counting on processes and structures for risk-management already available in the enterprise. While commendable, the SRSG's strategy has limitations that he does not acknowledge in the GPs but that should prompt the reader to somberly reflect about existence of a mere ‘tension’ or something approaching ‘incompatibility’ between the RtR and the separation of entities principle.

3. Multiple reframings and drafting choices

The analysis above problematized the SRSG’s risk management perspective. Ruggie explained the way he dealt with the separation-of-entities principle, stating:

> I did not set out to establish a global enterprise legal liability model. That would have been a purely theoretical exercise. My aim was to prescribe practical ways of integrating human rights concerns within enterprise risk-management systems. . . . Separate legal personality is rarely invoked in relation to enterprise risk management. But there had been no authoritative guidance for how to manage risks of adverse human rights impacts. (Ruggie, 2013, 189).

He also outlined the practical ways forward, through the concept of corporate culture and the oversight role of corporate boards of directors.[14] As we proceed with the analysis, it should be clarified from the outset that the SRSG’s references to the separation-of-entities principle have nothing inaccurate in them. Not only that, but Ruggie also accounted for the weight of this principle in the business group context by referring to it as a “fundamental question for business and human rights” (Ruggie, 2013, p. 188). In dealing with this question, the SRSG adopted reframing techniques that he deployed systematically through the GPs.

The first reframing has to do with the emphasis the SRSG places on the legal separation-of-entities principle to the detriment of the equally important organizational efficiency dimension. The SRSG tends to depict the separation of entities as a legal consideration that does not bind or constrain a SRSG mandate strategically oriented to capture and resonate with more diverse rationalities than the legal one. Ruggie chose his battlefield early on and decided not to produce a law-inspired account of corporate responsibilities. There are too many organizational arrangements, domestic legal systems filled of own peculiarities, differing operational contexts, and industries for such an account to be workable. Thus, even though the RtR applies to MNEs, the SRSG never felt compelled to provide a scheme of attribution clarifying when a company is answerable for abuses occurring in affiliates' operations. Instead, such a major task would be one sitting properly before lawyers; would be dealt with domestically, as finding the right balance between the RtR and the separation-of-entities principle will necessarily differ depending on the domestic legal system; and would be due chronologically after the GPs were adopted and laid a foundation for the business and human rights field.

Although the SRSG correctly impressed the longevity and spread of legal separation worldwide, he did not take the reader behind the scenes of the legal separation principle. Much controversy has been taking place regarding shareholder LL. One could venture to say that the SRSG understood too well the nature of controversies. LL is a privilege, a subsidy that policymakers give to companies to stimulate their growth (Milton, 2007). It is a legal invention stimulating business growth that purportedly delivers net social benefits. Not only is LL artificially induced and smacking of privilege, but prominent economists (including law and economics scholars) (Hansmann and Kraakman, 1991; Mendelson, 2002; Harper Ho, 2012) and victim advocates alike have constantly challenged LL. Critics of LL advocated for legal reforms that would eradicate or limit the applicability of LL, especially for involuntary creditors,[15] even on grounds of social inefficiency that LL produces. Such highly sophisticated attacks on LL failed to make a dent (Matheson, 2009), and the entity-liability model marches in jurisdictions across the globe (Ruggie, 2011a). That speaks volumes of the organizational efficiency and public policy considerations raised by LL and the separation-of-entities principle. The SRSG left this as a battle to be fought another day. What was more pressing for the SRSG mandate was for these organizational efficiency and public policy considerations not to disrupt the RtR in the GPs.

Turning to the second reframing, not only does the SRSG place emphasis on legal separation of entities, but he also frames it as a matter of access to remedies. As rightholders sought access to justice abroad against core companies, the separation of entities would be an important line of defense for companies denying responsibility for abuses in affiliate operations, particularly if the plaintiff could not pinpoint the company's own wrongful conduct casing harm. The SRSG accounted—accurately again—for the separation principle as an obstacle to rightholders' access to justice. No doubt mindful of the public policy considerations supporting the longevity and resilience of shareholder LL and separation-of entities-principles, the SRSG left it to states to consider lowering this obstacle and increasing access to judicial remedies for victims abroad. In his search to map and put forward in the GPs as many categories of remedies as possible—that is, state-based judicial and non-judicial grievance mechanisms and corporate operational-level mechanisms—the SRSG was naturally disinclined to expose the full range of public policy considerations. On the one hand the SRSG surely expects that human rights imperatives might counterbalance in some instances the traditional public policy objectives supporting the separation principle. On the other hand, the SRSG had no interest to let the separation discussion expand beyond the legal dimension toward public policy and soon after toward organizational efficiency aspects. When the latter is in focus, the DD concept based on risk-management will take a hit.

In this way the SRSG managed to account for some key facets of the separation-of-entities principle. The SRSG mostly emphasized the legal considerations but defined it out of the mandate's chosen way of constructing the RtR (a responsibility not outlining schemes of attribution of legal liability). The SRSG also implied the *public policy* considerations behind the principle, as he treated the separation of entities as a matter of access to judicial remedies, but limitedly so as reconsidering/readjusting/rebalancing public policy considerations would be a battle to be fought contextually and after the SRSG mandate was concluded. What was most important for the GPs was that the *organizational efficiency* considerations are not brought under the spotlight as the clash between the responsibility to act with due diligence in GP 13b and the separation of entities principles would be unavoidable. *That* battle could not be left for another day, as the battles for defining legal schemes of attribution of liability and access to judicial remedies could be. The SRSG needed the silence and as high a firewall around the RtR and DD as possible to repel the charge from the separation of entities principle.

This brings us to the interesting drafting choice following these two reframings. The SRSG found a way to acknowledge the separation of entities principle, but move it as far away from the RtR and DD discussions as possible. The imperative was to get any discussion out of Pillar 2. The SRSG was ready to concede that "far greater clarity is needed regarding the responsibility of corporate parents and groups *for the purposes of remedy* [emphasis added]" (U.N. Special Representative of the Secretary General, 2010, p. 21). Following this train of thought, the GPs placed the (now legal) separation-of-entities obstacle as a matter of remedy in Pillar 3 not as an issue questioning the very existence of the responsibility to act—part and parcel of the RtR concept—in Pillar 2. The key gain for the RtR is that a major obstacle inherent in applying the RtR to MNEs gets removed from Pillar 2 and placed in Pillar 3 where it is framed as a matter of judicial remedy and of adjusting national liability regimes at a later date (post-SRSG-mandate). The GPs keep the separation principle on the table but have moved it away as much as possible (in another Pillar) and framed it along two key dimensions (while de-emphasizing the third dimension of organizational efficiency).

By double reframing and ingenious drafting, the SRSG managed to insulate RtR from a devastating blow that unavoidably arises in the corporate group context. While apparently depicting a plausible account of responsibility, the SRSG managed to present the separation-of-entities principle as a feature of legal systems that hinders access to judicial remedies and is largely irrelevant (“rarely invoked”) from a risk management perspective. What the SRSG refrained from acknowledging was that this principle is much more than a legalistic obstacle. It appears to be a structural feature of business groups that raises challenges to the RtR because of the organizational efficiencies and societal wealth it creates and that ensures it strong public policy support.

4. Implications and limitations

It is the issue of efficient management of risks that is addressed here, not the issue of liability for damages. The SRSG may be correct that the enforcement aspect is a battle to be fought another day, not by the SRSG mandate and not to be settled conceptually in the GPs (in Pillar 3). Nonetheless, the organizational efficiency challenge cannot be similarly delayed. It is at the heart of Pillar 2 and has nothing to do with enforcement and liability, but with risk management and the very existence of the responsibility to act or legitimately be a bystander. And risk management is the framework that the SRSG explicitly and deliberately adopted, referring to “enterprise risk management” and providing “authoritative guidance for how to manage risks of adverse human rights impacts” (Ruggie, 2013, p. 189). The separation-of-entities principle, as a cornerstone of both organization of large business enterprises and corporate laws, will draw limitations more tightly around the RtR and DD and will follow a different dimension (tight or lose integration of the business enterprise containing less or more autonomous affiliates) than the

RtR and DD concepts of the GPs indicate. As the SRSG did not elaborate this dimension in his account of RtR, it remains to commentators to keep it in mind and think more carefully about the genuine limitations of the RtR and DD concepts outlined in the GPs.

After analyzing the separation of entities principle, the picture becomes clearer. The GPs expect companies to act with DD in Pillar 2; however, this runs counter the decision to offload the burden of managing risks related to affiliate operations. This tension is most difficult to handle in the situation of less-integrated enterprises featuring rather autonomous affiliates, be they equity-based or network-based. There is a genuine tension here that arises in a risk-management framework, not in a legal-liability or enforcement framework. The tension exists in Pillar 2, not in Pillar 3 as the SRSG encourages us to believe. As discussed above, DD is more or less compatible with diverse types of conduct in more tightly integrated enterprises and loosely integrated enterprises. The GPs ask companies to reverse (partly) the burden-offloading decision and deploy DD. Given that the SRSG did not offer a justification for RtR when the company did not cause or contribute harm, the promise that DD makes can go unfulfilled for reasons of business management reflected in the choice to offload risk management in the first instance. One is well advised to account realistically for the burden of risk-management: this might draw a more severe limitation on the applicability of DD and RtR than the SRSG expects us to believe.

This analysis points to a limitation of DD as presented in the GPs: there has to be something to counterbalance the powerful incentive of organizational efficiency on which corporate groups thrive. That counterbalancing incentive cannot be a legal one under current liability regimes drawing on long-lasting corporate law and tort law principles, at least not for loosely integrated enterprises. The incentive is also unlikely to arise from adoption of new laws overriding legal separation as these laws would be criticized heavily for running counter to organizational efficiency. Nevertheless, even with legal incentives unlikely or exceptional, other incentives can come into play. The SRSG mapped them well as he tried to capture the multitude of rationalities that shape behavior: business incentives coming from social and market pressure placed on corporate groups to internalize more the risks they generate (from outside the management group) and moral imperatives acted upon voluntarily and drawing on the discretion afforded to them under corporate governance (from inside the management group).[16] Needless to say, these incentives may be present—indeed, are present—to a greater or lesser degree depending on the case at hand.

By employing reframing techniques, the SRSG ingeniously sheltered the RtR from an organizational efficiency challenge based on the separation-of-entities principle, which is unavoidable in a corporate group context, and crucially gave a demonstrable boost to the process of convergence of stakeholder expectations. For this reason, judgment should be withheld until the value of the SRSG's treatment of RtR can be assessed on two separate dimensions.

III. **Looking Behind the RtR Label**

As discussed earlier, my preoccupation is with the *respect* label applied on the contents (substance?) of RtR and with the insufficient justification the GPs offer to the *protect* component (the responsibility to act under GP13b) given the tension with the separation-of-entities principle. So now, after grasping both the scale of the separation-of-entities challenge as well as the techniques the SRSG used, this Part asks the question, where is the above analysis leading the reader in the attempt to grasp the value of the RtR concept the SRSG put forward?

The reader might conclude that the RtR concept in the GPs does not solve the tension with the separation-of-entities principle and mislabels its content. Such mislabeling might encourage some to charge deliberate misrepresentation (hinting toward conceptual weaknesses and/or unacceptably far-reaching strategizing), or to more or less satisfactory approximation of content that nonetheless fails to be consequential in altering corporate behavior. Those who hoped that the SRSG mandate delivered more might be further aggravated in their perception that the SRSG's RtR works to move the spotlight away from some subjects of RtR (core companies of MNEs), that it overemphasizes process instead result (effective protection of human rights), that it exudes the virtues of guidance instead of the constraints of accountability, and that more than respect should be expected from powerful companies.

This chapter puts forward an alternative take on the GPs conceptualization of the RtR. The concept's value has to be assessed on two counts: on the one hand, its ability to deal conceptually with the situation of MNEs, wherein the separation-of-entities principle reigns and, on the other hand, its capacity to facilitate convergence of stakeholders' expectations.

B. Ability to Deal Conceptually with MNEs and Separation-of-Entities Principle

GP 13b put on the table a responsibility to act and, thus, countered the legitimate bystander option, while the commentary to GP 19 further laid down a responsibility to exercise leverage and thus foreclosed the cut-and-run approach of companies willing to distance themselves from harm fast by just ending relationships with abusive affiliates. This part of the RtR deserves conceptually a *protect* label. The SRSG should be commended for including such responsibility in his RtR. What is lacking from the GP account is a solid, principled justification for this protect component (part of the responsibility to act in GP 13b) that would enable it to stand a challenge from the separation-of-entities principle, which could well extinguish the protect component in its infancy.

What the analysis revealed was that the SRSG employed skillfully a battery of framing and drafting techniques to avoid a direct confrontation between the RtR and the separation-of-entities principle. But that leaves open the question of whether the SRSG avoided the confrontation and settled for a mere rhetorical exhortation on the protect element (GP 13b) or postponed the confrontation while meticulously preparing the ground for a latter confrontation. I would interpret Ruggie's approach as the latter. He deployed a battery of conceptual methods to develop an RtR concept of high ingenuity, fundamentally designed for a clear task: to ensure convergence of expectations and not to provide a principled, self-standing justification for the responsibility to act in GP 13b (Ruggie, 2013, p. 107).

E. Capacity to Facilitate Convergence of Stakeholders' Expectations

This thesis changes the justification equation fundamentally, as well as the assessment of the RtR concept's capacity to promote the protect element. It is not the SRSG mandate that could have ever provided a justification strong enough for GP 13b's responsibility to act to resist a challenge from the separation-of-entities principle; instead, it is the convergence of expectations that enables the avowed polycentric governance regime that would ultimately be able to support and institutionalize the responsibility to act in GP 13b and its protect element. Fundamentally, the SRSG appears to have calculated that, should the process of convergence advance, the justificatory battle around RtR would be carried in a new context where the GP 13b component would have a fairer chance against the separation-of-entities principle. His calculation clearly was that it is not worth mounting a direct conceptual attack on this principle, but instead approaching it politically by mobilizing and facilitating a social regulatory process. In my interpretation, the GPs were designed to facilitate a process that creates responsibilities that do not exist now.

Indeed the RtR in GP 13b goes beyond what is currently accepted in law and business and is in tension with long-lasting considerations relevant to group organization and public policy supporting separation of entities.

The reading of the GPs that I espouse points towards an expectation of the SRSG that a responsibility to act as in GP 13b will be recognized—through a process of social regulation, possibly though not necessarily, facilitated by legal regulation—as an exception for human rights from the separation of entities principle. Indeed there is nothing in the SRSG reports indicating he favored, or hoped for, an enterprise theory model abolishing legal separation. Instead, GP 13b would appear as an exception from the legitimate bystander account of responsibility and would be a responsibility to act regarding abusive affiliates, just as the commentary to GP 19 indicates. How expansive that exception will be is not something that the GPs or the SRSG set out to determine. The SRSG mandate actually achieve a lot in this respect in that it ensured that the exception is on the table and, by achieving convergence and endorsement, set in motion a process that would determine the breadth of the exception. It is highly probable that the exception will end up being defined, like all exceptions, narrowly.

The SRSG commendably articulated an RtR concept of broad application and showed no inclination to predetermine the narrow contours of the exception, even though that would have resonated favorably with the business sector. Furthermore, the SRSG was also careful to design the GPs in a way that would not limit the applicability of the protect element (*i.e.*, the responsibility to act in GP 13b) to powerful core companies in MNEs groups. Instead, by affirming a corporate responsibility to act regarding affiliates, the GPs mobilize the leverage of all companies over their partners, irrespective of the central or peripheral position of the company in the business enterprise. In addition, the GPs conceive the protect component of RtR in GP 13b as just one among other protective channels that we should not lose sight of, including state regulation under Pillar 1, self-help of victims empowered by access to grievance mechanisms under Pillar 3, and a manager's sense of professionalism and responsibility under Pillar 2. So, the SRSG positioned the responsibility to act in GP 13b in a governance context that he conceived in terms of an emerging polycentric regime (Ruggie, 2013, p. xliii).

The SRSG mandate proposes that the key to dealing with the separation of entities principle is not a Gordian-knot-cutting conceptualization of responsibility (and/or possibly followed by a push for the regulation of the enterprise liability model in law) but a good enough, versatile concept of RtR, which is able to facilitate convergence. It is not clear what a better alternative of conceptualizing the RtR would have been. If the fate of enterprise liability theory and economists' efforts of reforming the LL regime offer any guidance, one will be hard pressed to identify a better alternative than the SRSG's in the governance context in which his mandate took place. The conceptual edifice the SRSG developed is impressive in its thrust to systematically reframe key responsibility-related concepts and to cluster them around the DD concept, which in turn would be instrumental in facilitating convergence of stakeholder expectations.

F. Potency of the Due Diligence Concept

The generic treatment of the subjects of RtR, the shift of focus from entity to operations in order to bypass jurisdictional and organizational boundaries, the stealthy redefinition of *respect* between 2008 and 2011, the renouncement of do no harm during the mandate while still assuming the justificatory work for the RtR was completed, the emphasis on legal separation of entities instead of organizational separation, the placement of the separation principle discussion in Pillar 3 as remedy-related rather than in Pillar 2 as responsibility-related, the insistence on the *respect* label attached to RtR despite the undeniable 'protect' component are some of the reframing and drafting maneuvers that the SRSG performed. The SRSG not only used reframing and drafting maneuvers as described above, but he also clustered them around the concept of DD instead of RtR in order to present a novel risk-management account able to guide companies rather than a classical responsibility-centered account to determine their liability. Add the simplicity of the three-pillared structure and the rather jargon-free language and the RtR concept shapes up as an elaborate package. The impact of the RtR is compounded by the way it was placed in a polycentric governance context, which the GPs and the SRSG portfolio of reports covered systematically and comprehensively to identify levers for changing corporate behavior.

This sketch implies more than saying that the SRSG grasped the potency of the DD concept and used it to sell the GPs to previously skeptical audiences by slapping the attractive DD label on RtR and CSR as we knew them. There is much more going on conceptually than that, and that might explain the unprecedented convergence of expectations—at a declaratory level—that happened in 2011. To some the detailed textual analysis performed in this chapter might appear as speculative and textual nitpicking. One could argue that the relation between the RtR and DD has remained the same in both the 2008 and 2011 SRSG reports. Respect is the normative concept anchored in international human rights law, while DD is the operational concept highly familiar to business executives, which is necessary for implementing the RtR. What this chapter calls elevation of DD is not more than a detailed elaboration of DD, which is hardly surprising given that the 2008 through 2011 SRSG mandate was expressly set up in order to operationalize[17] the more conceptual[18] Framework resulting from the 2005 through 2008 SRSG mandate (U.N. Human Rights Council, 2008).

Such a reading of the SRSG reports would merely scratch the surface. There is a subtle shift in emphasis taking place in Pillar 2, elevating the concept of *due diligence*. As Part II.A above showed, the GPs redefined what *respect* means. The SRSG kept the *respect* label from 2008, but in 2011 he stealthily moved the posts through which the DD balls could go. It looks like the definition of *respect* was expanded to make room for a concept of DD that outgrew the confines of the RtR as defined in 2008. While the 2008 responsibility to respect was single-pronged (*i.e.*, not to infringe), the 2011 definition is double-pronged (*i.e.*, to avoid infringing and to address impacts with which companies are involved). Thus, the presentation of the RtR as a responsibility to act rather than as a negative obligation began elevating the concept of DD in the economy of Pillar 2. Actually the reader finds the term *due diligence* mentioned in the very definition of RtR in 2011, as the GPs state that “the corporate responsibility to respect human rights, which means that business enterprises should *act with due diligence* [emphasis added] to avoid infringing on the rights of others and to address adverse impacts with which they are involved” (Ruggie, 2011b, p. 4).

Furthermore, GP13b’s clear reference to RtR being triggered without a company contributing to affiliates’ misconduct is absent from the 2008 Framework. This clarification actually appeared expressly only in a 2010 paper submitted to the OECD, which was hosting a roundtable on supply chain responsibility (Ruggie, 2010). In the 2011 GPs, the RtR did acquire a protect component, which has been introduced stealthily, without openly wearing a *protect* label and apparently with limited efforts of justification from the SRSG. One could say that, when it comes to the protect component, as well as GP 13b in its entirety, the responsibility to respect works in the GPs as a label putting to rest company fears that unreasonably much is expected from business, while the DD concept delivers the cleverly disguised punch.

Reading the SRSG reports issued throughout the years suggests that the concept of DD cannot be seen merely as an operationalization-related concept in Pillar 2, as the implementation counterpart of RtR. Instead, it is a concept that works to expand RtR to encompass a protect component and shelter the RtR from a deadly blow from the separation-of-entities principle that jeopardized the very existence of a large part of the RtR. The DD approach the SRSG employed shelters the RtR in a twofold manner. First, it emphasizes the risk-management side of respecting rights and offers guidance in ways that ease the burden on managers seeking to “know and show” that they respect human rights. As the GPs provide authoritative guidance on risk management (Ruggie, 2013, p. 189), the DD approach makes a direct contribution to repelling the challenge from the separation-of-entities principle. Unfortunately, it is also only partly effective, as DD cannot justify the existence of an RtR but, at most, can only ease the burden for companies contemplating the voluntary adoption of the RtR. Second, and more interestingly, DD shelters the RtR by aiming to facilitate convergence of stakeholder expectations and governance regime evolution. If this aim is realized, the RtR will have more chances in a confrontation with the separation principle at a later date when the battlefield had changed. This is the indirect contribution that DD makes to the existence of the RtR.

The separation-of-entities principle is the iceberg in front of the RtR when this is applied to MNEs. The SRSG devised a concept of RtR able to navigate around the iceberg rather than crash into it. Crucially, the SRSG’s reframing and drafting methods were employed not to build that elusive justificatory foundation under the RtR that would almost miraculously have made stakeholders finally agree on that unique justification of corporate responsibilities. Rather, the methods were used to secure a process of convergence. DD was the instrumental concept uniquely able to facilitate that process. In this light, DD is more than an attractive label and a concept encompassing the implementation stage of RtR. If GP 13b and the leverage paragraphs in the commentary to GP 19 did not exist, it is true that DD would have been just a fancy label. If the SRSG mandate were not deliberately and explicitly designed to reverse polarization and facilitate convergence of stakeholder expectations in a polycentric regime and if the SRSG did not spend half of his team's time selling the GPs to key institutions (Ruggie, 2013, pp. 159-166), it is also true that DD would have been a mere label, a well-known, hardly original term guiding implementation in yet another soft law document.

What we have witnessed in the 2011 GPs was a reversal in importance in the relationship between RtR and DD. As we saw throughout this article, the SRSG reframed key concepts and terms in the CSR discourse and clustered them around DD instead of clustering them around responsibility. This highly ingenious and conceptual maneuver delivers effects salutary for SRSG purposes, namely, to begin the convergence of stakeholder expectations and to lose the baggage that crippled other mandates bent on responsibility, which required precision on the responsibility's justification, subject, content and limits, and reviewer of compliance. Ruggie found the voice he was searching for in the early years as SRSG by focusing on sound process rather than responsibility. More than a fancy label applied on the RtR concept, DD came to redefine the very content of respect and offered the vehicle to try to shelter the RtR from a deadly challenge from the separation principle. DD became the key organizing concept for Pillar 2, able to facilitate the convergence of stakeholder expectations.

G. Post-GPs Developments

The elevation of the DD concept in Pillar 2 apparently created a new dynamic in how the corporate responsibility is conceptualized in both its existence and scope and how it is presented to stakeholders. The SRSG made a strategic bet that the conceptual match of operations and DD, not entity and responsibility, holds the key to the deadlock in CSR. This strategy surely paid off in facilitating the UN organizations' endorsement of the GPs. Is this strategy also able to deliver dividends in the post-GPs period, at the implementation stage of this groundbreaking UN instrument? In other words, does the SRSG strategy seem promising to facilitate regime building and consolidation, given that the issue that the SRSG skillfully dogged—the justification of a responsibility to act in GP 13b with a strong protect component in light of the separation-of-entities principle—is bound to re-emerge?

The SRSG aimed both to provide guidance on risk management and to gain multistakeholder endorsement. In this way the GPs stabilized expectations of what respecting human rights means. This in itself has important and welcome implications in destabilizing the incentives and enforcement. New actors and new synergies might become involved and in a more forceful manner after being stimulated and enabled by these newly stabilized expectations. The SRSG unequivocally counts on this happening. The mapping of remedies in Pillar 3 is illustrative, as is Ruggie's talk of a polycentric regime for CSR in a global governance context. For Ruggie, "[T]he GPs needed to be carefully calibrated: pushing the envelope, but not out of reach" (Ruggie, 2013, p. 107). This chapter's thesis is that the SRSG developed the RtR concept the way he did in order to postpone the justification of RtR and instead immediately stimulate convergence. And, in fact, the GPs have strategically postponed the justificatory battle. Although Ruggie set up his mandate to formulate a conceptual foundation for CSR, he delivered an RtR taxonomy and an RtR concept for convergence. He must have realized early on that the mandate could not deliver the conceptual foundation for an RtR prevailing over the separation-of-entities principle.

Nobody in the CSR community, not even Ruggie himself, ventured to foresee the success of the RtR and GPs in terms of implementation. This article explains one reason why this is indeed impossible to do: the responsibility contained in GP 13b is a true exception from the separation-of-entities principle. Like all exceptions, it will need its own justification, and its scope will be defined narrowly and contextually. The SRSG opened the door for this exception and skillfully assured it a place at the table; whether its justification will be provided and its scope will be not so narrowly defined to be practically irrelevant depends on the continuing convergence process that the GPs have set in motion. As Ruggie wrote, “Only time will tell if the Guiding Principles actually generate their intended regulatory dynamic” (Ruggie, 2013, p. 172).

Conclusions

This chapter examined the application of the RtR to business groups and networks, especially multinational enterprises, and dissected the approach the SRSG took to bypass a high obstacle in his quest to establish an ambitious and properly broad concept of corporate responsibilities. The main thesis advanced herein is one that the Ruggie expressly denies, namely, that the RtR has a protect component. Thus, a part of the responsibility of a company that did not cause or contribute to harm to act as required under GP 13b has the demonstrable nature of a responsibility to protect human rights. The analysis not only substantiated this claim but also examined why and how the SRSG constructed the RtR in the way he did. The “why” is explained by the fundamental challenge coming from the separation-of-entities principle, unavoidable when the RtR is applied to multi-entity business enterprises. The analysis of the “how” reveals the SRSG systematically reframed concepts, employed ingenious drafting techniques, used silence strategically, and fully capitalized on the strength and appeal of an approach delivering operational and practical guidance.

Another thesis put forward herein is that, in the ingenious intellectual edifice the SRSG erected for the RtR, it is the concept of DD not that of responsibility that does the intellectual heavy lifting. DD should not be seen as an attractive label stuck to the implementation stage of the RtR; on the contrary, DD is instrumental in eventually justifying the existence and broad scope of the RtR as defined in GP 13b. The responsibility under GP 13b is currently so weakly justified as to be existentially threatened by a blow from the separation-of-entities principle. What the SRSG fundamentally did about this problem was to employ the power of the DD concept (with its risk-management connotations and guidance as the stated aim) to facilitate convergence of stakeholder expectations. The SRSG postponed the battle between the RtR in GP 13b and the separation-of-entities principle. Through the methods mentioned above and other ways, the SRSG meticulously worked on dismantling conceptual hurdles placed in the path of convergence and evolution of the CSR field. Once that began happening the clash would unfold on more favorable terms for the RtR and an exception from the separation of entities principle would be more likely to be accepted and institutionalized. The justificatory inadequacy currently plaguing the RtR in GP 13b would have been remedied.

In this plan, DD plays first violin. Not only does it play comforting notes of pragmatism, familiarity, guidance, and reasonableness to weary corporate executives, but it also crucially allows the SRSG to cluster around it key concepts that he worked on with framing and drafting methods. The way the SRSG managed to move the center of gravity from RtR to DD is remarkable. It is this shift of the center of gravity that allowed Ruggie to get rid of the baggage with which a responsibility-based elaboration inevitably comes, because it requires precision on the responsibility's justification, subject, content, and limits, as well as reviewer of compliance. In the GPs, the relation between RtR and DD has been reversed. It is the RtR that became the label for DD. Rather than a mere fancy label stuck to the implementation stage of the RtR, DD became the concept instrumental in achieving convergence and, thus, eventually in establishing the secure existence of a properly broad RtR. In turn, the RtR became a mere taxonomy device in the GPs.

Is the SRSG's strategy a masterful break of deadlock or a fleeting illusion of success? Ruggie aimed to construct during his mandate an "authoritative focal point around which the expectations and actions of relevant stakeholders could converge" (Ruggie, 2011b, p. 3). Judging by the endorsements the GPs have received, the SRSG managed spectacularly well. Still, what does the consensus around the GPs mean specifically on this issue of a company responsibility to act in GP 13b? Is the convergence of expectations real and profound or are disputes bound to explode after the declaratory stage is consumed, when action and actual implementation is required? Given that this is a foundational issue—that of deciding whether a company has to act or, to put it differently, that of a company legitimately remaining passive like the legendary tort law's cigar-smoking bystander watching someone drown—future disputes are unavoidable. The battle of the RtR with the separation of entities principle was not won, but was avoided and postponed to a date when the CSR field would have evolved and looked more favorable for the RtR. So the current consensus is bound to be severely tested precisely on the situation covered by GP 13b. It will be interesting to see whether Ruggie's strategy will play out in a way that makes the current weaknesses in the justification of RtR a moot point.

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[1] Ruggie (2013, pp. xxxvi-xlii; 3-19) recounts the emblematic cases.
[2] The SRSG and his team provided a definition of due diligence in the Interpretive Guide (U.N. Office of the High Commissioner for Human Rights, 2012, p. 6).
[3] For example, the GPs prevent one from arguing that only large (core) companies have responsibility for affiliates' misconduct while entities at the periphery of the enterprise have no responsibility.
[4] For example, one cannot maintain that appropriate action for entities at the periphery of the enterprise is limited to ending relationships; if leverage over partners exists, or could be increased, it has to be exercised.
[5] The SRSG team's "Interpretive Guide" to the RtR included a discussion—in answer to the question "Do enterprises have any additional human rights responsibilities?"—of its conception of when responsibilities extend, in exceptional circumstances, beyond respect (U.N. Office of the High Commissioner for Human Rights, 2012, p. 14).
[6] Actually, at a September 2011 conference in London, after the GPs were endorsed in the Human Rights Council, I was present to hear a member of the SRSG team insist that the do-no-harm explanation was deliberately excluded from the GPs and should be seen as obsolete.
[7] The corporate responsibility to respect human rights "means that business enterprises should *act* with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved" (Ruggie, 2011b, p. 4).
[8] In a previous piece, I discussed more thoroughly the RtR as a responsibility to act (Mares, 2010, pp. 69-77).
[9] As GP 11 states, "Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation" (Ruggie, 2011b, p. 13).
[10] Subsidiaries are companies 'owned' partially or fully by a parent company. In such equity-based relationships the parent owns shares in the subsidiary.
[11] A multi-jurisdictional comparative report observed that "[s]ome form of 'separate legal personality' and 'limited liability' exist in all of the 39 jurisdictions" and concluded that "most of the surveyed jurisdictions have similar

approaches to the concepts of separate legal personality and limited liability—it is rare for the 'corporate veil' to be pierced" (Ruggie, 2011a, pp. 10, 14).

[12] Most such cases are litigated in the United States under the Alien Tort Statute and before British courts applying tort law.

[13] The Legal Accountability portal of the Business & Human Rights Resource Center provides exemplary cases (Corporate legal accountability portal, n.d.).

[14] Ruggie advances two broad approaches: first, the concept of corporate culture, which can be recognized in law and policy and, second, the role of corporate boards, which should exercise oversight over human rights risks as part of their fiduciary responsibility to the company (Ruggie, 2013, pp. 190-92).

[15] Involuntary creditors would be those harmed by corporate activities making a claim in tort law (Muchlinski, 2012).

[16] Such discretion is epitomized by the business judgment rule and judicial self-restraint in second-guessing the wisdom of managerial decisions (Mares, 2008, pp. 40-52).

[17] The Human Rights Council's Resolution 8/7 in 2008 asked the SRSG "to 'operationalize' the Framework – that is, to provide concrete and practical recommendations for its implementation" (Ruggie, 2011b, p. 4).

[18] The 2008 Framework presents "a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors" (U.N. Special Representative of the Secretary-General, 2008, p. 1).