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Reflections on the 2017 "Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises" (A/72/162; 18 July 2017)

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Abstract: The Working Group for Transnational Corporations and Other Business Enterprises 2017 Report to the U.N. General Assembly (A/72/162) (the 2017 WG Report) sought to unpacks the concept of access to effective remedies under the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. These reflections seek examine the core elements of this unpacking exercise and the resulting "all road lead to remedy" approach. It suggests some of the limitations inherent in the approach as it is currently framed. These include the difficulties of aligning state sovereignty with remedial coherence, the difficulties of identifying the rights holders on which the remedial project will be centered, and on the challenges of using remedies to advance broader governance objectives. The importance of data to the remedial project and the forms of its use is also considered.

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Introduction.

The Working Group for Transnational Corporations and Other Business Enterprises traditionally presents a report to the UN General Assembly a few weeks before organizing its Forum on Business and Human Rights. Often that report sketches the themes and approaches that serve to shape the UN Forum, and the points of emphasis that the Working Group would see elaborated. This year is no different. The 2017 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/72/162) (the 2017 WG Report) lays out the thinking and approaches of the Working Group to the issue of Remedies under the UN Guiding principles of Business and Human Rights. This is a perennially visible issue, and one with respect to which the Working Group has yet to achieve anything that approaches coherent and effective approaches. But that is to be expected in a context n which the remedial pillar of the UNGP itself creates hurdles.

The Summary of the 2017 WG Report provides

> In the report, the Working Group on the issue of human rights and transnational corporations and other business enterprises unpacks the concept of access to effective remedies under the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. It clarifies the interrelationship between the right to effective remedy, access to effective remedy, access to justice and corporate accountability. It examines the issue of effective remedies from the perspective of rights holders and proposes that remedial mechanisms should be responsive to the diverse experiences and expectations of rights holders. Affected rights holders should be able to claim what may be termed a "bouquet of remedies" without fear of victimization.

The Working Group also outlines what may be termed as an "all roads to remedy" approach to realizing effective remedies, which implies that access to effective remedy is taken as a lens to guide all steps taken by States and businesses and that remedies for business-related human rights abuses are located in diverse settings. The report ends with specific recommendations to States, business enterprises, civil society organizations and human rights defenders.

The 2017 Report provides a valuable guide to the thinking of the institutional human rights establishment to remedial mechanisms within and beyond the UN Guiding Principles. That is both its greatest strength and the source of its weakness. This essay sets out reflections on the WG 2017 Report.

I. The WG 2017 Report—Foundations and Context

The Remedial Pillar of the UN Guiding Principles has been a perennial focus of the U.N. and various of its organs. It is of special concern to the Working Group (WG) if only because it is one of the three principal pillars through which the UN Guiding Principles for Business and Human Rights are themselves organized. The Remedies Pillar's organization is straightforward. It starts with a foundational

principle (UNGP ¶ 25) and an operational principle (UNGP ¶ 26). The foundational principle provides that as part of their duty to protect human rights, States must take appropriate measures, within their territory and jurisdiction, to ensure that those affected have access to effective remedy (UNGP ¶ 25). The operational principle urges States to ensure the effectiveness of domestic judicial mechanisms when addressing business related human rights abuses. (UNGP ¶ 26). The Remedial Pillar then suggests the framework for ordering state based non-judicial *grievance* mechanisms (UNGP ¶ 27) and non-state based grievance mechanism, including those preferred by enterprises, private third party groups and international human rights bodies (UNGP ¶ 28).Where these non-state mechanisms are operated by industry, multi-stakeholder and other collaborative initiatives and are based on respect for human rights-related standards, the mechanism should be effective (UNGP ¶30). In addition, the role of enterprises in the remedial structure appears to be centered on their utility for addressing grievances early and directly through the development of operational-level grievance mechanisms for individuals and communities who may be adversely impacted (UNGP ¶ 29). The last of the remedial principles touch on a variety of effectiveness criteria for non-judicial remedy, whether or not state based (UNGP 31). These criteria are grounded in legitimacy, accessibility, predictability, equity, transparency, rights compatibility, norm setting value, and stakeholder engagement (UNGP ¶ 31). And, indeed, UNGP ¶ 1 sets out the fundamental principle of the state duty to protect human rights in terms of process, of "effective policies, legislation, regulations and adjudication" (Ibid). Principle ¶ 22 speaks to the remediation obligations s of enterprises in terms of expressed through "through legitimate processes" (Ibid).

Taken together the UNGP Remedial mechanisms frameworks is worked around a core ideal: "Effective judicial mechanisms are at the core of ensuring access to remedy." (UNGP ¶ 26 Commentary). But it is also based around an operational core ideal: that non-state non-judicial mechanisms will constitute the front line of effective operation of a system the core objective of which is effective and direct remediation (UNGP ¶ 29). The two core ideals must be understood together. They represent the transposition of normative obligations—the duty of states to protect and the responsibility of enterprises to respect human—into the functional realm of remedy, of righting wrongs with respect to which all parties agree liability (or responsibility) for remediation attaches. At the same time, it also suggests the primacy of the state within law centered remedial mechanisms and the primacy of the enterprise within its own field of governance

It was with this in mind that one can better examine the WG 2017 Report with its core focus on interrogating the meaning of "effective remedy." Indeed, a reference to the UNGP themselves are a necessary foundation for the WG 2017 Report objective—one that "unpacks the concept of access to effective remedies under the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" (WG 2017 Report, at p. 2 (Summary)). This unpacking has precise goals—the principal one of which is to draw the Remedial Pillar back into the normative frameworks of the state duty to protect and the corporate responsibility to respect human rights[1]

[1] "It clarifies the interrelationship between the right to effective remedy, access to effective remedy, access to justice and corporate accountability. It examines the issue of effective remedies from the perspective of rights holders and proposes that remedial mechanisms should be responsive to the diverse

But the WG proposed to do more—it "outlines what may be termed as an "all roads to remedy" approach to realizing effective remedies, which implies that access to effective remedy is taken as a lens to guide all steps taken by States and businesses and that remedies for business-related human rights abuses are located in diverse settings." (Ibid). To achieve this, the WG 2017 Report first provides a background, in which it describes objectives and methodologies (Ibid., pp. 4-5), and then describes the scope an limitations of its proposal and approach (Ibid., pp. 6-7). With that preliminary contextualization described, the WG 2017 Report then constructs its remedial approach, one grounded in the centrality of rights holders in access to effective remedies (Ibid., 8), and consisting of sensitivity to the diverse experiences of rights holders (Ibid., 9), accessibility, affordability and timeliness (Ibid., 11), freedom form retaliation (Ibid., 11), and the notion of a bouquet of remedy (Ibid,, 12). From this foundation the WG 2017 Report unveils its "all roads lead to remedies" line (Ibid., 16-22), followed by its conclusions and recommendations (Ibid., pp. 22-25). The 2017 WG Report, then, may be less of a Report and more of a proposal and it is in that light that it may be most usefully considered.

The introduction makes the WG's intentions clear. They mean to set out what an effective remedy means under the GP (WG 2017 Report ¶ 1). The objective is "to ensure that rights holders are at the heart of remedies" (Ibid., ¶ 1) for which the outline of an "all roads lead to remedy" approach may "inform the action of all relevant stakeholders to realize effective remedies for those affected by business-related human rights abuses" (Ibid.). To that end the WG seeks to ground the notion of the close connection between rights and remedies both to international law principles and to the UNGP themselves (Ibid. ¶ 2). Of course, the UNGP focus on ensuring *access* to remedy; it is not clear that the UNGP meant to guarantee effective outcome (there is no legal system on earth that has legalized such an objective). Indeed, the fundamental principle for remediation is *directed to states* and limited by the scope of their duty (in law) to protect human rights (within the confines of their respective legal orders). Moreover, when read together with the core operational principle of Pillar 3 (UNGP ¶ 26) it appears that the core objectives of the remedial pillar *run to effective access to remedy and to effective remedial mechanisms, rather than to remedial outcome*. The WG 2017 Report acknowledges this to some extent (WG 2017 Report § 3).

Yet the WG would move from access and process effectiveness to outcome an outcomes effectives approach. This might represent a step beyond, perhaps a necessary one, from the framework of the UNGP and into an area that itself might be understood as controversial among and between legal systems. There is some acknowledgement of this role. The WG 2017 Report notes that the UNGP themselves fail to define adequately the notion of *effective* remedy, which is to be distinguished from effective mechanism (or process (Ibid ¶ 3). "Accordingly, there is scope to provide guidance on the concept of an effective remedy irrespective of the type of mechanism employed by rights holders to seek redress. The Working Group aims herein to provide such guidance." (Ibid., ¶ 3). To that end, the mechanism of the National Action Plans, one of the core projects of the WG virtually since its constitution in 2011, is seen as a key tool (WG 2017 Report ¶ 4)). But the effectiveness of the National Action Plan is criticized even in the context of advancing the process and access obligations of states with respect to remedy: "most of the existing plans do not contain adequate specific measures to remove well-documented barriers to access to remedies"

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experiences and expectations of rights holders. Affected rights holders should be able to claim what may be termed a "bouquet of remedies" without fear of victimization." WG 2017 Reoirt at p. 2 Summary).

(Ibid.). Even less progress has been made with respect to effective remedy, at least by the judgment of the Working Group through its country visits (Ibid.). Still, this ought not be unexpected. It must be remembered that an overarching caveat applies to all Pillar 1 state duty related matters—that the legal duty of each state is constrained by their constitutional traditions and by the extent to which they have embedded international obligations within their domestic orders.

In the face of this roadblock, or rather in the face of the apparent lack of diligence in meeting this state duty (and corporate responsibility), the WG noted that the driving force for advancing the project of effective remedy appears to shift from the Working Group to the Office of the High Commissioner and others (WG 2017 Report ¶ 5). The 2014 OHCHR "Accountability and Remedy Project," provided specific guidance to States in removing barriers to access to judicial remedies and in turn improving corporate accountability. The Council of Europe (CM/Rec (2016)) and the European Union Agency for Fundamental Rights offered guidance on access to remedy that might also produce more effective outcomes.

II. Objectives and Methodology

With this as background, a sense of the meaning of the UNGP, a conviction that gap filling is necessary with respect to effective remedy, a frustration with current national measures and some confidence in cross border cooperation that the WG set out a three-part objective (WG 2017 Report ¶¶ 6-8). First, the WG attempts what it calls a "clarification about the distinction between the "right to an effective remedy" and "access to an effective remedy"" in aid of what it will offer as an aid "in building a shared understanding around pillar III of the Guiding Principles." (Ibid., ¶ 6). Second, the WG applies the principle of the centrality of rights holders to craft its operational expression as the "bouquet of remedy" (Ibid., ¶ 7). Lastly, the WG the WG offers suggests for attaining its objectives through its "all roads lead to remedies" approach. (Ibid. ¶ 8). To that end it relies on its own construction of international law aided by academic commentary "to unpack what an effective remedy means under the Guiding Principles" (WG 2017 Report ¶ 9). But it also "was informed" by the experiences of "rights holders and of civil society organizations and human rights defenders, who work closely with the affected communities, in seeking effective remedies in relation to business enterprises." (Ibid ¶ 10) These were augmented by questionnaires completed by states and others. (Ibid.).

The problem of methodology, of course, is central to the project of the WG. And it is to their credit that they reached out more broadly than to the letter of the law and to the writings of well-placed academics. But the difficulty remains. At its core, the project remains essentially an academic one—and one constrained by the web of relationships and experiences of those who seek to craft its structures. To put rights holders at the center conceptually requites one to *put rights holders at the center methodologically*—and this objective the WG 2017 Report only partially achieved. A few meetings and questionnaires are helpful but they can be as distorting as revealing of underlying reality. Meetings may be packed with those voices whose attendance was financed by (usually well-meaning) non governmental organizations with quite specific ideological agendas and even more specific objectives for reform. This is not a criticism of them but a recognition that mass opinion is an exceedingly difficult methodological task, and the appearance of consultation does not substitute for its reality (discussed in "Fractured Territories

and Abstracted Terrains: The Problem of Representation and Human Rights Governance Regimes Within and Beyond the State," *Indiana Journal of Global Legal Studies* 23(1):61-94 (2016)). Thus in this case it might have been as useful for the WG to embark on a multi year project, the first to acquire deeper empirical data on mass opinion across the most important areas of global production—not just the states visited but also China, the U.S., and Bangladesh, among others. For this report not a single African state was visited, though there had been visits in other years. Again, the point isn't to fault the intention but merely to suggest that mass based projects that do not rely on data rich real time information must be confronted with the issue of representation. And the issue of representation is itself a complex and deeply political-ideological construct whose constraints must be acknowledged if the task is to find "truth" from "facts". The WG makes an excellent initial effort, an effort necessarily targeted on the representatives of rights holders. Yet an important and underexplored task for the WG to consider is the creation of systems for more effective feedback and engagement form human rights holders. To that extent it is import to remember that while the UNGPs are "rooted in international human rights law" (WG 2017 Report ¶ 9) the UNGP extend far beyond that narrow and formalist conception. The WG indeed understands that by relying freely on related law and norms. Yet it appears to take an altogether too narrow view of its relation to the mass and mass opinion. The WG is interested in the experience "of rights holders and of civil society organizations and human rights defenders," (Ibid., ¶ 10), but perhaps less so in their opinions (at least those unrepresented by influential global NGOs). One cannot construct a view of effectiveness of output, the WG's ambitious project, without a more robust sense, contextually derived, of sentiments and objectives on the ground. And one must be prepared for the inevitable—that there is little consensus except with respect to damages. It is to that extent that one ought to pay particularly close attention to the WG's well crafted understanding of the limitations of its Report (Ibid., ¶¶ 11-12).

III. Clarifying Concepts

It is in Section II of the WG 2017 Report (¶¶ 13-17) that the WG most clearly expresses its normative position, one on which its interpretive project is based. Here the AG is quite clear. The WG starts by noting what they see as an ambiguity: "The Guiding Principles and the Working Group's guidance contain references to both accountability and access to effective remedy, but without any explicit mention of the correlation between the two." (Ibid., ¶ 13). Those references are contextualized in an environment in which legal instruments use of number of terms. (Ibid,). The WG then declares: "The right to an effective remedy is a human right with both procedural and substantive elements" with a reference to the Convention on the Elimination of All Forms of Racial Discrimination and resolution 60/147 (Ibid., ¶ 14). That flourish is appreciated as ideology *but not as law*. It is not clear that it is law beyond the constraints of the specific treaties in which it is thus understood. It is not clear that this is a statement of either international customary law (to the extent that states subscribe to this notion) much less *jus cogens*. At the national level, it is not clear that this is a principle common to the constitutional traditions of states.

Yet, once framed as a human right, it is easier to embed the notion back in through the three pillar structures of the UNGP. And that is effectively what the WG attempts. A human right to an effective remedy "imposes a duty on States to respect, protect and fulfil this right. It also entails responsibility for non-State actors, including businesses, as articulated in the Guiding Principles . . . ." (Ibid., ¶ 14). The realization of that right is then bifurcated; to be effective there must be "access to appropriate remedial

mechanisms . . . provided by the bearers of a duty or responsibility concerning this right." (Ibid). This is the process part of the human right to remedy. But here the WG flips the traditional approach in an interesting way. Where the effectiveness of remedy follows from the protection of access to remedial mechanisms (indeed, the heart of the conception in the International Covenant for Civil and Political Rights), for the WG the reverse is true. "It can thus be said that the concept of access to effective remedies is derived from, and dependent on, the right to an effective remedy." (WG 2017 Report) Here one starts from the approach of the International Covenant for Economic, Social and Political Rights. In effect, what the WG is attempting is the reordering of the two International Covenants along the lines of the old Third World notion that economic rights (in this case the protection of remedial outcomes) is the foundation for the systemic fairness that then makes effective access possible. At their limit, of course, these are notions that carry weight in developing states, among certain factions of global academia, and in a very specific way among Marxist Leninist states. However, at its limit it upends the classical constitutional approach of at least one Western liberal democratic state whose own constitutional traditions have always avoided the Constitutionalization of remedies in favor of the Constitutionalization of process and process rights.

The difference is nicely highlighted in the explanation of the distinction between the duty to provide access-mechanisms, and the duty to provide effective remedy. The right to access merely ensures that a claimant has the ready ability to the mechanisms through which her rights can be vindicated. The right to effective remedy means "there should be an effective remedy in practice at the end of the process." (WG 2017 Report ¶15). This is what the WG would read into the Commentary to UNGP ¶ 25. Of course, this assumes there is validity to the claim and that there are no adequate defenses. And it also assumes some sort of correspondence between rights-remedy at international law and the rights-remedy framework of every domestic legal order. But that is likely to be unattainable—except in theory. The WG has an answer for that—and a very good one—the bouquet theory of remedy, discussed below. But its basis in notions of effectiveness of remedy, may be a weak foundation on which to build a sensible approach.

More importantly, they would read this into not only the state duty to protect—to which UNGP ¶ 25 is directed—but also would read this through the state duty to the enterprise responsibility to respect ("Similarly, when a business enterprise provides remediation in cases in which it identifies that it has caused or contributed to adverse impacts, such remediation should be effective in terms of both process and outcome." (WG 2017 Report ¶ 15)). One may laud the sentiment but not its analysis. There is little that would support this extension in UNGP ¶ 25. Indeed, even in the context of non-state grievance mechanisms the UNGP are careful to direct obligation to the state ion the first instance (note, e.g., UNGP ¶ 28). Closer, perhaps is UNGP ¶ 29 which touch on *operational level* grievance mechanisms. But the object is different from the remedial mechanisms ascribed to the state ("Such mechanisms need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but specifically aim to identify any legitimate concerns of those who may be adversely impacted. If those concerns are not identified and addressed, they may over time escalate into more major disputes and human rights abuses." UNGP ¶ 29 Comment). More importantly, UINGP ¶ 31 clearly focuses on the access and process oriented aspects of remedial mechanisms rather than on an assurance of the quality of the outcomes. Even UNGP ¶ 22 (on 2nd Pillar remediation) provides only that enterprises "provide for or cooperate in their remediation through legitimate processes" (Ibid).

The WG effectively distinguishes between access to justice and access to and effective remedy. The AG appears top embrace the ideal of access to justice understood in the narrow the delivery of remedy satisfactory to the aggrieved rights holder, they appear to distinguish that from access to justice in a broader sense that "would require more fundamental changes in social, political or economic structures." (WG 2017 Report ¶ 16). And indeed, the great difficulty of the outcomes centered measure is the measure of the outcomes. That is a difficulty that the WG tackles in its discussion of application.

Yet social justice does not disappear entirely. It remains visible in the conflation the WG undertakes between right to remedy and corporate accountability (Ibid., ¶ 17). The bridge is the societal goals of remedies which, the WG asserts "should result in some form of corporate accountability. Conversely, corporate accountability should contribute to some form of remedies, which may or may not be effective." (Ibid.). Accountability is certainly considered in the UNGPs. First as against states in promoting the rule of law (UNGP ¶ 1 Comment), and against enterprises by urging states to develop accountability mechanisms for enterprises "when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights" (UNGP ¶ 5). Likewise the operational principles of responsibility to respect human rights includes a policy commitment that "should make clear what the lines and systems of accountability will be" (UNGP ¶ 16 Comment). Corporate accountability is built into human rights due diligence in the obligation of enterprises to communicate externally about how they account for their human rights impacts (UNCP ¶ 21). Indeed, where corporate accountability and the provision of effective remedy meet is precisely where the state duty to protect directly clashes with important state legal protections for enterprises within their domestic legal and constitutional orders (UNGP ¶ 26 Comment speaks to 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"). Accountability is also built into Industry, multi-stakeholder and other collaborative remedial initiatives (UNGP ¶ 30) buy only with respect to the remedial mechanisms themselves. And lastly accountability is again focused on the integrity of remedial mechanism in the development of effectiveness criteria for remedial mechanisms. It is hard to reconcile the aggregate impact of these expressions with the WG's conflation of remedy and corporate accountability writ large.

Having said that, the issue of corporate accountability remains an important matter, It is important for shareholders worried about the business case issues for business and human rights. It is important for the state which has significant control over the regulation of the internal governance and the external behavior rules of enterprises that it charters and which operate in its territory. But corporate accountability without more proves an ambiguous concept. These social justice goals may be what the WG may be referencing. Yet the bootstrapping of societal goals to remedial justice to social ¡justice just does not bear much scrutiny. At some point, states must be made responsible for their own political choices. The constant effort to end run state breaches of their own duties by governmentalizing enterprise operation eventually will destroy the integrity of the state and the law based project of business and human rights.

For all that, the effort by the WG to theorize a principle of effective remedy that looks to output rather than to access is both necessary and timely. The sum of all efforts to produce mechanisms that are readily accessible and process that is exquisitely fair and easy to access amount to nothing if at the end of all of this process through all of these mechanisms a rights holder receives little of value to her. Central to

the issue of remedy then, must be its effectiveness in compensating the rights holder and in serving the societal goals of avoiding future behaviors that produces the breach in the first place. Yet the issue is not one inherent in the UNGP or ought it to be constructed from out of some contorted hermeneutics built around the edges of the accumulated language of international instruments whose objectives were quite distinct. The courageous efforts by the WG to extract a right to substantive remedy from the UNGP notwithstanding, a definition of effective remedy as applied to states would constitute the sort of new and remarkable intrusion of international law into the practice of states that the UNGP themselves explicitly rejected.

All the same, the WG has done us a great service by pointing out the need to *refocus the issue of substantive remedy on the state*. The substantive element of remedy–its effectiveness generally and as applied to individual cases of harm–is the fundamental duty of states to their inhabitants. It is the central issue of the legitimacy of states and of their legal orders. This is the fundamental insight of UNGP ¶ 1and the UNGP General Principles. Indeed, in this sense the UNGP stand as a challenge to states to live up to their constitutional traditions and their international treaty obligations by reordering their legal structures, including access to justice and the substantive scope of remedial protections to effectively redress individual grievances in accordance with their constitutional traditions and their cultures. Indeed, it is to the constitutional orders of the state and its political determinations of the relationship between forms of remedy and violations of rights–especially human rights that are central to the issue of effectiveness of remedies–that now expose themselves as ready objectives of interrogation by the WG. More specifically, the WG's focus on output measures with respect to remedies reminds us of the critical deficiencies of states with regard to their Pillar 1 duties–deficiencies that will not be cured by further governmentalizing the economic sector as a substitute or supplement to state abandonment of their duties under their own legal orders or international law. Here, of course, the key to measuring effectiveness of remedy is political–that is it is grounded not in the satisfaction of individual grievant but in the conformity of the substantive remedial forms to the political decisions of states. That is the substance of remedies and the extent of their availability are political issues that reflect the will of the people through their governmental organs. One can question the wisdom of those choices and one can try to persuade the government of the value of reform, but respect for sovereign decision-making, especially in democratic states means that even where remedies may be deemed inadequate when measured by the satisfaction of the grievants or through the application of outside standards, their legitimacy may not be questioned except to the extent that they violate international law to which the state itself has bound itself.

This is not to say that the issue of effective remedy does not involve the enterprise under the 2nd Pillar. Indeed, access and effectiveness of result are central to the non-judicial non-state grievance mechanisms that are described in the 3rd Pillar. Ironically it is with respect t non state based remedies that the WG's approach has its strongest affinity. For here, in the societal realm, it is indeed the satisfaction of grievants with their remedy that serves as the central functional relationship that determines effectiveness.

Lastly, this is an issue with respect to which the WG could contribute in quite concrete ways within the scope of its authority. It might be useful, for example, for the WG t begin to harvest data from states with respect not just to measures of access or measures of process, but also of measures that go to the quality of the remedy in relation to the breach that gave rise to remedy. To that end, for example, state

NAPs might be modified to require that states report annually on the following: (1) the bases of the legal claims that may be made related to the state duty to protect human rights; (2) the number of such claims made (separated by claims); and (3) the number of claims that were successful; (4) the reasons for no success by claimant (rejection of claim, process issues, etc., and (5) of the successful claims the type and description of relief. This would provide a useful mapping of remedial effectiveness in a more data driven way. Likewise, enterprises might be required to provide similar reporting with respect to (1) their non state non judicial grievance mechanisms and (2) information about state based claims made against them or any of the entities in their production chain.

IV. Rights holders at the Center

The theoretical basis for the construction of an outputs focused right to effective remedy is nicely developed in the core of the WG 2017 Report, "Centrality of rights holders in access to effective remedies" (WG 2017 Report ¶¶ 18-54). It is here that the unpacking promised by the WG in its introduction to the Report is at last realized. Its academic approach is appreciated and serves as its great strength. But it also limits its utility as applicable policy. To undertake this unpacking the WG cast a wide net; "Human rights instruments, treaty bodies, experts and courts have developed elements to provide general guidance about what constitutes an effective remedy under international human rights law" (WG 2017 Report ¶ 18). These are also proffered as "relevant to understanding access to effective remedies under the Guiding Principles" (Ibid.). On the basis of this corpus of guidance, the WG develops "herein an overarching idea that rights holders should be central to the entire remedy process, including to the question of effectiveness." (Ibid., ¶ 19). The object is to take rights holders and their suffering seriously (Ibid.). Yet as discussed above, there is a dissonance here between the *project of remedial coherence with respect to its effectiveness as output* (gauged by the amelioration of the suffering of the rights holders) which has a basic economic and international character, and the *basic political right, indeed the fundamental political right, of states to allocate remedies* in accordance with the political choices made by its polity, only one of the factors of which might touch on the suffering of the rights holders. For legal internationalists this may indeed be a hard pill to swallow. But the legal order of the state system is itself founded in respect for the state as the fundamental unit within which political decisions are made and translated into legal regimes. In the absence of superior legal constraint (binding international law or jus cogens) there is little impediment to state choice.

It seems, then, that the WG's project here is not legal or law making in the formal sense, but societal and norm forming. They are effectively seeking to provide a normative basis for influencing states (and really for influencing popular sentiment that then holds states accountable) to embed a different sensibility into their law. The "centrality of rights holders" project, then, is a political project in the service of social justice undertaken through the forms of the UNGP to eventually reshape the legal regimes of states, and through them, the social order within which enterprises operate (and to which they respond under the 2nd Pillar). In this their interventions are to be welcomed, no doubt. But it is important to understand that the project exceeds the conceptual structures of the UNGP themselves. This is important work, but is strategically bound up in the social justice implications of the project itself. What appears to be the case is that if the WG is to affect the interpretation of the UNGP, it must help reshape the societal and legal contexts in which such interpretation is possible. To that end the UNGP may themselves be used

to some extent by drawing on implications to support a broader point, which, thus legitimated can then be applied to expand the scope and meaning of the UNGP themselves. To that end, UNGP ¶ 31 becomes the lynchpin of analysis, the explicit and implicit implications of which can then be used to construct a broader human rights principle of effective remedy, whose implications as international norm can then be turned back on the UNGP to refashion the meaning and application of effectiveness of remedy within the UNGP themselves (WG 2017 Report¶ 20).

The WG identify nine requirements to effect the centrality of rights holders in access to effective remedy. The first four are developed in the WG 2017 Report, the others were flagged but summarily treated for reasons of space limitation (Ibid., ¶ 20). But all nine are equally worthy of consideration. They are these: "First, remedial mechanisms and remedies should be responsive to the diverse experiences and expectations of rights holders" (Ibid ¶¶ 20, 26-31). "Second, the key constitutive element of effectiveness, such as remedies being accessible, affordable, adequate and timely, should be determined with reference to the needs of rights holders seeking justice." (Ibid., ¶¶ 20, 32-34) "Third, the affected rights holders should have no fear of victimization in the process of seeking remedies." (Ibid., ¶¶ 20, 35-37). Fourth, "a range of remedies should be available to rights holders affected by business-related human rights abuses." (Ibid., ¶¶ 20, 38-54). "Fifth, . . . all mechanisms should be at the service of rights holders, who should be consulted meaningfully in creating, designing, reforming and operating such mechanisms."(Ibid., ¶ 21). "Sixth, the effectiveness of a remedy should be judged also from the perspective of affected rights holders." (bid., ¶ 22). "Seventh, if there is a power imbalance between the affected rights holders and a given enterprise facing allegations of human rights abuses, persons administering a remedial mechanism should take proactive measures to redress this asymmetrical relationship" (Ibid., ¶ 23). "Eighth, rights holders should have access to information about their rights, the duties of States and the responsibilities of businesses in relation to those rights, all available remedial mechanisms and trade-offs between mechanisms." (Ibid., ¶ 24). "Ninth, access to effective remedies should be available without discrimination." (WG 2017 Report ¶ 25).

These requirements are rich and complex. Their intent is positive and serve as a powerful statement of advocacy for social justice objectives for holders of human rights. Their connection with the UNGP tenuous. Still they are worth considering because, if the WG is correct, then it is possible to reach beyond the UNGP for principles and governance that might then be applied directly to the interpretation of the UNGP themselves. While each of the one requirements are worthy of considerable analysis, this reflection offers only some general observations of a more general nature with respect to the requirements.

First, the identification of rights holders might require additional attention. Understood at its broadest, each of us, including the heads of the most human rights disrespecting states and enterprises, is a human rights holder. It would follow that each of the nine requirements would apply to all of humanity. Thus for example, read broadly in this way the fifth requirement, for consultation, would merge with the basic principle of democratic governance requiring democratic participation in self-government, including the governance of remedies made available through state mechanisms and framed by law. But it is clear that the WG used the term in a narrower sense (e.g., WG 2017 Report ¶¶26-27). But that is the problem. How does one distinguish the sub class of human rights holders that are the real object of the nine requirements from the rest of us. And how does one do that when it is quite possible that in one

context an individual ought not to be included while in another that same individual might count herself a victim of human rights abuses by enterprises or states, or vice versa. The focus on women provides a nice example (Ibid., ¶¶ 28-30). Women suffer great disabilities that may be given legal effect and that in any case may complicate human rights norms beyond law. Yet women may also be a sort of human rights abuses (against children, indigenous people, etc., where their singular privileged characteristic (woman) merges into others (adult, or member of a racial or religious racial majority) where the characteristic that was a source of human rights victimization now becomes neutral. In this respect intersectionality analysis might serve to enrich the analysis–and to complicate it. In any case, then, victimization does not work because all individuals are potentially victim and some victim communities may at the same time commit breaches of human rights against others. Yet even if one is successful in producing a workable definition of the subclass of rights holders to which the requirements apply, it is hard to square the requirements with the constitutional traditions of the states within which they are meant to be applied. On the other hand, if these are meant only to serve as expressions of hortatory principle, to be interpreted and applied in contextually appropriate ways, then one avoids the political issue and takes on the issue of coherence. In any case, the primary issue–the identification of the class of rights holders who are the objects of this project remains to be clarified in a meaningful way.

The discussion of adequacy of remedy provides rich analysis of a difficult subject. Here the issue of adequacy of remedy ought to have formed the core issue given the objectives of the WG. Yet the focus as well on timeliness and affordability detracted from that analysis and brought the focus back to access issues rather than the more important (for this Report) adequacy issues (WG 2017 Report ¶¶ 32-34). Focusing on adequacy would indeed be a useful task for the WG going forward. And to that end it would benefit from data about adequacy. The difficulty, as the WG noted but not acknowledged, is that adequacy issues have two quite distinct components. The first is *objective adequacy*–the extent to which a remedy makes a person whole or put the person back to the position she occupied before injury (if that is possible). These are judged by societal criteria of value. The second, and more important, given the focus of the WG, is *subjective adequacy*–the value of the remedy to the victim. The land compensation example at ¶ 33 of the Report provides an excellent example. And, indeed, in that example, adequate compensation should have focused on the victim (the value she derived from the land as an enterprise) rather than on the loss (the social value of the land in the "market"). That would have required an easy fix–the value of the compensation as the present value of the income derived from the land, or the provision of funds adequate to purchase a similar value producing property. But that raises the issue of the extent to which subjective adequacy ought to be a factor in the determination of remedy. More importantly it suggests a technical question–the extent to which such a remedial basis could be fairly administered. Neither is answered in this Report.

And, indeed, it might have been more useful had the Report started its focus on victimization rather than on the effectiveness of remedy under the UNGP or otherwise. The Report becomes a more powerful instrument for interpretation of the UNGP and of the elaboration of appropriate human rights sensibilities in the societal sphere when one starts with the insights of ¶¶ 35-37 of the Report. Indeed, the great insight here–that effective remedy is impossible for human rights holders who are victimized. Thus *an effective remedy can be defined more narrowly as remedial relief that results from the invocation of mechanisms without fear of victimization or the occurrence of victimization in fact*. Victimization, as the

Report suggests, can be defined as any act of "intimidation, arrest, arbitrary detention, criminal defamation charges, enforced disappearance" or killing (WG 2017 Report ¶ 35) that occurs in any manner to the victim which are directly or indirectly related to the effort of the victim to seek access to judicial or non judicial mechanisms for vindicating human rights. That definition might serve as a starting point for discussion. The object, of course, would be the same as that set by the WG–to ensure that remedies are as effective as the access to remedial mechanisms. Effectiveness of remedy can be measured by the absence of victimization. In this way, states remain free to develop its own bouquet of remedies that express national conditions and national legal cultures. More importantly a victimization approach is consonant with both the state duty and corporate responsibility. Effective monitoring–through disclosure regimes imposed on states as well as businesses would do much to expose the weaknesses of current approaches to the issue of victimization. But here again, the focus on the multinational enterprise (Ibid., ¶ 37) misses an important point–the rise and existence of victimization is a *fundamental problem of state failure*. Governmentalizing the enterprise in the face of state failure does not solve the problem. Shifting authority on the enterprise contributes to the growing power of the enterprise through the territorialization of the production chain, to serve as an autonomous source of power. For those, including many influential leaders of non governmental organizations, and those who put their hopes in a Comprehensive Treaty for Business and Human Rights grounded on state power, this shift undercuts, in material ways, the relevance of the state as an actor in human rights. *It is thus a greater focus on state duty rather than on enterprise responsibility that the entire discourse of victimization and effective remedy points. And that is a conversation that is yet to be had.*

The WG focus on the forms of remedy are quite useful, of course (WG 2017 WG Report ¶¶ 43-54). They serve as a valuable recap of the palette of remedial forms that have been developed over the course of the centuries by many distinctive legal orders. Yet that palette only provides the first step of the process toward effective remedy. The determination of which among this palette ought to be available within any domestic legal order is for the state itself to determine. In the absence of a new international order compelling the provision of specific remedies for righting specific wrongs, those choices are left to the state. And where the domestic legal order is the product of sovereign decision-making by represented governments, there is little in the UNGP or in international treaty law that could set those choices aside. True enough a state may adere to one or another international standard, but that is a decision that invikes the same power as decisions to avoid them. Sovereign political choices remain the very large elephant in the room created by the WG Report. At some point it must be confronted. It is not enough to point to international norms to impose legal standards within a sovereign state. It is the character of state duty and its meaning that must be changed in a way that reflects political consensus. The WG Report seeks to move that conversation forward, and for that its work must be appreciated. But such conversations do not carry the weight of law; and they do not constitute international norms much less norm making. Yet they are essential, and for that the courage of the WG ought to be recognized.

Yet acknowledgement of courage is not agreement with the agenda advanced. And those moved by the WG Report ought to engage critically with its important observations and insights. Most important in this regard are the WG's notions about the purposes of remedy. They are quite right, of course, to note the principal purpose of remedies–at least for the UNGPs–""to place an aggrieved party in the same position as he or she would have been had no injury occurred" (2017 WG Report ¶ 39, quoting UNGP ¶

10). It is in moving beyond this that the WG seeks to break new ground–at least with respect to the obligations of states and enterprises under the UNGP. The WG notes two additional purposes for remedies that they glean from international law; "remedies also have a key role to play in pre-empting future abuses. Lastly, remedies should be able to discourage not only a given actor, but also others, from committing the same or similar abuses in the future." (WG 2017 Report ¶ 40). There is nothing revolutionary here in terms of purpose. Most states have infused their remedial mechanisms with these three key objectives. Ironically that incorporation has sometimes caused international consternation–for example the use by the United States of punitive damages. Yet here we are again, looking to the vindication of individual grievance as the space within which societal objectives and managerialism through judicial mechanism can also be attained. That is not a criticism so much as a recognition that using individual grievance as a site for societal managerialism has often been criticized as shifting the focus from the victim–precisely the objective the WG seeks to avoid. *Here it may be that the WG may not be able to have it both ways–either one targets remedies to the victim or one admits that the point of permitting victims to seek remedies is as a means through which the state may better govern*. This potential contradiction would be most usefully addressed in the future by the WG. For now it is difficult to reconcile the overarching goal of the WG 2017 Report–the "Centrality of rights holders in access to effective remedies"–with the discussion about the "bouquet of remedies" at least to the extent that this bouquet is to be offered to the state, to society or to anyone other than the victim in a victim initiated effort to seek vindication of personal rights.

V. All Roads Lead to Remedy

At last we come to the end. There can be no dispute with the WG on this point: "Ensuring access to effective remedies for business-related human rights abuses will require transformative changes in laws, policies, remedial mechanisms, societal structures and global governance." (Ibid., ¶ 55). The implications for state duty are clear as well–"to remove well- known legal, practical, procedural and jurisdictional barriers to gaining access to judicial and non-judicial mechanisms" (Ibid.). What the WG offers, then, is a *complement* to the reform proposals driven by others (the OHCHR and European Union Agency for Fundamental Rights (Ibid., ¶¶ 55-56). That, in essence, is the foundation of the "all roads to remedy approach to realizing effective remedies for rights holders affected by business-related human rights abuses" (Ibid., ¶ 56). The WG 2017 Report ends with a discussion of the three components of this *all road lead to remedy approach*. The first is that access to effective remedy should be taken as an all-pervasive lens (Ibid., 57-59), the second is that diverse actors should work individually and collectively towards the common goal of providing access to effective remedies (Ibid., ¶¶ 60-74), and the third is that remedies should be realized in diverse settings (Ibid., ¶¶ 75-78). The first provides a sound interpretive lens–to read remedial objectives and consequences into all duties and responsibilities of states and enterprises. This in effect imports a corporate compliance culture into the business of public policy. Perhaps in a world in which economics now displaces politics as the language of governance (see e.g., here) this makes sense. It is likely easier for the enterprise to adjust its compliance cultures to embed remedial liability than it will be for the state. And unstated is the legal difficulties of this compliance culture with respect to state enterprises and state failures to do their duty. *The issue of sovereign immunity is the second elephant in the WG 2017 Report*. The aspirational objectives for state, enterprise and civil society embrace of the "all roads lead to remedy" approach is to be lauded, though the heavier emphasis on corporate

responsibility rather than state duty again suggest that the WG has shifted emphasis from the state to the enterprise as the engine for the remedial project. The generality of the direction to states, without suggesting the need to revisit their own constitutional orders, may be contrasted with the more specific program offered to enterprises, and the linkage between enterprise reform and the role of civil society again suggests a shift in focus to the societal relationship of economic actors and civil society representatives in societal space rather than of the management of these forces within the political space of the state. Lastly, the call for reconfiguration of trade agreement and of the importance of financial actors in the management of rights related conduct of enterprises *and states* merits the emphasis provided in the WG 2017 Report. This applies not just through UNGP ¶ 9, as specified in the Report, but also is inherent in the entirety of the second pillar with respect to private financial enterprises and in the state duty for state investment vehicles (e.g., here).

VI. Conclusion

It is hard to do justice to the WG 2017 Report. It represents the highest form of engaged advocacy determined to push an organization forward. That pushing is courageous. And in return, it merits an equally engaged analysis and discussion. There is no better complement to excellent work than to engage with it critically. For in that engagement lies the possibility of consensus and forward movement. This engagement is meant to further that task and the opportunity it provides. It is hoped that others will engage as well. Just as the WG sought to put the rights holder in the center of discourse, so this reflection has sought to center the state in that enterprise. And in the process, it sought to suggest both the possibilities and the limitations of the use of the UNGP framework as the means for attaining what are best understood as broad social justice objectives built into the WG analysis. Might the WG has placed more of a burden on the UNGPs than it was meant to bear?

To center the rights holder, one must bring the rights creator—the state in the legal sphere and the enterprise in the societal sphere in greater alignment. But it is t the state that one must look first if one is to remain true to the state dominance of the legal sphere. With respect to the societal sphere, the complex relationship between global enterprises, their production chain and the norm making legitimacy of international actors requires greater affirmation and development. And lastly, the WG must avoid inadvertently decentering the rights holder by investing their remedies with substantial societal and governance characteristics. It is not clear that governing through the remedial burdens of individual victims may be the best way to move governance forward in this century. Surely there are already better ways—ways grounded in data, in transparency, and in markets, for example. But that is a discussion for another day.