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## Introduction

### 1.1 Why a Commentary for the UN Guiding Principles?

The UN Guiding Principles on Business and Human Rights (the “UNGP”)<sup>1</sup> were endorsed unanimously by the UN Human Rights Council in 2011.<sup>2</sup> That endorsement has been characterized as a “watershed event in efforts to tackle adverse impacts on people resulting from globalization and business activity in all sectors.”<sup>3</sup> With that endorsement, the Office of the U.N. High Commissioner for Human Rights also noted, the UNGP for the first time made available “a globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises to prevent and address such impacts”.<sup>4</sup>

The UNGP are remarkable for a number of reasons. It is the first instrument of its kind, an instrument produced by a public international organization to provide authoritative guidance respecting the human rights implications of economic activity. It sets out a framework that is directed not just to states, but to enterprises and civil society as well. The UNGP avoids the constraints of legalization to produce a set of expectations that are normative and that may be embedded within legal and societal systems. It changes the center of conduct expectations from a political and economic case for human rights to a human rights case for economic activity expressed through law, public policy and social norms. It embraces the expectations of markets based global economic activity but is sensitive to the national and production chain contexts in which it is to apply. Lastly, it seeks to tie together within new governance modes, the three critical governance communities with substantial effects on the organization and operation of economic activity—the state, the enterprise and mass organizations. The “Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.”

The endorsement of the UNGP by the UN Human Rights Council in 2011 was also the culmination of an equally remarkable mandate undertaken by John G. Ruggie. The principal architect of what became the UNGP, Professor Ruggie had spent the years 1997-2001 as UN Assistant Secretary-General for Strategic Planning, in the course of which he assisted on the establishment of the UN Global Compact and General Assembly approval of the Millennium Development Goals. It was in those projects that the effort was first made to “weave universal principles into global corporate behavior [through an] expanding set of nested networks.”<sup>5</sup> By 2005 Professor Ruggie’s attention was shifted from the Global Compact and the Millennium Development Goals to a project that

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<sup>1</sup> United Nations, UN Guiding Principles on Business and Human Rights (New York & Geneva: UN, 2011).

<sup>2</sup> UN Human Rights Council, Human rights and transnational corporations and other business enterprises A/HRC/RES/17/4 (6 July 2011), ¶1.

<sup>3</sup> United Nations Office of the High Commissioner for Human Rights, ‘Corporate human rights due diligence – identifying and leveraging emerging practices’ (United Nations Human Rights, n.d.) <<https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>> accessed 27 February 2022).

<sup>4</sup> Ibid.

<sup>5</sup> John Ruggie, ‘global\_governance.net: The Global Compact as Learning Network’ (2001) 7(4) Global Governance 371, 377, 374; George Kell and David Levin, ‘The Global Compact Network: An Historic Experiment in Learning and Action’ (2003) 108(2) Business and Society Review 151.

more broadly sought to develop a framework for weaving of human rights norms into the economic activity into the activities of states and business enterprises. He was appointed to those ends in July 28, 2005 as the UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (then well-known during the period of his stewardship as the “SRSG”). That appointment followed years of efforts to overcome the challenge of embedding human rights into the activities of multi-national enterprises, an effort ongoing in the United Nations in its then current form since the 1960s and the effort to develop an international code of conduct for business.<sup>6</sup> The SRSG mandate was established<sup>7</sup> in the wake of the rejection (principally by states and enterprises) of earlier efforts to frame a normative structure for the human rights elements of economic organization,<sup>8</sup> represented by the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” [the “Norms”].<sup>9</sup> Six years after his appointment as SRSG, Professor Ruggie was able to develop in the UNGP a novel framework based on the now familiar three “Pillars”.<sup>10</sup> The first pillar posited a set of standards around a state duty to protect human rights. The second pillar developed the critical concept of a corporate responsibility to respect human rights. Both enterprise and state were then bound under a third pillar crafting an obligation to provide remedies for breaches of state duty or enterprise responsibility. What drew most attention at the time was the construction of a corporate responsibility to respect human rights—one that appeared to recognize that both governance and regulatory systems were neither bound exclusively to nor possible to develop only within the legal systems of states. This represented the great innovation from the approach taken in previous iterations of efforts to embed human rights into economic activity—and one that brought forward the work of the UN Global Compact to weave universal principles into global corporate behavior [through an] expanding set of nested networks.

At the time of its presentation to the UN Human Rights Council, Professor Ruggie urged that “Council endorsement of the Guiding Principles will mark the end of the beginning. Therefore, I very much hope that the Council seizes the opportunity provided by the remarkable consensus and convergence of approaches that has been achieved, endorse the Guiding Principles, and then build on this solid foundation, step by step, in the years ahead.”<sup>11</sup> Since its endorsement, the UNGP has indeed become, as the SRSG hoped at the time, “a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.”<sup>12</sup> A UN Working Group on the issue of human rights and transnational corporations and other business enterprises was established at the time of the UNGP’s endorsement to promote

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<sup>6</sup> Development and International Economic Cooperation: Transnational Corporations, UN Doc. E/1 990/94; see also Draft United Nations Code of Conduct on Transnational Corporations, May 1983, 23 ILM 626 (1984)

<sup>7</sup> UNCHR Res. 2005/69 of 20 April 2005, Doc. E/CN.4/RES/2005/69.

<sup>8</sup> UNCHR Resolution 2004/116 of 20 April 2004.

<sup>9</sup> Sub-Commission on the Promotion and Protection of Human Rights, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) See, David Weissbrodt and Maria Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ *American Journal of International Law* 97 (2003) 901-922; available <[https://scholarship.law.umn.edu/faculty\\_articles/243](https://scholarship.law.umn.edu/faculty_articles/243)> accessed 15 February 2022.

<sup>10</sup> See, John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton, 2013).

<sup>11</sup> John G. Ruggie, ‘Presentation of Report to United Nations Human Rights Council’ (Remarks at Meeting of the UN Human Rights Council, Geneva, Switzerland, 30 May 2011) <<https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf>> accessed 10 February 2022.

<sup>12</sup> John G. Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework,’ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31 (212 March 2011), ¶ 13.

the UNGP.<sup>13</sup> A multi-stakeholder platform was also created, the UN Forum on Business and Human Rights. Held annually, that platform has generated a tremendous amount of activity—a global market for ideas about the interpretation, application and development of the UNGP.<sup>14</sup> The UNGP has been incorporated into the governance projects of the OECD, principally its Guidelines for Multinational Enterprises. It has played a prominent role in the construction of related frameworks for managing economic conduct, especially of enterprises, including, for example ISO 26,000.<sup>15</sup> Even as the UNGP were being established and developed, they have been the subject of criticism on a number of levels. These criticisms have emerged especially from developing states, from influential constituencies within academia and civil society, and some within the business community itself. Those criticisms have also fueled efforts to advance the core principles of the UNGP to continue through a process of formal legalization of regulation of economic activities of states and others.

This Oxford Commentary weaves together the historical foundations of the work that produced the UNGP and build on current developments to contextualize and analyze the rules and principles of the UNGP. The Commentary will provide a comprehensive understanding of the underlying premises which shape the UNGP. From these premises as they evolved, the Commentary will provide an understanding of the UNGP as a system of norms that meld together the governance communities at the center of the operation of economic activity—the state, the enterprise and civil society.<sup>16</sup> By examining and specifying the content of the provisions of the UNGP, thirty-one principles, each with commentary elaborating its meaning and implications for legal systems, public policy, and operational application, the Commentary will contribute to an understanding of the UNGP “as a coherent whole.” By providing a coherent framework, grounded in the understanding of those who contributed to its development and those who have wrestled with its application since, but shaped by its inherent logic as a system for elaborating the human rights basis of economic activity, this Commentary will provide guidance to those institutions and individuals who seek to understand and apply the UNGP to their activities. The aim of the Commentary, ultimately, then, is to serve as a useful standard reference for making sense of the of the UNGPs as a systematization of norms, and of each of the norms in their own right.

Nonetheless, to strive for a comprehensive rationalization of the “sense” of the UNGP is not the same as seeking to arrive at the “correct” or “best” sense in which the UNGP ought to be understood as either as a system for rationalizing the role of human rights within economic activity or with respect to each of its principles. The fundamental starting point for this Commentary is that there are no single correct, or true, or manifestly right way to read and understand any commentary, and especially one focusing on the UNGPs, the Commentary. Such efforts say more about the times and the agendas of those who put forward that “truth”, their “truth”,<sup>17</sup> than it does about anything into which that “truth” is projected. Its greatest value is in its politics, and as a historical marker of

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<sup>13</sup> UNHRC Resolution 17/4 of 16 June 2011, ¶ 6.

<sup>14</sup> *Ibid.*, ¶ 12.

<sup>15</sup> International Organization for Standardization (ISO), ISO 26000: Guidance on Social responsibility (Geneva; ISO, 2010). These are built on seven core principles that sound in the UNGP 2<sup>nd</sup> Pillar (respect for human rights and include: Accountability; Transparency; Ethical behaviour; Respect for stakeholder interests; Respect for the rule of law; Respect for international norms of behaviour; and Respect for human rights. See, ISO, *Discovering ISO 26000* (Geneva, ISO, 2018).

<sup>16</sup> Larry Catá Backer, “From Guiding Principles to Interpretive Organizations: Developing a Framework for Applying the UNGPs to Disputes that Institutionalizes the Advocacy Role of Civil Society,” *in* *Business and Human Rights: Beyond the End of the Beginning* 97-110 (César Rodríguez Garavito, ed., Cambridge University Press, 2017)

<sup>17</sup> There has been some work in this context as it touches on communication, see, e.g., Gert Biestra, “‘This is My Truth, Tell Me Yours’. Deconstructive pragmatism as a philosophy for education,” *Educational Philosophy and Theory* 42(7) (2010) 710-727; Edith Marko-Stöckl, “My Truth, Your Truth-Our Truth? The Role of History Teaching and Truth Commissions for Reconciliation in Former Yugoslavia,” *European Yearbook of Minority Issues* 7 (2007/8) 327-352; Alex Wiegmann, Jana Samland, Michael R. Waldmann, “Lying Despite Telling the Truth,” *Cognition* 150 (2016) 37-42. .

agendas ion a particular time and place. And perhaps that is the real moral. *Reality matters less than the ability to cover over it with something plausible.* Formally coherent fantasy can have a far greater and long lasting legal effect than the reality that it seeks to cover. Generations of people may look, and understand the disjunction, and not recognize the disjunction for what it is. The only thing that appears natural in the construction of legal orders of human social and political systems, including the UNGPs, seems to be the ability to construct legal fictions with formidable effect.<sup>18</sup> But its long term value as something other than a historical marker is limited. It provides little by way of tools for extracting relevant readings of the UNGPs. To be useful is to be timely, and to be timely requires a different approach to commentary.

To better ensure a long term timeliness, this Commentary avoids the catechistic temptation of orthodox truth in favor a plausibility approach. The Commentary will focus on the UNGP text and its context in and of itself—detached, in the first instance, from context, and then reattached to develop the framework within which it is possible to identify a plausible range of meaning. Context, rather than text, in turn, will serve to expose the boundaries within which it is possible to describe the extent of the scope of interpretive plausibility. That is, the intent is to rationalize the interpretive scope of the UNGP as a whole, and each of its provisions. That, it is hoped, will provide a more comprehensive guidance on both the sources of plausibility and the connection between ideology, perspective, and principle for interpreting the UNGP in specific ways. The object, then, is to expose the range of possibility (of the plausible), identify the boundary between plausibility and everything else, and help the reader toward their own interpretive choices in reading and applying the UNGPs. The Commentary will model its aims along the lines of the UN Special Representative’s mandate: “establishing universally applicable and yet practical Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm.”

## 1.2 The Aims and Scope of this Commentary

John Ruggie noted several years after the endorsement of the UNGP, that its thirty one principles “are not merely a text. They were intended to help *generate a new regulatory dynamic*, one in which public and private governance systems, corporate as well as civil, each come to add distinct value, compensate for one another’s weaknesses, and play mutually reinforcing roles—*out of which a more comprehensive and effective global regime might evolve.*”<sup>19</sup> That understanding, uttered several years after the end of his mandate, suggests some of the complexities of approaching the UNGP—as text, as idea, as a set of intentions, as a system, and as a platform through which global governance may be directed within a constrained normative field. Depending on which meaning of the UNGP one references, a potentially quite distinct set of interpretive possibilities might be plausible. All of it, though, eventually reduces itself to text for its authority—text of one sort or another (which might also derive from other media or be embedded in code). In effect, one might start with the premise that the UNGP ought to be treated as a species of hypertext.<sup>20</sup> The consequences for interpretation and commentary can be profound. Internet and media based communication “have changed a traditional linear text into a more interactive, dynamic, unstable and visual

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<sup>18</sup> Larry Catá Backer, “Aristotle’s Natural Slaves and African Slavery in the United States.” *Law at the End of the Day* (28 September 2007) available <http://lbackerblog.blogspot.com/2007/09/aristotles-natural-slaves-and-african.html>.

<sup>19</sup> John Ruggie, Keynote Address by John Ruggie at the Conference ‘Business & Human Rights: Towards a Common Agenda for Action’ (2 December 2019); available [https://shiftproject.org/resource/john-ruggie-keynote-finland2019/], last accessed 1 February 2024 (emphasis supplied).

<sup>20</sup> “After all texts are not random sets of linguistic expressions, but rather limited and coherent sequences of linguistic signs which, as a whole, are able to signal a recognizable communicative function.” Wojciech Cyrul and Tomasz Pełech-Pilichowski, ‘Legislating in hypertext (Legislacja w hipertekście),’ (2020) 18(2) *Opolskie Studia Administracyjno-Prawne* 27-42, 28.

one. . . . texts in a hypertext environment split up, recombine and provide simultaneously existing reading paths. Even if the reader re-linearises the hypertext while reading it, the text itself structurally remains a network.”<sup>21</sup>

It is with that in mind that one might best start a commentary with a set of first principles that are meant to inform the commentary that is to follow, and expose its core premises of approaching textual analysis:

1. No person or thing says, describes, or represents what they or it means;
2. No person or thing means what they or it says or describes or represents;
3. Meaning that can be extracted from what is said, written, indicated, described, or represented is rooted in context, as a function of place, time, intent, speaker, application, form of communication, and circumstance;
4. In the search for a primary meaning, one invariably must consider or at least acknowledge a range of plausible rationalizations and their relationship of the object (or person) onto whom meaning is projected;
5. The identification of meaning among this range of the plausible is a choice;
6. The means by which this choice is made is also intersubjective and a function of the parameters within which meaning is consequential within a community or to its recipient (whether an intended recipient or not);
7. The critical task of commentary to assemble as large a basket of choices as may plausibly be extracted from what is said, represented, or described, the meaning of which is the object of inquiry;
8. That basket of choices is constrained on the one side by the normative framework and premises producing text and on the other side by the structural normative constraints of those consuming text (“receiving” text poses challenges that reflect those of “producing” text at least with respect to the scope within meaning may be possible)
9. Everything else are acts of disciplining belief within a social collective and guiding application to suit its objectives.

This commentary provides pathways toward the rationalization of belief in the meaning, purpose, and pathways of text, intent, and context within and around a specific set of social relations memorialized in text of the UNGP. That textual analysis is informed by intent, context, and application; these ten produce the scope of the plausible. It is in the extraction of the plausible from text in context that the commentary serves its core object—to provide guidance for those who would apply that explanation specifically within the normative and ideological context from which the reader seeks to approach the text and extract, strategically, meaning useful to the ends for which the text is accessed.

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<sup>21</sup> Sergey Stroykov, ‘Linguistic Research of Text, Intertext, and hypertext: Moldovan Experience,’ (2014) 1(1) *Speech and Context* 121-131, 121.

The production of a commentary of this magnitude, respecting an instrument of foundational importance, is undoubtedly a humbling task. The profundity of that necessary humility is deepened where, as in this case, the Commentary follows the production of both an official commentary, written by those responsible for the development of the forms and text of the UNGPs themselves, and more recently by a magisterial effort, written in the form of a Talmudic ‘Gemara’ (גמרא), originally a mastery and transmission of existing tradition, to the primary text of its ‘Mishnah’ (משנה), oral traditions and expectations reduced to text, one which was undertaken by a collective of some of the most distinguished students of other fields of human rights, business, and its related fields of academic study.<sup>22</sup> In the shadow of those efforts, it may be useful to attempt a brief justification for the production of another commentary, and a suggestion of the ambitions for its elaboration that may both distinguish this commentary from others and at the same time contribute in some meaningful way to the understanding, scope, character, and utility of the object of its study—the UNGPs in and of themselves as well as in their environment.

As a foreshadowing of the focus of the commentaries that follow, it may be worth starting with a brief consideration of the idea of a commentary. More importantly, it may be useful to consider the first principles around which it is possible to develop commentary as a meaningful exercise.<sup>23</sup> At its simplest and essential form, a commentary may be understood as a multi-functional text “intended to complement a particular source”<sup>24</sup> Among the objectives of a commentary are to explain, analyze, and provide context. The techniques often employed include interpretation of text and its terms, description and analysis of application, history of enactment and drafting (intent and objectives), and situating the source within a broader policy or social background. None of that, however, helps one understand the quality of the effort or its foundation in presumptions, principles and analytic lenses which shape any approach (and also direct it in quite specific ways). To gain greater clarity, and thus to better inform a commentary project, it may be useful to start with the textual representation of the central task itself—the commentary especially as it has come to be understood through a very long history. Three words provide insight here: *comment*, *gloss*, and *commentary*.

The first is the core word-concept of “comment.”<sup>25</sup> Since the 14<sup>th</sup> century in English, the word has acquired both a passive and active meaning. On the one hand, *comment signifies an object*: an explanation, interpretation, a contrivance or fabrication (that is the signification) of another object—the thing explained, object, process, condition, state of being, etc. Its foundational derivation from its PIE root—an intensified product of thinking. On the other hand, *comment also signifies the act of commenting*. Here its focus is on the acts of considering, thinking, discussing, and disseminating (writing in the pre-digital eras). It acquires a twofold character—the first is internal (the acts of thinking and considering) as well as of a very public and external focus (discussing and disseminating).

Beside it lies another—the term *gloss*.<sup>26</sup> Its etymology is interesting. On the one hand it references the explanation, translation, or definition of an object otherwise potentially obscure. In a broader sense the original Greek source (γλῶσσα (*glossa*)) suggests an act of translation from one language to another. That has now acquired a digital dimension.<sup>27</sup> On the other there is within it a sense of something that is, on its surface smooth

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<sup>22</sup> *The UN Guiding Principles on Business and Human Rights: A Commentary* (Barnali Choudhury (ed); Edward Elgar, 2023).

<sup>23</sup> Robert J. Tierney, “Toward a Model of Global Meaning Making,” *Journal of Literacy Research* 50(4) (2018) 397-422.

<sup>24</sup> Crowdsourcing Legal Commentary, Vox Populii, Cornell University Legal Information Institute (31 March 2010); available [https://blog.law.cornell.edu/voxpath/2010/03/31/crowdsourcing-legal-commentary/].

<sup>25</sup> Etymology Online, Comment; available [https://www.etymonline.com/word/comment]

<sup>26</sup> Etymology Online, gloss; available [https://www.etymonline.com/search?q=gloss].

<sup>27</sup> Takanori Mizowaki, Haruka Ogawa, and Masaru Yamada, ‘Linear versus Non-Linear Translation in Parallel Text Reading,’ (2023) 10 *Ampersand* 100124.

and lustrous, something that can shine in the light. That underscores the word in its active sense—to gloss—to make lustrous, smooth over, or sometimes to veil or shift the meaning of its object. Commentary in this sense of gloss adds a layer of teaching and of internalizing meaning—in the parlance of the 21<sup>st</sup> century—of impact.<sup>28</sup>

The second is the object of the work to be attempted—commentary.<sup>29</sup> Here one enters the world of intersubjectivity—that is the use of commentary to build solidarity within a community about the meaning and use of a text.<sup>30</sup> The commentary as gloss represents a performance of cooperation producing group solidarity.<sup>31</sup> Like its own building blocks, comments, a commentary is understood in three senses. *In one sense commentary is understood as the collection of an integrated or associated group of comments bounded by a common understanding of shared first principles.* One has a sense of commentary in this sense as evidenced in the great engaged interpretive projects like the Talmudic Gemara; but also the it underlies the glosses of Roman Law produced by medieval Law Schools,<sup>32</sup> or more generally European scholia or glossators, or Mesopotamian commentators on key texts of their era.<sup>33</sup> Indeed, there is a sense that the great cultural marker of civilization is the deep interlinking between literati culture (文人文化 *wenren wenhua*) and their inscribing, collating, and excerpting of critical sources of knowledge<sup>34</sup> now transposed in contextually relevant ways. This is commentary as translation, but also as conversion from a language that is specialized or embalmed in time and place, into contemporary and pragmatically useful space.<sup>35</sup> But it is also one that seeks solution to the question of ambiguity. Aquinas provides a model template—commentary as instruction.<sup>36</sup> Commentary here shapes its object from the inside rather than the outside.

*In its second sense, commentary starts from a first principle that the commentary is itself an object that, autonomous of the subject of its commentary, is also a subject of commentary in its own right.* One has a sense of commentary in this second sense, in an authoritative institutional setting, in the constitutional interpretation jurisprudence of common law courts.<sup>37</sup> Here commentary is meant to focus on enlightening a reader. The object is to extract meaning from text that is difficult and or obscure. The meaning of what is self-evident (in the context of the grammar and syntax rules in which it is found), that is what in the Anglo-American world might be referenced as “plain English” is otherwise unworthy of comment or gloss, except to the extent its “plainness” can be used to

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<sup>28</sup> See, e.g., Peter Muchlinski, “The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights,” *Business and Human Rights Journal* 6 (2021) 212-226.

<sup>29</sup> Etymology Online (Commentary); available [https://www.etymonline.com/word/commentary].

<sup>30</sup> Jan M. Broekman and Larry Catá Backer, *Lawyers Making Meaning* (Dordrecht: Springer 2013); Jordan Zlatev, “Meaning making from life to language: The Semiotic Hierarchy and phenomenology,” *Cognitive Semiotics* 11 (2018) 50-73.

<sup>31</sup> Alessandro Duranti and Nicco A. La Mattina, “The Semiotics of Cooperation,” *Annual Review of Anthropology* 51 (2022) 85-101.

<sup>32</sup> Josiah C. Russell, “Gratian, Irnerius, and the Early Schools of Bologna,” *Mississippi Quarterly* 12(4) (1959), 168-188.

<sup>33</sup> Eckart Frahm, *Babylonian and Assyrian Text Commentaries: Origins of Interpretation* (Guides to the Mesopotamian Textual Record 5; Münster: Ugarit-Verlag, 2011).

<sup>34</sup> Fan Wang, “How Late Imperial Chinese Literati Read Their Books: Inscribing, Collating, Excerpting,” *Book History* 24(2) (2021) 320-361.

<sup>35</sup> In the context of philology, see, e.g., Sheldon Pollack, “Future Philology? The Fate of a Soft Science in a Hard World,” *Critical Inquiry* 35 (2009) 931-961.

<sup>36</sup> Thomas Aquinas, *Summa Theologica* (Fathers of the Dominican Province (trans., 1911); Christian Classics, 1948 (12-65-1273)).

<sup>37</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Press, 1982 (original 8<sup>th</sup> edition 1915)); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (2<sup>nd</sup> ed., (Indianapolis: Liberty Press, 1997); Thomas C. Grey, “Do We Have an Unwritten Constitution?,” *Stanford Law Review* 27 (1975) 703; Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” *Harvard Law Review* 73 (1959) 1;

bring clarity to the otherwise obscure found elsewhere in text. The “*acte claire*” doctrine of EU law and the plain English limit on judicial glossing in the US suggest its institutional face.<sup>38</sup> To comment is to judge, and to judge is to guide, confine, and orient approaches to the text, tradition, or object that is the focus of comment in specific ways. That is, the commentary itself, like textual interpretation, shapes its object not from the inside but from the outside. It can serve as a conscious instrument of ideology//traditionalist or progressive.<sup>39</sup> That introduces the dynamic element of commentary—the dialogue between text (comment object), commentator, and what the commentator brings to the task of commentary.

*In a third sense, commentary is the expression of a strategic set of objectives meant to advance and apply, or to bend the object of commentary, to a specific ideological point of view.* Here one enters the domain of the public intellectual<sup>40</sup> and their interaction with text as a vessel that must be made to contain a particular and fixed set of answers that are grounded in and advance a particularized set of policy projects around an overarching rationalization of the world. This is the world peopled by civil society elements,<sup>41</sup> by politically strategic academics,<sup>42</sup> and by theorists—in the context of the human rights impacts of economic activity, principally by political theorists of a liberal democratic, Marxist-Leninist, and post-colonial anti-imperialist camps. Here commentary must be bent to the ruling ideology and strategically deployed to advance its operational objectives. Here commentary is a strategic tool of a vanguard, or a collective of leading social forces. Its object is the realization of a driving ideology within a text through the forms of commentary. Commentary, in this sense is the guidance necessary to understand the way a text incarnates a guiding ideology in a form that can be applied to a particular issue of managing social relations—for example the relationship and expectations around the human rights impacts of economic activity.

It is in this mix of approaches that the business of commentary becomes much more sensitive as it jiggles among the tasks of thinking, to that of discussing and disseminating. It at this critical nexus point between commentary, the commentator, culture, politics, ideology, that the conscious management of meaning through the instrumentalization of hermeneutics toward specific objectives may transform commentary from an exercise in revealing possibility to an instruction in orthodoxy. This is an ancient issue—though one that was unproblematic until this, critical, age.<sup>43</sup> The problem is magnified where the “ownership” of the object to be commented upon is itself a valuable prize in cultural-political battles for the control of meaning, and meaning making structures among leading social and cultural groups. That itself may be an important socio-political-cultural project, but one that leaps off from rather than resides in the UNGP itself.<sup>44</sup> The same applies, of course, where interpretation is

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<sup>38</sup> See, e.g., William Baude and Ryan D. Doerfler, “The (Not So) Plain Meaning Rule,” *University of Chicago Law Review* 84(2) (2017) 539-566; Lorenzo Ceccetti and Daniele Gallo, “The Unwritten Exceptions to the Duty to Refer After Consorzio Italian Management II: ‘CILFIT Strategy’ 2.0 and its Loopholes,” *Review of European Administrative Law* 15(3) (2022) 29-61.

<sup>39</sup> Kevin Tobia, Brian Slocum, and Victoria Nourse, ‘Progressive Textualism’ (2022) 110(6) *Georgetown Law Journal* 1437-1493.

<sup>40</sup> Cf., Richard Posner, *Public Intellectuals: A Study of Decline* (Harvard University Press, 2003); Pierre Bourdieu, ‘The Corporatism of the Universal: The Role of Intellectuals in the Modern World,’ *Telos* 81:99-110 (1989).

<sup>41</sup> Cf., Konstantin Reiners and Esther Versluis, “NGOs as new Guardians of the Treaties? Analysing the effectiveness of NGOs as decentralized enforcers of EU law,” *Journal of European Public Policy* 30(8) (2023) 1518-1536.

<sup>42</sup> See, e.g., Pierre Bourdieu, *Homo Academicus* (Stanford: Stanford University Press, 1988).

<sup>43</sup> Cf., Paolo Grossi, “Ideologia e Técnica em uma Definição Jurídica (a Definição Obertina de Feudo dos Glosadores a Cujas) Ideology and Technique in a Legal Definition (the Obertine Definition of Feudo from the Glossators to Cujas),” *Seqüência: Estudos Jurídicos e Políticos* (Marjorie Carvalho de Souza (trans.) 39 (2018): 220-256.

<sup>44</sup> Cf., Akinwumi Ogunranti, “Localizing the UNGPs – An Afrocentric Approach to Interpreting Pillar II,” *Business and Human Rights Journal* (2022) 1-19.



grounded on measurement—there the issue is compounded by a double translation—a perspective driven interpretation of text that is then itself the basis of its translation to the language of measurable effects.<sup>45</sup> It is here that commentary moves into that more contentious arena of polemic, or rather that ne moves from commentary to strategic intervention—something quite important to be sure, but not the stuff of commentary. And it is precisely that sort of agenda or ideologically perspective commentary that ought to be avoided if commentary is to serve its fundamental purpose as explanation, interpretation, and translation of it so that polemic, agenda, strategy, or ideologies might be more soundly applied to it in the service of whatever it is the UNGP are to be used as instrument, pathway, bridge, or foundation. A proper commentary ought to serve all ideologies, strategies, agendas, hopes, dreams and the like alike. That is the aim here.

That is the case with the UNGPs. Its great importance is as the *urtext of the language of business and human rights*, and now of business, human rights, sustainability and climate change. The normative power of urtext ought not to be underestimated. The concept of urtext, translated from the music field,<sup>46</sup> centers on the privileging of text not embellished by gloss, that is of text as originally transmitted in written form. It is the transposition of a concept taken from the field of music in which the purity of original text is offered—over and over—as a base from which one can comment or gloss without the distraction or pull of other glosses.

Yet the UNGP urtext becomes a temptation too irresistible to present without gloss—an authoritative, or a coercive, gloss. Everyone will have a go. That makes it a prize for anyone (person or collective) seeking to manage not just its language, but to invest that language with a meaning that provides the basis for instrumentalizing their particular world views, principles, strategic agendas, and sensibilities. Commentary, then, sometimes finds it irresistible to stray far from the orientation of the glossator. It represents an embellishment that fundamentally guides urtext toward an altered state. That is fair. But that is politics clothed in meaning making. It comes closer in concept to what students of semiotics sometimes refer to a 21<sup>st</sup> century phenomenon of discursive fluidity—of conversion (of text and meaning) that resonates with the flow of social patterns.<sup>47</sup> Whatever one thinks of this natural impulse to control sources of language and perception over an aspect of human life, the impulse itself suggests both the importance of the task of commentary, and the sensitivity one ought to bring to its production.

Nonetheless, the overlayment of glossing produces either a tendency to *bury text in its glosses*, so that the urtext is lost or becomes irrelevant. This is sometimes the fate of documents like the U.S. Constitution, whose urtext has now been buried in the living constitution of centuries of judicial gloss. Conversely, commentary can sometimes reshape either the way that text is approached or shape the principles and perceptions through which it can be read. That, certainly, has been the century long ambition of august institutions like the American Law Institute, whose glosses (and sometimes reconstructions) of the law of the United States have in their own way become both dispositive as the authoritative means of reading text or rationalizing judicial standards expounded through judgments rendered in cases. This is inevitable and unavoidable as a matter of the linearity of time and

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<sup>45</sup> James Harrison and Mark Wielga, “Grievance Mechanisms in Multi-Stakeholder Initiatives: Providing Effective Remedy for Human Rights Violations?,” *Business and Human Rights Journal* (2023) 1-23 (online).

<sup>46</sup> G. Henle Verlag, “What is Urtext” (nd); available []. “The idea behind it is simple and easy to understand. The musician is offered a musical text which reflects the composer’s intentions. The text is undistorted, meaning that neither the editor nor the publishing house have undertaken changes that might misrepresent it. . . This might appear self-evident. However, well into the twentieth century the great performers of the day were absolutely convinced that musical texts – especially those of works from the eighteenth century – were incomplete or had suffered from faulty transmission, in particular concerning “how” they were to be performed.”

<sup>47</sup> Umberto Eco, *Chronicles of a Liquid Society* (Richard Dixon (trans); NY: Houghton Mifflin 2017); Jan M. Brockman, *Knowledge in Change: The Semiotics of Cognition and Conversion* (Springer, 2023).

the mortality of those who draw from text. Commentary provides a link to perception—cognition—that has floated downstream in time from the present.

This Commentary is intended to provide a comprehensive, principle by principle, analysis of the provisions of the UNGP. That analysis, in turn, is undertaken within a commentary on the overarching unifying framework of the UNGP as itself the development of a system for approaching issues of business and human rights by states, enterprises and civil society. To that end, it will draw on *travaux préparatoires* leading to the UNGP along with the practices, initiatives and other materials (toolkits, analytical frameworks and the like) developed since the adoption of the UNGP in 2011. In that context, attention will be paid not just to the work of those who were central to the creation of the UNGP but also to the critical assessments and challenges articulated during the process leading to endorsement, and thereafter. It will also tackle the rationale and objectives of the various provisions of the UNGP, focusing on their impact for the development of a common regime on the governance of human rights through economic activity.

Textual commentary, though, must also be informed by the way that text itself is utilized and applied. Application and use enriches the meaning of text—or at least suggests how those with the authority of influence to mold textual meaning to their own vision may help shape (and change) the meaning, focus, and relative weight of text. To those ends, the output of other institutions that have adopted or referenced the UNGP within their own frameworks will also be considered. Principal among them must be the interventions of Working Group on the Issue of Human Rights and Transnational corporations and other business enterprises (the “UNGP Working Group”), a special procedure established simultaneously with the endorsement of the UNGP in 2011.<sup>48</sup> Also useful are the work of the OECD and its National Contact Points as well as judicial decisions by national courts and regional human rights tribunals, among others, that draw on the UNGP. Since the early 2020s the legislative efforts of primarily European states and the EU to develop legislative programs in the spirit of the UNGP also lend some weight to the evolution of textual meaning—at least as it is used going forward. It is understood that such application trajectories are both a moving target and generally at their formative stages of development. In that light, application is useful for textual commentary to the extent that it can provide hints about the development of structures and frameworks, of guiding premises, that are used to interpret and apply the UNGP—that is the framework for identifying the proclivities to align with one or another plausible interpretive pathway for the UNGP text.

As such, the commentary will attempt to meet several objectives, some of which are worth foregrounding here. One is to raise awareness about the significance of the UNGP as a framework for governance within states, and enterprises. Another is to consider the interaction between the UNGP and the international practice since 2011. Still another is to explore the key criticisms of the UNGPs, both as a system and with respect to individual provisions as well as to explore how the UNGP interact with regional and specific governance frameworks on human rights in economic activity. A related objective is to examine the relationship between the UNGP and other international instruments, both public and private as well as to examine the contribution of judicial and non-judicial mechanisms in the provision of remedy. Lastly this contribution has as an objective to provide concrete illustrations of the challenges and best practices that are being developed in line with emerging consensus on the application of the UNGPs.

These objectives and that framing cannot be undertaken in a vacuum. The author is quite aware of the sensitivities that have emerged in this area, especially in the wake of the endorsement of the UNGP in 2011. The ambiguities and complexities that are contained in the UNGP make the case for the production of commentary; at

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<sup>48</sup> UNHRC UNGP Res, §6.

the same time these continue to serve those who adhere, sometimes passionately, to ways of rationalizing the world only within the premises of which it is possible to understand the UNGP text, and as sub-text, and as meta-text. The Commentary will avoid polemic or the appearance of taking sides. The intent is to turn agnosticism into a strength that can contribute to the value of the commentary beyond current debate, and provide a basis for current and future generations to return to the source as they continue the long struggle to shape and reshape social relations in the field of economic activity. It is hoped that this approach will make it possible to better address key arguments that helped form the UNGP as well as those key criticisms, in a way that invites the reader to assess and arrive at her own conclusions. The UNGP is also in its formative stage of development; as Professor Ruggie suggested it represents the end of the beginning. The approach to be adopted is one of systemic integrity and coherence—to let the logic of the UNGP to drive analysis. At the same time, the work will lay out the debates and controversies that have emerged around the UNGP, as well as their consequences for the advancement of the project of regulating the human rights effects of economic activity in whatever form undertaken. Substantial effort will be made to identify and consider all significant viewpoints with respect to ambiguities of interpretation and to identify issues where there is little consensus. The overall objective is to present the range of plausible approaches that the logic of the UNGPs would suggest but also identify those areas where ambiguity remains unresolved and to point the way to resolution. A final note: the book will avoid a formal legal analysis of the provisions of the UNGP. The UNGP are not law, though they point to law; they are not social norms though they suggest its contours. The UNGP is something quite new and distinctive—a systemic framework for developing a new focus and language through which governance systems may be ordered. That is both the genius of the UNGP and the difficulty of using conventional forms to gloss its principles. The Commentary, then, will point to legal effects and societal consequences, as well as expectations for governance of policy and markets oriented behaviour oriented mechanics.

This commentary, then, is written with these structural, discursive, ideological, historical, and political foundations of comment well in mind. The book Commentary will have the following features. First, it includes a principle-by-principle analysis, accompanied by a bibliography of significant academic literature relevant to a provision, an overview of the drafting history of the provision and an analysis of the text. Second, it attempts an analysis of the extent to which the UNGP organises a body of international law or departs from it, as well as the extent to which the UNGP Principles highlight tensions between international normative and national legal orders. In that context it will draw on relevant thematic sources from international human rights law, appraising the contributions of other instruments such as the International Bill of Human Rights and other relevant instruments to the UNGP. Third, it will focus on key areas of policy implications. Foremost among them will be an appraisal of the interaction between the UNGP, international law, and societal norms; that is an engagement with the polycentricity that Professor Ruggie noted appeared at the heart of the 3 Pillar UNGP project; thematic focus will include human rights and economic activity in weak governance or conflict zones. Fourth, it will embed consideration of applications of the UNGPs as a modality of both interpretation and development of the UNGPs themselves.

To that end, the commentary will include an examination of the case-law, toolkits, human rights due diligence forms, and other expressions of state agencies, international courts and tribunals, civil society, labor organizations and others in producing practical applications of the UNGP. Fifth, related to the application of the UNGP within the broad 1<sup>st</sup> Pillar structures of the state and law, the Commentary will examine the UNGPs' application by 2<sup>nd</sup> Pillar institutions. Areas of focus will include an analytical and comprehensive assessment of the UNGP as a key-working tool for the management and protection of human rights in economic activities of states, enterprises, other organizations, and individuals. Sixth, the Commentary will consider the effect of key sources of opposition, at the macro and micro level to the idea and the text of the UNGPs in its development and character. That will be undertaken through a clear and thorough examination of the debates and criticisms around the

UNGPs as conceived and thereafter, as implemented. Seventh, no Commentary can be complete without considering the contribution of the UN's Special Procedures, and in the case of the UNGP, the work of the Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights to elaborate an international legally binding instrument on transnational corporations.

Putting this all together gives one a sense of the complexities of commentary. But more importantly it suggests the central role of disclosure. This is especially significant where the object is to shift the power of decision—of the way that explanation, analysis, interpretation, etc., is received—from the commentator to the reader. The object here is not to hide but rather to expose the principles and structures from which the act of commentary can be undertaken. It exposes the range of alternative approaches that are plausible within the cages of the UNGP structure and its thirty one principles plus its general principles. It invites the reader to be an active participant in the further construction and application of the UNGP—and in that way to contribute to its meaning in ways that build on the work and actions previously undertaken. And always, the key element of this commentary is to provide an anchor—a center—around which the significance and effects of intention, of intent, of effects, and of application and resistance, can be read consistently over time. *That anchor, and that center, is the text of the UNGP itself.*

That text is source, and gateway. It is a source in the sense that it defines a space and then populates it with key elements of structure, perspective, form, and process. In this sense authoritative text, like law, ought to be “adequately accessible;”<sup>49</sup> or in the language of Montesquieu, it ought not be subtle; they are designed for people of common understanding not as an art of logic, but as the plain reason of a father of a family.<sup>50</sup> Accessibility, though, aligns with completeness of applicability. In that sense the text serves as gateway requiring inference and interpretation when applied to specific context and over time. In the case of the UNGP, its text is itself a portal toward other spheres and forms of engagement—in markets, in social relations, and in and through the language of regulation in every conceivable context in which economic activity occurs. It is also a gateway from out of it is confined space—as words in text, and text as words placed in sequences that are meant to invoke the laws of syntax, and grammar, to represent meaning. Beyond that confined space are the realms of the quantitative; the measurable made accountable through a quite different set of languages, those of analytics and those of coding. The UNGP are gateways in another sense—they stand for, or stand in for, a host of aspirational goals and principles that it makes manifest.<sup>51</sup> In this sense it is not so much what may be in the text of the UNGP that makes it worthy of commentary, but its symbolic existence as gateway from out of an ordered past without a center. This is the gateway that defines the space that the symbolism of its text makes possible.

Text in general, and the text that is the UNGP, then, are bridges between aspiration and realization. It is a symbol, the invocation of which now serves as a conceptual foundation for regulatory frameworks and for the ordering of expectations in the market. At its broadest, the UNGP loses coherence, its specific interpretation becomes a secondary element of its principal impact—as a representation of a system for the construction of which was begun in earnest with the endorsement of the UNGP itself in 2011. This Commentary, then, might best serve as a guide not just to the specifics of text, of its ideologies and the plausibility of its various interpretations, but to its utility as a monument around which all sorts of other regulatory approaches may be anchored, legitimated, or developed. To that end, one can speak of the UNGP, and the value of its commentary, in terms of the ideologies

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<sup>49</sup> *Sunday Times v. United Kingdom*, European Court of Human Rights, Application 6538/74 (26 April 1979); ¶ 49.

<sup>50</sup> Charles Louis de Secondat de Montesquieu, *The Spirit of the Laws*, Book XXIX, Chp. 16, in Robert Maynard Hutchins (ed.); *Great Books of the Western World* (Chicago: Encyclopedia Britannica, 1952 (1748), p. 267).

<sup>51</sup> This becomes clearer in the travaux préparatoire discussed infra, Chapter 3.

and plausibility of meaning, as well as in terms of its performative politics by those who would seize its text for their own ends.

### 1.3 The Meaning of Text and the Performative Politics of Commentary

One of the difficult issues for a glossator is that of the object of the gloss. This opens the door to two related challenges, the scope of annotation, and the lens through which that gloss is to be undertaken. More significant still, perhaps, is the issue of the underlying ideology of the act of commentary itself. The term “Commentary” is so ubiquitous, and now ancient in advanced societies that it is easy to neglect the challenges and ambiguities often veiled by its symbolic rendering as text. Turning again to etymology, the term in the principal languages originating in modern form in Europe help reveal some of that ambiguity and challenge. The focus is on explanation of *obscure and difficult passages in text* that may be culturally important, religious fixed and eternal, or otherwise authoritative as a source for the justification of the organization of social relations, but that acquires its own methodological structures, sometimes as important as the object of commentary.<sup>52</sup> It can serve to augment explanation and curate application and understanding by those responsible either for the creation or the protection of the integrity of the text for which commentary appears necessary. That also suggests an educational role—targeting those who must explain or apply these texts or practices to others. In this sense commentary augments collective solidarity through guidance by a vanguard or elite invested with a special relation to text.<sup>53</sup> In its most positive form, it can represent “an organic synthesis of the essential and fundamental contents” of doctrine, written and oral.<sup>54</sup> Yet it can also serve the opposite purpose—to expose and resist orthodoxies deepened through the commentary of groups devoted to the protection of a specific way of approaching text, its meaning, and the principles through which textual analysis and application may be approached.<sup>55</sup>

Sometimes lost in these structural social relations are its object—*text situated in place and time*. Text can acquire a life of its own. *In principio erat Verbum, et verbum erat apud Deum, et Deus erat Verbum. Hoc erat in principio apud Deum. Omnia per ipsum facta sunt; at sine ipso factum est nihil, quod factum est.*<sup>56</sup> At its broadest, text may be understood broadly as any authoritative or socially important expression around which guidance appears to serve a positive purpose. Commentary cannot escape the tightly woven territories within which text is confined, whatever the commentator’s pretensions to politics, cultural manifestations, or instrumentalization. Commentary navigates most soundly within the kingdom of text; it can meander elsewhere but then it changes its character—to polemic, program, re-education, and the like, for the greater glory of those whose collar the

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<sup>52</sup> See, e.g., Andrea Padovani, “‘Tenebo hunc ordinem’ Metodo e struttura della lezione nei giuristi medievali (secoli XII–XIV),” *The Legal History Review* 79 (2011) 353–389.

<sup>53</sup> This vanguard may be politically constituted and formally inserted into social relations—the communist party for example. Or they may constitute a priesthood—for example within religious communities. Likewise they may also develop informally through social interactions or by membership in a particular class of people, for example academics, or judges, or lawyers, or experts—as is common in some liberal democratic societies. Cf., Bertrand de Jouvenel, *On Power: The Natural History of Its Growth* (J.F. Huntington (trans); Indianapolis: Liberty Fund, 1993 (1947).

<sup>54</sup> *Catechism of the Catholic Church* (2nd ed.) Libreria Editrice Vaticana., 2019) ¶ 11.

<sup>55</sup> Friedrich Nietzsche, *The Antichrist* (H.L. Mencken (trans) NY: Alfred A. Knopf, 1923; Project Gutenberg eBook #18322 (18 September 2006)), ¶ 8 (“So long as the priest, that professional denier, calumniator and poisoner of life, is accepted as a higher variety of man, there can be no answer to the question, What is truth? Truth has already been stood on its head when the obvious attorney of mere emptiness is mistaken for its representative”), also § 26.

<sup>56</sup> *Ioannes 1:1-3* (In the beginning was the Word, and the Word was with God, and God was the Word. He was with God in the beginning. All things were made through him, and nothing that was made was made without him. John 1:1-3; translation Sacred Bible.org; available [https://www.sacredbible.org/studybible/NT-04\_John.htm] ; The King James Version translates et “Deus erat Verbum” from the Vulgate as “the Word was God”).

commentary wears.<sup>57</sup> While it is tempting to focus on its consequences, the challenges of text for producing explanation, analysis deserves sustained attention. Text presents its own constellations of difficult questions, questions the resolution of which colors not just the analysis/explanation but also exposes the fundamental premises from which commentary is approached. Simple tasks—identifying obscurity requiring explanation, choosing the basis on which to frame explanation/analysis (word, phrase, etc.), and investing the symbolic directions for reading text (punctuation, grammatical rules)—become applied manifestations of presuppositions that themselves may reveal an underlying lens that in turn reflects choices about the way the world is rationalized (to the exclusion of others). Likewise the determinant of the choices of emphasis—text or intent—are themselves the end product (rather than the beginning) of the application of presumptions about the nature of text, the basis of its authority and the identification of the sources of that authority. The determination that text speaks for itself, or that text merely serves as a snapshot of the intent and objectives of those invested with the authority to produce authoritative expressions of intent and objectives changes the lens of explanation and analysis. More difficult, but in contemporary commentary more prevalent, is the premise that both text, or the intent or desired effects it may have memorialized, may be less relevant than the uses to which the community into which it is projected puts it. Thus it is not either text or objectives, but application that matters for commentary—a phenomenological approach to hermeneutics. But like commentary that privileges either text or intent, applications privileging commentary is also locked in time. It can suggest only the contours of application through the time of publication and thus becomes irrelevant with the passage of time, since the power of this commentary depends on its temporal currency.

The choices have important consequences. *Text based explanations* are grounded in the notion of the separation of collective acts (people) from the expression of their collective actions (which for the preservation of the integrity of the system of social relations) must be detached from the living individuals who produced it. This is an ideology that guards against abuse of discretion and the arbitrary in human relations by making text exogenous to those who produce it. Nonetheless, it is an approach that becomes deeply mired in the challenges of language and linguistics, and especially its fluidity and indeterminacy other than as acts of collective power.<sup>58</sup> *Intent based explanations/analysis* are grounded in the premise that textual autonomy is impossible but must be grounded in the context and social relations within which it is produced. And thus text is a gateway bridging the exercise of authority and its temporal application from the moment of creation onward. This is an ideology that reflects the vertically ordered hierarchical structures of authority that presumes authority flows down. *Application based explanation* effectively displaces the primacy of text as autonomous or of the creator as controlling in favor of the notion that both text and intent are merely the static starting points for the dynamic process of dynamic interaction between text/authority and the population into which it is projected. What animates text and intent are its *use*. Text and intent are inanimate (or in the language of critical scholars, radically indeterminate and thus legitimacy threatening);<sup>59</sup> the only power they have is to move others to act. This is a bottom up ideology of social relations; if text is the clay that molds the body of an object created for a purpose, then that clay and purpose become animated

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<sup>57</sup> This, it seems, is built into the nature of commentary, especially by those whose patronage made commentary possible and desirable. See the discussion in Davis S. Clark, “The Medieval Origins of Modern Legal Education: Between Church and State,” *The American Journal of Comparative Law* 35(4) (1987) 653-719.

<sup>58</sup> See, generally, Elżbieta Chrzanowska-Kluczevska, “Textual indeterminacy revisited: from Roman Ingarden onwards,” *Journal of Literary Semantics* 44(1) (2015) 1-21; Schlomo C. Pill, “Leveraging Legal Indeterminacy: A Judeo-Islamic View of the Indeterminacy Problem and the Rule of Law,” *Journal of Law, Religion, and State* 6 (2018) 147-198.; Michael C. Dorf, “Legal Indeterminacy and Institutional Design,” *New York University Law Review* 78 (2003) 873-981.

<sup>59</sup> Cf., Ken Kress, “Legal Indeterminacy,” *California Law Review* 77 (1989) 283-337.

(ensouled) by through the breath of application. And yet the great fear—that application will be monstrous, and unguided, text and intent will be obliterated.<sup>60</sup>

And then there is the additional wrinkle of non-linear text and textual analysis—including its context in place, space, and time. One no longer necessarily reads a text linearly; for example news platforms provide simultaneous texts constituting fragments of an evolving whole.<sup>61</sup> Linearity touches on translation and transposition.<sup>62</sup> Text need not be memorialized in letter or by script. Or, one does not read a single text at a time; hypertext and links permit simultaneous textual reading. And text itself might represent a reconstruction from coded instruction—an interpretive translation from the language of machine transmission. The same applies where the text represents a reduction of speech or acts that conveys text visually or orally.<sup>63</sup> One can read multiple portions of text simultaneously as well. Word searching, for example, permits me to read the UNGP text knowing that “smart mix” is mentioned only once,<sup>64</sup> but that “size of the business” is mentioned twice,<sup>65</sup> and that “human rights impact” is mentioned fourteen times.<sup>66</sup> Nonlinear reading would produce an interpretation of the term “human rights impact” by simultaneous reference to each of these iterations of the phrase as a function of variations in meaning (or meaning extracted from textual context) across these fourteen “mentions.” And beyond the issue of non-linearity in hermeneutics (and commentary) looms the now ever larger issue of sources of commentary. Machine learning algorithms and generative intelligence can now, through processes of iterative dialogic mimesis,<sup>67</sup> produce commentary, and nudge reading (from its interfaces with humans) from out of its own logic and the evolution of its application of the core premises from which its iterative dialogical exercises are framed. Commentary and hermeneutics autonomous of humans can, indeed, as Allen Turing once suggested, “take us by surprise” in now quite comprehensive ways.<sup>68</sup>

Commentary that remains rooted in the pre-virtual produces anachronistic readings of text. Nonetheless, while commentary grounded in digital hermeneutics is in its infancy, its importance, especially in the context of consultation and consensus based meaning making, cannot be underestimated. Its production of multi tracking narrative reinforces the tendency of textual interpretation to fall within ranges of plausibility, simultaneously

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<sup>60</sup> “That is also my victim!” he exclaimed. “In his murder my crimes are consummated; the miserable series of my being is wound to its close! Oh, Frankenstein! Generous and self-devoted being! What does it avail that I now ask thee to pardon me? I, who irretrievably destroyed thee by destroying all thou lovedst. Alas! He is cold, he cannot answer me.” Mary Wollstonecraft (Godwin) Shelly, *Frankenstein; or, the Modern Prometheus* (Project Gutenberg eBook #84 31 October 1993), Chp. 24; available [https://www.gutenberg.org/files/84/84-h/84-h.htm#chap01].

<sup>61</sup> See, e.g., Pablo Porto López, ‘The dynamic configuration of non-linear texts in live blogs: a discursive approach,’ (2022) 43(3) *Text & Talk* 313-332

<sup>62</sup> Amrollah Hemmat, ‘Hermeneutical translation of classics and cultures: the case of the *I Ching* and China’s inter-civilizational dialogue,’ (2021) 5(1) *Comparative Literature: East & West* 15-28.

<sup>63</sup> Cyrul and Pełech-Pilichowski, ‘Legislating in hypertext (Legislacja w hipertekście),’ *supra*, pp. 30-38. The issue of adaptive legal text, that is text that includes links to its own interpretation poses a challenge only now in its infancy. *Ibid.*, pp. 38-40.

<sup>64</sup> UNGP, Principle 3, Commentary.

<sup>65</sup> *Ibid.*, Principles 17(b) and 18(b).

<sup>66</sup> *Ibid.*, Principal 3(d), 11, 12 (Commentary only), 13, 14, 15, 17-22, 24, and 29-30 (Commentary only).

<sup>67</sup> Larry Catá Backer, ‘The Soulful Machine, the Virtual Person, the ‘Human’ Condition, and its Social Constitution –An Encounter with Jan M. Broekman, *Knowledge in Change: The Semiotics of Cognition and Conversion* (Cham, Switzerland: Springer Nature, 2023),’ (2024) 37(3) *International Journal for the Semiotics of Law* <https://doi.org/10.1007/s11196-023-10065-4>.

<sup>68</sup> Alan M. Turing, ‘Computing machinery and intelligence,’ (1950) 59(236) *Mind* 433–460; discussed in interesting ways in Sylvie Delacroix, ‘Comouting Machinery, Surprise, and Originality,’ (2021) 34 *Philosophy and Technology* 1195-1211.

capable of multiple approaches within a defined range of premise clusters.<sup>69</sup> This is particularly useful in the development of what becomes the UNGP as a core part of the SRSG's initial mission was to develop evidence based approaches. As John Ruggie noted in the text of his opening statement to the UNHRC in 2006, "The resolution asks me to "identify" and "clarify," to "research" and "elaborate," to "compile" compendia and "develop" materials. Only then, with that solid analytical and evidentiary basis established, am I to make recommendations for your consideration."<sup>70</sup> One starts, then, from a baseline in digital hermeneutics—combining normative expressions of quantifiable data built around presumptions that fuel the SRSG's mandate. In that context, the meaning that can be extracted from information (including text) is dependent on the multiple contexts in which they are embedded.<sup>71</sup> The UNGP, then, might be approached for commentary as much as a platform as a linear text in the traditional sense.<sup>72</sup>

### 1.3.1 Words and Commentary.

*The ordinariness of meaning.* It has long been a mainstay of interpretation, especially among jurists, and among those even more passionately embraced by those emerging from the traditions that can be called "common law," that words ought to be given their *ordinary* meaning.<sup>73</sup> Indeed, the good doctors of jurisprudence, especially in the United States and then from there among those who admire this sort of approach, have devoted themselves not merely to the gospel of ordinariness, at least when it comes to meaning, but also to the business of preaching or teaching the "word."<sup>74</sup> They, in turn, stand on the shoulders of giants, who built a special room for legal hermeneutics and interpretation within the mansions of hermeneutics, cognition, and the construction of

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<sup>69</sup> On digital hermeneutics, see, Alberto Romele, Marta Severo, and Paolo Furia, 'Digital hermeneutics: from interpreting with machines to interpretational machines,' (2020) 35 AI & Society 73-86 (distinguishing between methodological hermeneutics (computer mediated interpretation); data and text oriented hermeneutics (refocusing meaning on the means used for gathering up text); and quantitative and qualitative credos in digital hermeneutics (a qualitative corrective for quantitative methods). Cf., Tom Van Nuenen, and Inge van de Ven. 'Digital Hermeneutics and Media Literacy: Teaching the Red Pill across Horizons,' *Tilburg Papers in Culture Studies* (2020) 201, paper 241 available [<https://www.tilburguniversity.edu/research/institutes-and-research-groups/babylon/tpcs>] last accessed 1 March 2024.

<sup>70</sup> John G. Ruggie, Opening Statement to United Nations Human Rights Council, Geneva, Switzerland (25 September 2006); available [<https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf>], last accessed 13 February 2024.

<sup>71</sup> Alberto Romele, *Digital Hermeneutics* (London: Routledge, 2000); discussed in Ângelo Milhano, 'Book Review: Romele, A. *Digital Hermeneutics*,' (2021) 44 *Trans/Form/Ação*, Marília 265-274.

<sup>72</sup> For a caution, see, Paul Piatkowski, 'Deterritorializing the Textual Site in the digital Age: Paratextual and Narrative Democracy in Mark Z. Danielewski's *Only Revolutions*,' (2019) 43(1) *Journal of Modern Literature* 169-187.

<sup>73</sup> Kevin P. Tobias, "Testing Ordinary Meaning," *Harvard Law Review* (2020) 134:726-806.

<sup>74</sup> See, e.g., among the mountain of worthy efforts: Felix Frankfurter, Some Reflections on the Reading of Statutes, *Columbia Law Review* (1947) 47, 527; Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, "Text and Context: Contract Interpretation as Contract Design," *Cornell Law Review* 100 (2014) 23; Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge, Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012); Lawrence M. Solan, *The Language of Judges* (1993); Lawrence M. Solan, *The Language of Statutes: Laws and their Interpretation* (2010); Larry Catá Backer, "Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture," *Boston College Third World Law Journal* 20 (2000) 291.



knowledge.<sup>75</sup> And they define a sub-set of semiotics that has acquired a life of its own within the regulatory jurisprudence of American common law ideological practice, for example.<sup>76</sup>

The goals are worthy. Its importance is substantial enough to induce generations of students of legal semiotics to indulge, without irony, in its study.<sup>77</sup> While for jurisprudence, the object is both “pure” (to capture the singular or best or plausible essence of meaning of a word) and practical (in a power-business sense) to “sell” meaning to those organs of state and market that might then by operation of their own functions in society, impose that meaning on the collectives over which they exercise some measure of authority. One cannot detach the ordinariness of meaning from the power to compel (public and political) or induce (private, cultural, economic) adherence in collective life. And that brings one back to the word. “So there must be a close connection between law and society, between language and legal discourse. Before everyday language can compose this expressivity, it needs the ‘word’ as its ultimate building block in language.”<sup>78</sup>

Taking a broader view, whatever the quantum of effort, and however important the stakes, this effort might be supposed to amount to nothing more than a great feat of jurisprudential bathos, though a critically important one for the operation of a collective within its time.<sup>79</sup> Nor is it even a particularly subtle and complicated insight derived in essence from theories of communication, that is the way that grunts and scratching can be commonly decoded by a group trained in that art. Nor further still, does the insight jar among those who worry about the alignment of symbol (text) or performance (utterance, including inflexion) in the construction of predictable and imitable invocation (text and performance) or response (reading and hearing).<sup>80</sup> One operates in the field of social relations always in the service of the ordinary; the essence of Commentary might then be well situated within the ordinary project extraction of meaning, plain meaning, from words, or their performance in speech or in action. One performs text as commentary, and yet commentary (or the treatises into which they may be embedded) is not merely the performance of text but the script through which commentary is performed.<sup>81</sup> And that brings one back to the word in its broadest sense: *In principio erat Verbum*.

In that insight lies contradiction—and the great challenge for Commentary. The more tightly one holds to the idea that a word has a plain meaning, that the word incarnates the ‘ordinary,’ the more difficult it is to grasp that meaning in fact—*et Deus erat Verbum*. This is the problem of the word, what in ancient Chinese rhetoric

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<sup>75</sup> See, e.g., Francis Lieber, *Legal and Political Hermeneutics* (3d ed. 1880; Friedrich Carl von Savigny, I *System of the Modern Roman Law* 66-268 (ed. 1979) (1st ed. Berlin 1849).

<sup>76</sup> John F. Manning, Textualism and Legislative Intent, (2005) 91 Va. L. Rev. 419; Victoria Nourse, ‘Textualism 3.0: Statutory Interpretation After Justice Scalia,’ (2019) 70 ALA. L. Rev. 667 (2019); Kevin Tobia & John Mikhail, ‘Two Types of Empirical Textualism,’ (2021) 86 Brook. L. Rev. 461.

<sup>77</sup> Jan Broekman and Larry Catá Backer, *Lawyers Making Meaning: The Semiotics of Law in Legal Education II* (Dordrecht: Springer, 2013).

<sup>78</sup> Jan Broekman, *Meaning, Narrativity and the Real: The Semiotics of Law in Legal Education IV* (Dordrecht: Springer, 2016), p. 96.

<sup>79</sup> For a brilliant exposition in the context of the transition of the meaning of Irishness, see Donald Harman Akenson, “Public Taste: Baths Ain’t Always Bad,” *Queen’s Quarterly* 127 (2020) 244-263.

<sup>80</sup> Jan Broekman, *Knowledge in Change: The Semiotics of Cognition and Conversion* (Dordrecht: Springer, 2023).

<sup>81</sup> Erik Ringmar, “The Problem with Performativity: Comments and contributions,” *Journal of International Relations and Development* 22 (2019) 899-908 (“To perceive and to conceive are closely related activities and explicit interpretations become possible only because of this embodied interaction. Theatrical performances are one way in which we do this.” *Ibid.*, p. 906).

touches on the issue of *ming-ming* (明名 intelligent naming).<sup>82</sup> And what in the Judeo-Christian tradition touches on the intimate connection between creation and naming.<sup>83</sup> Intelligent naming, and the connection between creation and identification, sets the fundamental template—the eternal in the semiotics of religion. Meaning, even in its ordinary senses—“is not a thing.”<sup>84</sup> It is instead better appreciated as the product of symbols that encode instructions for perception that is in constant motion as it is shared among community of encoders. Put differently, the problem of the word, and the language built around it, is that it is an object the value of which is derived from the production and consumption of meaning that serves the community of meaning producers and users—that is as an object of language platforms.

That, in turn, embeds a number of instabilities. Seven are worth identifying:

*First there is the matter of time.* People die, societies change, and with that death and those changes, the words that may have been plainly meaningful in one way at one time and among a generational cohort of people may lose both plainness and meaning. The famous example of the meaning of the term “commerce” for purposes of the US Constitution, or for that matter the lain meaning of equality in a society in which when it was first proffered females virtually no political and limited economic rights, while others, mainly people of African descent were enslaved.

*Second is the matter of technology.* Technology changes society. More importantly, technology changes the way in which it is possible to “read” a text—as well as the character and location of that text (on paper, in a website, as a part of a larger data set, and the lie). Those changes must be built into the language and communication of that society and its structures of operation and power. Those changes are sometimes built into the language society uses. For example, the meaning of “copy and paste” in the age of the word processor is quite different than at the of the founding of the American or the French Republics, or even of the People’s Republic of China. More transformative is the technology of word searching in text, and the simultaneity of text reading through the now ubiquitous technology of hyperlinks. Simple linear reading of text, and commentary based on that practice, now are substantially less useful or relevant.

*The third is the matter of migration.* People bring all sorts of baggage with them when they migrate. Among this baggage is their language. European languages are filled with examples of substantial changes in vocabulary, meaning and usage during periods of great migrations—for example the waves of migrations of Angles, Saxons, Norman French, Danes, and now large populations from what had been the imperial domains of the United Kingdom are examples within a single language group. Changes here are subtle and sometimes suggest the ways that people seeking to learn a host language change it in the process. This pattern continues today, and especially important for reading the six official languages of the United Nations—Arabic, Chinese, English, French, Russian, and Spanish. More interesting still are efforts, officially embedded since the mid 1990s, in which clusters of states have sought to challenge the dominance of English within the UN system.<sup>85</sup>

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<sup>82</sup> Guiguzi (鬼谷子), *Guiguzi: China’s First Treatise on Rhetoric; A Critical Translation and Commentary* (Hui Wu (trans.); Carbondale: Southern Illinois University Press, 2016 (before 220 A.D.)); Book II.6.1.

<sup>83</sup> Genesis 2:19 (KJV) (“And out of the ground the Lord God formed every beast of the field, and every fowl of the air; and brought them unto Adam to see what he would call them: and whatsoever Adam called every living creature, that was the name thereof”).

<sup>84</sup> Broekman, *Meaning, Narrativity and the Real*, supra, p. 94.

<sup>85</sup> United Nations General Assembly, Resolution on Multilingualism A/RES/76/268 (21 June 2022) (“regrets the delays in the elimination of the disparity between the use of English and the use of the five other official languages in the archiving of official meetings webcasts by the Department of Global Communications” *ibid.*, ¶ 28, “notes with concern the disparity between the English and the non -English languages on the websites maintained by the Secretariat” *ibid.*, ¶ 49).

*The fourth is the matter of linguistic functional differentiation among same language speakers.* In the English speaking world it is something of a cliché to suggest that lawyers speak a different language than others; but the same applies to other fields. Terms of art are as much a part of the world of business and they are a part of the world of law, science, religion, and other sib communities with their own argot. Plain meaning here becomes a meadow held together only by proximity and pollination (sometimes).

*The fifth is the matter of engineering.* From the time of the Enlightenment, human society, first in Europe, and then virtually everywhere, embraced the notion of perfection. This perfection was not understood in its previous version bound up in the language and sensibilities of religion. Rather it was bound up in the rationalization of the human, its measurement, and ultimately its expression as an ideal to which those in control of social forces could nudge the masses under their charge. This fundamental shift in the understanding of humanity at the center of itself required a vocabulary, and to that ends old words could be repurposed. Consider as an example the transformation of words like accountability and accounting.

*The sixth is the matter of translation.* Societies borrow words, even as they borrow customs, practices, and sometimes sensibilities. Globally connected societies borrow more aggressively. And borrowing can become a matter of state policy. Even when one is not borrowing, one is encountering other collectives whose language and usage—whose text—requires some form of translation. The free movement of goods, capital, and investment has made that inevitable. Common language sometimes sacrifices older specific meaning in the service of new context.

*The seventh is the matter of the extra-ordinary.* To insist on an ordinary meaning also admits to the possibility of the extra-ordinary—the specialized language of a community. Lawyers are masters of the construction of language as its own homonym—built on words that sound and are spelled the same as words in their ordinary sense, but which acquire a distinct meaning. This is the world of terms of art, and of the production of specialized knowledge, and the power relations that follow.

And thus the reason for this con-textualization of text and its plain meaning is to serve as one of a series of caveats to the commentary that is to follow. It is offered by way of explanation of the reason the Commentary will not indulge in the usual practice of those who wear the collar of their profession and their status as elites with an obligation to conform to class orthodoxy (the power of the plain) and on that basis to proffer the best or only or most logical or most correct way of extracting the ordinariness of the meaning of the word around which it is necessary to comment—and here one encounters obliviousness to the ironic contradiction of the ordinariness of meaning. Put differently, in the words of Michel Foucault—to make oneself, and this Commentary “acceptable.”<sup>86</sup> Very little that is plainly evident—and especially words—require mountains of other words to ensure the proper construction, understanding and use of the all too ordinary text that is its object. The exception—where it is necessary to protect the ordinary either from the extraordinary or from capture by others whose sense of the ordinary is indeed quite distinct from that being defended. The extraction of meaning, then, to reinforce the sub-text of the last few paragraphs, is intrinsically political.

*The task of the Commentator.* In the face of this, it seems clear that the Commentator faces an initial choice. The conventional approach is to use the commentary to extract what the Commentator will suggest is the true or best meaning of text. This is an important exercise, to be sure. But it is a political one that increases the value of the

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<sup>86</sup> Michel Foucault, Preface, Gilles Deleuze and Félix Guattari, *Ani-Oedipus: Capitalism and Schizophrenia* (New York: Penguin Classics, 1977), p. xi. (“There was a certain way of thinking correctly, a certain style of political discourse. . . that made the strange occupation of writing and speaking a measure of truth about oneself and one’s time acceptable.”).

Commentary by fashioning it into an instrument that can be utilized by those who favor that interpretation and meant to use it in their battle for control of the ordinary meaning of a term. In a field the core approaches to which are neither plain or stable, such an approach has great value and is likely the better political choice. That “better” political choice is augmented if the Commentary can also cement or advance the status or position of the Commentator within the meaning making community of which they are a member. One is, in effect rewarded for being loyal to one’s intellectual caste.<sup>87</sup> The act of glossing is then made an instrument that is not attached to the text but rather to the meaning community that sees in such text (and its glossing) a meaning of advancing its world rationalizing project.

The alternative approach is to seek to define the limits within which it is plausible to extract some form of ordinary meaning from the text. To that end, a Commentary might serve a higher purpose not by arguing for the value of one ordinary (or extra-ordinary) meaning over another, but rather to consider the extent of the range of plausible ordinary meanings—or perhaps extraordinary meaning—that may be identified. It is in the construction of that field of plausibility that a number of additional issues arise that also affect both the interpretive process and the character of the challenge the Commentator faces.

### 1.3.2 Words in Con-Text.

Though important to the task of the Commentator—and more so to the function of hermeneutics, linguistic and legal-cultural cohesion aligned with a worldview around which a social reality is ordered and preserved—word meaning tends to serve at least as the starting point (and sometimes) the center of the task of extracting meaning from text. Words, like other symbols, however, acquire meaning not merely in themselves, but in the context in which they are placed. That is, whether or not their meaning is ordinary, the meaning of words is derived not only in itself but from the words around it. At a greater level of generality, it acquires meaning from the self-contained environment of text which is meant to serve as a sort of autonomous meaning field: a phrase, a sentence, a paragraph, a section, the larger section within which it is embedded, and so on.

Nonetheless, the meaning of context always seeps out beyond the studied text. For context based commentary, the concept of context suggests the difficulty both of textual analysis for commentary and the ambiguity of context as a space from which to draw meaning outside the text. One can draw insight, however, from the etymology of the word context.<sup>88</sup> Its Latin parent, *contextus*, is a visually stimulating term. It points to a joining or weaving together, or a building of or around a thing. The word itself joining the word part *com* (with or together) with *texere* (to weave or make from). In its contemporary sense, one weaves or puts to those acts or text that precede or that follow, but which are connected to, the core text to be examined. One does to that get a better sense of the whole even as one seeks clarity on either a specific text, or words, phrases, or portions of the text studied. For commentary context can reference place, time, and intention or objective. That is context provides a means of more authoritatively considering the meaning of text in a particular time or place; or meaning as a function of the objectives or intent of those who chose those words and placed them in a specific place in text; or a means of liberating text from time, place, and intention.<sup>89</sup> In some cases, context, especially when it favors

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<sup>87</sup> Michel Foucault, Preface supra. This then serves as extended variant of the secret sheep chant in the movie Babe: ““*Baa-ram-ewe! Baa-ram-ewe! To your breed, your fleece, your clan be true! Sheep be true! Baa-ram-ewe.*” Babe (1995), quoted in Christopher Strom, “Baa-ram-ewe!” How the movie Babe explains the value of Lean project management, LinkedIn; available [<https://www.linkedin.com/pulse/baa-ram-ewe-how-movie-babe-explains-value-lean-project-strom/>].

<sup>88</sup> Etymology Online, Context, available [<https://www.etymonline.com/word/context/>].

<sup>89</sup> In the latter case, see, Ronald Dworkin, *Law’s Empire* (London: Fontana, 1986); Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999). Cf., Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press., 1999)

intention manifests an underlying principle of textual construction that holds that an authoritative text is merely a representation of the objectives of its authors. As such, text must be understood principally by reference to those objectives, which remain unchanged even as the meaning of words, time, and place change around them.

Why state the obvious? Because the obvious hides sometimes its own directional symbols: the meaning of words in context may be managed by other meaning rules: the rules of syntax (and its violation, rules of grammar and usage, the power of symbols in written text (periods, semi-colons, etc.), or pauses and inflection in speech, and the like. Word meaning exists not merely in the context of the words around it, but also in the context of the symbols that are used to rationalize and support the interrelationship of words aggregated together and meant to be read as part of a larger set or sets of wholes. One moves from word to language. And in the context of the UNGP, from general and popular language to the rarified language of an international community seeking to develop normative frameworks in a highly specialized field. One contends not merely with vocabulary and syntax, but with the language through which it may be expressed.

Yet here one encounters another problem. There is no ordinary meaning rule for reading clusters of words together; far less for reading words embedded in a larger and more complex text. One way to extract a range of meaning where its object is to consider the meaning of multiple words that are meant to have a relationship to each other is a formal one: to apply the rules of grammar, syntax, and punctuation to the word clusters and to give them the meaning that the application of such rules suggests—the ordinary meaning rule applied in a different terrain. Or one could, by discerning deviation from those rules, extract a meaning grounded in what appears to be an intentional effect to avoid the rules to a different meaning ends. In that context one can judge whether one penalizes inadvertent breaches of such rules (the traditional judicial rule that one reads a contract against its drafter), or otherwise indulge in rewriting (effectively forgiving transgression). Alternatively, one could look to other similar word projects for insights to be applied by analogy. Courts tend the approach the readings of similar statutes in the same way. Common law courts tend to use a number of techniques to rationalize and as a shorthand for unity of meaning or approach in similar circumstances; *stare decisis* as one of them. The notion of predictability is deeply built into language and the practice of the judiciary. Yet the determination of the boundaries between those circumstances in which application of meaning rules is warranted and when to avoid these rules then produce a set of meta or overarching grammars of extracting meaning from words in their textual context.

At its outer boundaries, context presents the challenge of objectification of a different sort. It is sometimes possible to detach the idea of the body of text that is the subject of commentary from the text itself. In the case of the UNGPs, for example, the idea of the UNGPs as a whole becomes as important as the substance of its text. Another example touches on the reconstitution of the UNGP as a platform—structured spaces in which consumers and producers of human rights may come together to evolve the rules of the socio-economic global operating system. One might understand this better as extracting the “spirit” of the UNGP from its text—with a reference to the spirit of legality much discussed since the time of pre-Revolutionary French Enlightenment;<sup>90</sup> the

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<sup>90</sup> One speaks here of the spirit of the UNGP the way that Portalis spoke of the interpretation and glossing of the French Civil Code. Jean-Etienne-Marie Portalis, *Discours préliminaire sur le projet de Code civil, 1er pluviôse an VIII* (1801); available [[http://classiques.uqac.ca/collection\\_documents/portalis/discours\\_1er\\_code\\_civil/discours.html](http://classiques.uqac.ca/collection_documents/portalis/discours_1er_code_civil/discours.html)] and discussion in Chapter 3, text notes 5-8. And Montesquieu perhaps also lurks in the normative narrative background speaking more generally to the spirit of the law. See Charles de Secondat, Baron de Montesquieu. *The Spirit of the Laws* (Tomas Nugent and J.V. Prichard, trans. Chicago Encyclopedia Britannica, 1952; Originally *De L'Esprit des Loix*, Genève: Chez Barrillot & Fils, 1748). These draw, in turn, on the insights of Aristotle's *Politics* (Aristotle, *A Treatise on Government* (William Ellis, trans. London: JM Dent & Sons Ltd. 1912; reprinted Project Gutenberg eBook #6762 (24 January 2013))).

UNGP as a representation of those first principles from which all social actors may draw to their own ends.<sup>91</sup> In these forms, the UNGP are objectified in ways in which it is no longer essential to understand how it works or even its three pillar structures. The UNGP stand for something else—as a project, as a process, as a set of aspirations, and the like. It is, in this sense a waystation in a long term process of change—the effort to change the fundamental narratives of social customs through the imposition of expectations (in law and norms) that change the spirit of the laws—its ordering narratives)—changing social first principles by a slow process of piecemeal changes to law and norms. The UNGP, then, is in some sense a fetish—a sign that signifies something else, a means to an ends in connection with which the UNGP serves as a waypoint—the “end of the beginning.”<sup>92</sup>

What do these Guiding Principles do? And how should they be read? Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.<sup>93</sup>

And it is this “something else” that may be invoked by those who draw on the “spirit” of the UNGPs in this way. A commentary of the objectified spirit of the UNGP, as distinct from a commentary of the UNGP text, is an important additional context from which meaning and application may be extracted, though with Aristotle’s caution firmly in mind: “For a law derives all its strength from custom, and this requires long time to establish; so that, to make it an easy matter to pass from the established laws to other new ones, is to weaken the power of laws.”<sup>94</sup>

*The task of the Commentator.* Commentary can fight against rules in the search for interpretive or explanatory purity. Or commentary can embrace them and add its own voice to the mellifluous polyphony of orthodoxy. However, all such efforts reveal more about the commentator than about the object of commentary. For strategic commentary it follows that either position (or anything in between that serves the purpose of the commentator) will do as long as one is content to understand commentary as an instrument serving a purpose beyond explanation or analysis. That is perfectly respectable. Its weakness is the temptation to pretend that what is instrument is universal, undisputed, inevitable, and incapable of objection. Yet that is precisely the foundation of orthodoxy (whether of vanguards in or with power or those seeking their displacement). Again, striving toward the boundaries of plausibility serves the larger objective of a commentary that means to outlast the fickle obsession with orthodoxies which in contemporary social relations hardly last long enough to merit documentation.

### 1.3.3. Intent and Effect

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<sup>91</sup> And thus the perpetual underlying question, attention to which a commentary may draw but with respect to which an answer is always situated in time, place, and space: “Which then shall we prefer? the custom which is already established, or the laws which are proposed . . . ?” Aristotle, *A Treatise on Government*, supra, Book II, Chapter I).

<sup>92</sup> Office of the High Commissioner for Human Rights, Introduction to the Guiding Principles on Business and Human Rights, PowerPoint Presentation December 2013, Slide 10; available [https://www.ohchr.org/sites/default/files/Documents/Issues/Business/IntroductionsGuidingPrinciples\_en.pdf], last accessed 21 February 2024.

<sup>93</sup> Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> (by John Ruggie).

<sup>94</sup> Aristotle, *A Treatise on Government*, supra, Book II, Chp. VIII.

Do words and the text in which it is embedded have any meaning at all in themselves? If text or words are merely symbols—then they represent something other than selves. They are a picture, an object, a memory, a recording, of the intention of those who had the authority to not merely choose these words, but (through some process that accords with the practices and habits of a culture) to make them authoritative. If that is the case, then are words (text) may be understood as mere pass-throughs for, and proxies which signify, the intention, meaning, objectives, principles, world views, and approaches of those who were responsible for their use or those for had the authority to give the words power. Here one encounters ordinary meaning in the experiences that are held in common and reduced to word.

What, in the end, is [common]? Words are vocal symbols for ideas; ideas, however, are more or less definite mental symbols for frequently returning and concurring sensations, for groups of sensations. It is not sufficient to use the same words in order to understand one another: we must also employ the same words for the same kind of internal experiences, we must in the end have experiences *in common*.<sup>95</sup>

In the field of law—hard or soft—the issue is usually framed as the context between text and intent. On the one hand, one can take the position that words speak for themselves. That is that what was made authoritative were the words, and nothing else. Whatever intent was meant to be inserted into those words would have had to have been accomplished by aggregating enough words to make the intent plain enough to discern from the ordinary meaning of the words used to those ends. On the other hand, it is possible to see in words nothing more than a set of symbols that direct one towards meaning—and the only possible authoritative meaning must be that embodied in the intent of the drafters (or adaptors) in authorizing the clusters of words that became text.

In this sense, words never have an ordinary meaning—they have only the meaning that expresses and furthers the intention of the drafters in choosing them to memorialize their intent, objectives, understandings, and purpose. If one embraces a notion of meaning through but not in words, then the object of extracting meaning might also be redirected from the meaning embedded in words (text, speech, or symbol) to an examination of the way that choices of meaning changes or threatens intent or purpose.<sup>96</sup> That is one moves from a formal standard to a functional standard; the former focusing on words and their meaning, the later focusing on *intent and effect*.<sup>97</sup>

Intent requires guidance, and Guidance is often proffered as additional text. In the case of the UNGP this function and the importance of its connection with the authoritative text of the UNGP appeared to be very much on the mind of Professor Ruggie. In the opening chapeau to the book, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*,<sup>98</sup> Professor Ruggie explained both the need for commentary and its objective:

It is impossible to distil six years of research, consultation and reflection into a document the length of the Guiding Principles. This Interpretive Guide is a means to provide some further explanation of those Principles that relate to the corporate responsibility to respect human rights. As work continues to elaborate the implications of this responsibility for different sectors, issues and situations, I hope that this

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<sup>95</sup> Friedrich Nietzsche, *Beyond Good and Evil: A Prelude to a Philosophy of the Future* (Helen Zimmern (trans.) from the Complete Works of Friedrich Nietzsche 19091913; Project Gutenberg eBook #4363 (1 August 2003); ¶ 268.

<sup>96</sup> In the context of American academic debates, see, John F. Manning, What Divides Textualists from Purposivists?, (2006) 106 Colum. L. Rev. 70.

<sup>97</sup> Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford University Press, 2012), chp. 3.

<sup>98</sup> Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (HR/PUB/12/02, New York & Geneva, United Nations, 2012) [hereafter Corp. Resp. Interpretive Guide].

Guide will *help ground those efforts soundly and squarely on the original meaning and intent of the Guiding Principles themselves.*<sup>99</sup>

Professor Ruggie’s preference is to ground interpretation in the original meaning and intent *of the text*. And yet, he also suggests that the text does not lend itself to that effort without guidance. That guidance, in turn, can be endorsed (like the UNGP itself) when expressed through the mechanism within which the definitive text was itself produced—in this case from within the apparatus of the Office of the High Commissioner for Human Rights. Thus, *the UNGP text must be interpreted to be understood* (“impossible to distil six years of research . . . into a document the length of the Guiding Principles”). That interpretation must be sourced in the “research, consultation and reflection” of the SRSG and his team. That guidance is critical to the work of those who would “elaborate the implications” for which UNGP textual guidance is offered. And the value of that guidance must be assessed as a function of its fidelity to the “original meaning and intent” of the UNGP text. And, to square the circle, that fidelity is sourced in the “research, consultation, and reflection” from out of which the UNGP text emerged.

Nonetheless, the question remains respecting the identity of those whose intent is authoritative as well as the scope of that authority as a function of the authoritative text itself. More fundamentally, the question of the relationship between that intent and the articulation of preferred effect and the glossing of text continues to search for consensus. There are several possibilities, three of which merit consideration. The first focuses on the person or group actually drafting the language to be considered. The second focuses on the group that considered the draft submitted and approved or enacted it. The third focuses instead on those who applied it, whether within the apparatus of state or outside of it. This has particular relevance to the UNGP.

Focusing on the drafters would produce an analysis heavily weighing the work product of John Ruggie and his team. But this team included both a core of people and a larger band of others, sometimes harder to identify, that produced key input at various points in the process. It also leaves open the question of whose intent and what effects ought to be used for interpretation: Ought the focus of the intent and effects be centered on the formal work product of John Ruggie as SRSG, or should a broader net be cast—including speeches and other performances of meaning, earlier work on other mandates and even his academic work? The same would apply for his collaborators. If John Ruggie represents the synthesis of intent, then the individual strands of his collaborators’ intent may be weighed less or ignored. But the reverse may be true. Coordinating, weighing, and aggregating issues then may have greater effects on shaping interpretation than the actual intent or effects that are subject to that analysis. That is the danger, of course: text is hard to miss even if one misses the interpretive mark—intent must be constructed by the debris it leaves lying around, and the effects to be advanced or avoided must then be adduced from this construction.

In contrast, focusing on the endorsers shifts analysis to the UN Human Rights Council and the apparatus of the Office of the High Commissioner for Human Rights. But they did not work in a vacuum either and several states played leading roles. That opens the question of relevance, focusing on the universe of statements and materials produced. It also exposes the apparatus of the HRC and the OHCHR as contributors to the text—and the shaping of the intent—of the UNGP. That is not implausible. But it is inconvenient in the sense that it requires a disaggregation of intent and the production of identified effect that may be difficult to reconcile much less coordinate. And in this case, the problem of intent becomes more difficult.

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<sup>99</sup> *Ibid.*, p. iv (emphasis added).



Most interesting is the last of the possibilities—a focus on those who apply the text to whatever ends suit them. Here intent and effect is extracted from the aggregation of the uses to which it is put by those who find in it something sufficiently valuable or convenient to be bent to the purposes for which it is invoked. Here the political and strategic objectives of use may, in the aggregate provide a sense of the meaning of text; not necessarily the meaning the words suggest or that its creators, drafters, or enactors might have assumed, but rather the meaning which suits the mass of those who employ it for their own ends. This use, in some instances might itself function as a gloss—in the sense that the need to use text in a particular way requires the provision of some sort of more or less persuasive glossing of the text. That gloss, in turn, then serves as a basis for the instrumental proffering of text (now suitably glossed) and towards the ends for which the gloss is put forward.

### **1.4 The UNGP Commentary Universe : Text, Intent, and Application**

Commentary tends to focus on micro analysis. It necessarily disaggregates text, and detaches it from its contextual surroundings. That is necessary but poses the challenge of retaining a sense of the whole, and of the context in which the whole of the text is embedded, while engaging in the necessarily precise analysis that calls for dissection of the text. One builds from key words, to sentences, to sub-sections, to sections, to parts of the text before one can lift one's gaze up toward the authoritative text of the UNGP as an integrated whole. In the case of the UNGP that suggests the importance of both micro and structural analysis around its now well-known three pillar structure (the state duty to protect, the corporate responsibility to respect, and the joint obligation to remedy). At the same time it requires some attention to the chapeau within which those three pillars were meant to operate—the sometimes neglected General Principles that frame the UNGP substantive text.

That textual analysis cannot be conducted in a void. The historical context in which the UNGP text was developed, as well as the ideas generated and to some extent rejected during the long process that led to the unanimous endorsement by the UN Human Rights Council in 2011, suggest some sensitivity to the text that memorialized earlier efforts. It is important, then, to read the UNGP text in relation to text against which it was written. In the case of the UNGP that suggests an importance to the two critical but rejected earlier efforts—the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights<sup>100</sup> and the earlier and abandoned efforts carried out by a special Intergovernmental Working Group under the UN Commission on Transnational Corporations (itself under the UN Economic and Social Council) to draft a Code of Conduct under the UN Commission on Transnational Corporations (1977-1992).<sup>101</sup>

And all of that is undertaken with an eye toward the intention or understandings of those who converted ideas and consensus into text. Intent, as suggested above, can be a difficult object to capture, especially at its edges. The most useful evidence of intent are preserved in those documents deemed authoritative.. That is so even as one understands that around the edges of this formally preserved evidence of intent lie a vast pool of motivation, negotiation, strategic choices, utterances, and silences that might be inferred but which cannot be entirely and definitively captured. In the case of the UNGP, there are a number of authoritative sources that were meant to memorialize intent. These included the Official Commentary attached to and included in the distributed version of the authoritative text of the UNGP. It also includes the reports delivered by Professor Ruggie in his role as SRSG

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<sup>100</sup> See supra note 9. See also Detlev F. Vagts, “The UN Norms for Transnational Corporations,” *Leiden Journal of International Law* 16 (2003) 795-802.

<sup>101</sup> Karl P. Sauvant, “Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned,” *Journal of World Investment & Trade* 16 (2015) 11-87.

from 2006 through 2011. Lastly, it includes those statements, speeches and other writings that were produced by key actors during the course of the process from formulation to endorsement of the UNGP. This latter set of documents are far more diffuse, strategic in a partisan way, and difficult to value in terms of their utility for interpreting the UNGP. A core of them can be identified, though a comprehensive listing or consideration of these documents is beyond the scope or purpose of this commentary.

Finally, it cannot be forgotten that the UNGP was itself the product of an application of text to a context it was the mandate of John Ruggie to flesh out. From the very beginning of the mandate, the SRSG focused on a data based approach to frame a process of textualization that was fundamentally inductive—in contradistinction to the earlier failed version of the Norms<sup>102</sup> which was essentially an exercise in deductive drafting.<sup>103</sup> As the SRSG noted in presenting the first of the Reports produced under his mandate, the foundation of his work would be comprised of mapping exercises, and data gathering about the realities of the actors against which the standards of human rights are to be applied. “On the research front, to begin the documentation of best practices called for in the mandate, we recently conducted a survey of the Fortune Global 500 firms, in collaboration with key international business groups, and we are following up with a detailed study of a broader cross-section of companies.”<sup>104</sup> One encounters here the context for digital hermeneutics in its primary stages. One can read the UNGP as anchored in time, place, and space. It is, in this sense, a text rooting in itself and the linearity of a memory of an idea and intent reduced to symbolic representation in text. Yet at the same time, it is text that arises from a foundation of data that, interpreted in turn, provided the context in which it was possible to construct text in the way it was presented for endorsement. That flow of data, the signal that fed the text of the UNGP, continued after, and that post enactment data-text loops back to inform the original text. One might comment on the iterative dialectics that this represents, and its forms, but its manifestations are themselves a function of the platforms in which the UNGP text are reproduced and consumed. One example suffices to make this point—the evolution of the text of the draft E.U. directive on corporate sustainability due diligence.<sup>105</sup>

That template has followed the UNGP after endorsement. While those efforts are meant to move the UNGP project forward, they also inevitably fold back to contribute to the narratives of the meaning of its text. Especially in the context of the UNGP, analysis and commentary is undertaken with an eye to the way in which those who took those ideas and its text understood them and on that basis and then applied it in their own context. At one level one can read the text of the UNGP against these efforts. At another level one can read these operationalizing efforts as evidence of the development of consensus understanding of the meaning of the UNGP text at least by those with the power to convert that text into binding law or norms. Here the sources of commentary at their most diffuse and fracture in interpretation most evident. That diffusion and fracture, though, can also inform both the reading of text (in context) and its implications for the way in which text is “activated” through operationalization beyond its original frame of reference.

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<sup>102</sup> *Supra*, note 9.

<sup>103</sup> Larry Catá Backer, ‘Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law,’ (2006) 37 *Columbia Human Rights Law Review* 287.

<sup>104</sup> John Ruggie, Opening Statement to United Nations Human Rights Council, Geneva, Switzerland (25 September 2006); available [<https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf>], last accessed 13 February 2024.

<sup>105</sup> See Claire Methven O’Brien and Olga Martin-Ortega, Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective (European Parliament Directorate General for External Policies PE 702.560 (May 2022); available [[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702560/EXPO\\_IDA\(2022\)702560\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702560/EXPO_IDA(2022)702560_EN.pdf)], last accessed 15 February 2024.

All of this requires an anchoring for the textual dissection that follows. What follows, then, might be understood at a substantially high level of abstraction, as a process of recursive interpretation—an interpretive semiosis.<sup>106</sup> Commentary can in this sense be understood as a means of translation from the dense and formal language of authoritative text. That translation, to be authentic and legitimate must effectively draw on itself. That drawing on itself requires a wrestling with the formal text within common linguistic frameworks. But it also seeks to find meaning within the evidence left in the process of developing this formal text. It is in this sense that textual evidence of intent becomes important (what might be called transfers and reconstructions of the original text). These are substantially endogenous processes in the sense that commentary and interpretation are built on a “dialogue” within the original text itself and between that text and what survives in text that preserves something like a memory of the intention for writing that text in a particular way. That internal process is then augmented by context in which the text communicates ideas outward which then also suggest the way that meaning is constructed through externalized exchanges (structural coupling in the language of systems theory). Here the way that critical actors—states, third party standards makers, other private and public organizations, build systems on the basis of their applied understanding of the original text (the UNGP principles) itself suggests meaning and to some extent then (re) shapes that meaning by interpretation “in action.”

It is in this sense that one can speak about commentary as an exercise in comprehensive interpretation that builds on itself first, and then solidifies that construction by a process of engaging with an ever widening group of sources to which the authoritative text may be tied. The object is to provide a basis for understanding the structures within which it is possible to extract meaning and intent from text, and to tie that the post-endorsement exercises in action-interpretation. More importantly, it is in the interactions among these sources that one can better expose the range of interpretive possibilities embedded within the authoritative text. Each additional element adds another layer of interpretive possibility that together creates a dynamic interaction between text, a secondary body of textual materials that evidence intent, and a third layer of textual representation that suggest meaning through a recording of its application in other textual frameworks that self-consciously draw on the original text. Interpretive range is indebted to the interplay between text, intent, and application.<sup>107</sup> This acquires a dynamic element

Lastly, a note on authoritative text and translation. The UNGP are available in six principal languages: English, Arabic, Mandarin Chinese, French, Russian, and Spanish. Informal translations are available in a variety of other languages. This commentary focuses primarily on the authoritative English language version of the UNGP. It is important to note, though, that the existence of authoritative text in multiple languages—each with its own socio-linguistics, and each deeply embedded in the dynamic cultural norms that shape meaning—presents additional challenges of meaning consensus.<sup>108</sup> At the greatest level of generality, and around a core of meaning, the alignment of meaning in multiple languages is strongest. Nonetheless, the farther one travels toward micro-

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<sup>106</sup> Shuo-yu Charlotte Wu, “Autopoiesis and Interpretive Semiotics: Translation as a Biological Phenomenon,” *Biosemiotics* 4 (2011) 309-330 (“it is an autopoiesis that not only ‘transfers’ but also ‘reconstructs’ the original sign from one sign system to another by interpretive semiosis, which takes place in the process of structural coupling and in consensual domains.” *Ibid.*, p. 328).

<sup>107</sup> Jacques Derrida, *Des Tours de Babel* (English version), in (J. F. Graham, ed., *Difference in translation*; Ithaca: Cornell University Press, 1985).

<sup>108</sup> There is a rich literature on the subject. Cf., Radegundis Stolze, “Translating Legal Texts in the EU,” *Perspectives: Studies in Sociology* 9(4) (2001) 301-311; Rodolfo Sacco, “Langue et Droit,” in *Langue et Droit, XV International Congress of Comparative Law* (Bristol 1998) (Collection des rapports, ed. E. Jayme (Brussels: Bruylant, 2000)); Rodolfo Sacco, “Définitions savantes et droit appliqué dans les systèmes romanistes”, *Revue Internationale de Droit Comparé* (1965): 827–837.

analytics of text, the more likely that cultural linguistics will affect and sometimes produce fracture in the meaning of text.<sup>109</sup> Much work has been undertaken to mediate challenge.<sup>110</sup> The issue, however, remains, if only at the margins of commentary.

#### 1.4.1 The task of the Commentator.

Where one moves beyond text to intent, the glossator may be tempted to choose. That choice is fair enough if it is made explicitly, and even better if the rationalization for the choice is also provided. That choice, however, is necessary if one moves from intent to effect. That is, if one uses the indeed effect as the basis for explaining/analyzing/interpreting—for glossing—text. One must be sensitive to the parallel approaches of glossing and interpreting a text. They occupy common ground. But the tasks are to some extent different, or at least their objectives out to be different. *Explaining* provides supplemental approaches to text to aid in the ability to understand what was attempted to be expressed through (in this case) words. Explaining can tie the broad themes of a text (as a whole, or as a set of interrelated parts) with its manifestation in each of its most granular sub-parts. *Analyzing* seeks to approach issues of complexity, ambiguity, or obscurity by disaggregating the thing analyzed into simpler (sometimes its simplest) elements and then to reconstitute the pieces in ways that are more approachable. Analysis can also serve as criticism, or in the process of reducing something to its essential components, to expose the underlying glue (ideology or unstated presumptions) that had held them together. That exposure then permits either better understanding the text in light of its ideological glue or to more effectively oppose the thrust of the ideology incarnated as text. Both are the stuff of treatise writing in the contemporary era. But leak into the core role now usually ascribed to the task of commentary.<sup>111</sup> *Interpreting* seeks answers about the meaning of text usually for the purpose of its application in specific context. Judges and lawyers interpret text, for example, in the context of providing advice to clients and in the meaning making context of disputes and dispute resolution. Interpretation is closely aligned with application—the positive act, which may draw on explanation and analysis, for a determination of meaning as a function of the context in which interpretation is necessary, and then to its application—especially to its consequences as outcome, doctrine, and remedy.

Glossing is not undertaken primarily for the consumption by specific clients (as such) or with a specific problem (or set of problems) for which a more or less specific answer is necessary. Directed generally to a collective, glossing, in this sense, might be described as an act of digestion, one the product of which is consumable by those otherwise unable to effectively approach the original text (unaided). “Because commentary sources digest the law for you, you will find it easier to grasp the law’s meaning and the policies behind it. Also, commentary sources cite to the relevant case law, statutes, regulations and administrative rulings. This is particularly useful if you do not know the citation of a statute.”<sup>112</sup> This draws on notions of cognition and

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<sup>109</sup> Jacqueline Mowbray, ‘Multilingualism, Translation, and International Law: Four Myths,’ (2023) 12(2) Cambridge International Law Journal 190-210; Simone Glanert, ‘Law-in-Translation: An Assemblage in Motion,’ (2014) 20(3) The Translator 255-272.

<sup>110</sup> Elena Ioriatti, ‘Comparative Law and EU Legal Language: Towards a European Restatement? ,’ *Global Jurist* 21(2) (2021)305–340 ; Stefaan Van Der Jeught, *EU Language and Law* (Groningen (NL): Europa Law Publishing, 2015), p. 103 et seq.

<sup>111</sup> See for example, Jerome Hall Law Library, Maurer School of Law, University of Indiana, Human Rights Law, Secondary Sources: Commentaries and Treatises; available [https://law.indiana.libguides.com/c.php?g=19825&p=112497].

<sup>112</sup> Brooklyn Law School, Library, Library Guides, Researching Statutes: Commentary; available [https://guides.brooklaw.edu/c.php?g=330891&p=2222840].

conversion, “<sup>113</sup>which facilitates the translation, repositioning, or recodification and understanding of something unknown in terms of something known and familiar.”<sup>114</sup> A general commentary, then, is most effective when it targets a general audience, which (re)presents knowledge in a more accessible form. This commentary, more specifically, aims to benefit academics and students of international law and international relations. But it is also *intended* for practitioners—lawyers, judges, and individuals charged with enterprise compliance and responsible business conduct (RBC) portfolios.<sup>115</sup> It will also be a reference publication for legal advisers of governments and NGOs, as well as policy-makers and practitioners working in human rights and economic activity. Lastly, it is meant to be accessible to people with no specialized expertise. They form a critical audience. Many of them ultimately will bear the responsibility for transforming text, and the legal framework that follows, along with markets expectations, into viable systems of managing economic activity.

#### 1.4.2. The Structure of Analysis.

The commentary will be structured along the following lines.

(1) The starting point of commentary is the object itself—the UNGP. That object, in turn, can be understood in two senses, each with significant consequences for the form and character of comment. First, the UNGP can be understood as an embodiment of an idea or perspective. *The UNGP as idea* is detached from the specifics of its text. Rather the focus is on the UNGP as a sign or symbol that stands for something else. It is, in this sense, a sign that signifies a way of thinking about the relationship of economic activity to human rights in specific ways—in this sense one extracts generalized principles, ideologies, agendas, practices, and customs from the UNGP as a whole. Second, *the UNGP can itself be understood as its text*. In this sense higher order values might be extracted from its text, rather than, as in the case of starting with the UNGP as idea, reading text from higher order values derived from the production of the UNGP as a whole.

(2) Commentary here requires close reading of text. But that itself poses an initial problem—what is text? This is the long standing conundrum of memorialization: the relationship between text and text producers or adopters. Textualists at one end would detach text from its creators or users and start from the proposition that text alone is authoritative, detached from the context in which it was created. At the other, text is understood merely as the recording of context, instructions for preserving and applying the intent and sensibilities of its creators or of those, later, who use it (within the scope of its authority and extent). The gulf between these three starting points for commentary then produce the sometimes large space within which there exists a range of plausible construction, readings, interpretations, or “play at the joints” for the instrument.

(3) Consideration of these manifestations of the UNGP—as object, as sign signifying meaning, and as the means for interpreting, guiding, and judging the actions of others in systems of economic activity—might benefit from a closer connection with its origins. These suggest both the unifying vision that produced the UNGP (and which may still survive within its text or in its form), as well as those points of fracture within the core ecologies of those meant to receive and apply it. The object is not to tie the meaning of the UNGP to its origins or to the outside personalities that shaped it, but rather to be sensitive to the clues these processes might provide in shaping the

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<sup>113</sup> Jan M. Broekman, *Knowledge in Change: The Semiotics of Cognition and Conversion* (Cham, Switzerland: Springer Nature, 2023).

<sup>114</sup> E. Michael Gerli, “Translating Events, Glossing Experience: European Texts and American Encounters,” *Medievalia* 17 (2014) 39-55, 43.

<sup>115</sup> Cf., Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility, COM/2011/0681 final (25 October 2011).

contours and limits of plausibility in approaching interpretation, applications, and thus useful commentary on the object itself and within its intended context.

(4) With that in mind, commentary can then focus more precisely *on the UNGP as urtext*—in this case pristinely preserved in the form of the text of the 2011 UNGP as endorsed by the Human Rights Council. That serves as the hub. Commentary will radiate from that hub in waves that take one further and further from its core—but consciously so. It will start as a guide to the text in which the UNGP as understood and approached as a self-referencing system from which it is possible to deduce answers to any consideration within its ambit. This is not meant as another variation of the impulse to hermeneutics—but rather a close engagement with the signification of text in and as text as endorse and thus made authoritative. At the same time, it is meant to expose ideology supporting plausibility and this to provide an extra-textual context for textual meaning.

(5) It then shifts to interpretation—and here deviates from traditional commentary. Rather than reduce interpretations to a single or best one, this commentary will describe the universe of plausible interpretive ecologies that might be interpreted from out of the UNGP. More specifically, it will comment on the borderlands of the plausible. In the process it will identify the ideologies, strategies, and objectives from which different interpretive schools might be built to nudge the rationalization of the UNGP or any part of it in pre-determined directions.

(6) The identification of borderlands of plausibility then introduces the societal flows in which those are recognized, and with which the UNGPs communicate. This is the commentary on the patterns and possibilities of structural coupling with meaning making communities in which the UNGP are embedded or into which it is received.

(7) The focus of the commentary then shifts from UNGP to the key actors (and some marginal ones) whose instrumentalization of the UNGP also serve to define and suggest its meaning. Here one enters the pragmatics of meaning making—by states, enterprises, civil society, and academics, each of which reshapes the UNGP from itself to an instrument or pathway elsewhere.

(8) And then the commentary will return to text within these ecologies of meaning making, but from out of which text emerges to survive continue to serve as the urtext for successive waves of commentary, ideology, and instrumentalization, ready, in its original text, for commentary—not a commentary of commentaries. But again a source commentary.

(9) To this one adds a final element of gloss—the effects of the turn toward the digital, to the quantitative and analytic. The turn toward the datafication of cognition, of interpretation, and of meaning, also has a gloss of its own, and may fundamentally alter both the forms of commentary and the meaning of its text. That is likely the case in this field and to this text.