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UNGP: General Principles (Chapeau)

6.1 Text of the General Principles

General Principles

These Guiding Principles are grounded in recognition of:

(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

> These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.
>
> These 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.
>
> Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.
>
> These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

6.1.1 Signification: The Role of General Principles in the UNGP.

The *understanding of text*—especially of official text—*must be guided*. One does not speak here so much about hermeneutics. Hermeneutics focuses on the act of interpretation—that is of giving meaning to an object or sign—text, material or abstract "things" of relevance either to the ordering of the world or to the functioning of an individual within social collectives. Rather one speaks here about collective authoritative hermeneutics—the act of extracting meaning from objects , including that peculiar object—law/norms. Here two issues interplay. The first touches on the modalities of interpretation (what does text mean and where does one draw for that exercise). The second touches on the identification of those with authority to attach meaning to text that has effect on, or binds, or creates, meaning within a social collective.[1] That is, any person can interpret a statute, but generally only interpretation undertaken by designated persons (designated by reason of their status, reputation, office and the like) or within privileged institution, and that follow rules established for that exercise, might, by the rules of a social collective, become authoritative—an established meaning.[2] That authority for collective meaning may be

[1] Anne Wagner, Wouter Werner, and Deborah Cao (eds), *Interpretation, Law and the Construction of Meaning: Collected Papers on Legal Interpretation in Theory, Adjudication, and Political Practice* (Springer, 2007).
[2] Jan Broekman and Larry Catá Backer, *Lawyers Making Meaning: The Semiotics of Law in Legal Education II* (Springer, 2013).

extracted from a text, from the intent read into that text, or from other text or intent relevant to either. The authoritativeness of that extraction, in turn, is understood as a function of the social authority of the interpreter and their adherence to the general understanding of the methods by which the act of interpretation is to be undertaken. The essence of all of this work lies in the authority and forms of guidance.

But what of guidance itself—in what way are the modalities and forms of guidance to be guided? Its etymology provides clues. It emerges with modernity from the late 14th century, and in the English speaking word from the French 'guider' which speaks to giving direction, to leading, to conducting, presumably from one place to another.[3] It is, in this sense a word that signifies bridging—of taking some one or some-thing from one place to another. That, in turn, suggests that there is a starting place, with its own character, from which one travels to another. Guidance, then, is meant to take the reader from one state of meaning to another. The word contains two sets of meaning; the first references action, that is the leading from one end of the bridge (of meaning) to another; the second references the construction of the bridge itself. It is in that second form of meaning that guidance becomes quite potent—guidance, in this sense, represents the application of premises, expectations, understandings, objectives, and assumptions from which a social collective (or the guide) can determine where the bridge is to be built, and the character of the materials used to build it.

Guidance as a bridge provides the framework within which that movement is possible from one end of meaning to another. That emphasis is underscored by the word's possible Frankish derivation, *witan ″show the way″ or from a similar Germanic source, from Proto-Germanic *witanan ″to look after, guard, ascribe to, reproach.″[4] To show the way is to reproach those who fail to heed direction; it also requires a pathway, or as suggested before, the bridge. Guidance, then, presupposes a need to be guided; it assumes that one starts and ends at different places; and it is premised on the assumption that the guide knows the way.

When one must be guided around textual materials, sometimes the guidance is embedded in the text itself. That is often the case where the text is built on words and word usage that reflects deep cultural consensus as to meaning. In some systems of jurisprudence, this is sometimes referenced as a "plain meaning" rule, or a doctrine of *acte claire*. In addition, in some cases, conventions of interpretation seek to lock embedded meaning at the time the text is written or enacted. These, in turn, can be contentious, and ultimately incoherent when precisely applied. Yet, deep cultural consensus as to meaning may be equally deeply rooted in a particular time and with a particular group. As people die and are born, as the circumstances of life and usage shift to reflect these changes, deep cultural consensus may either disappear or change. Embedded meaning may also be extracted from context—and context is guided by grammar, usage, and related tools. Like meaning directly embedded, contextual meaning is a moving target—the context of an 18th century text in the 21st century may not align. And yet these shifts are critically important when approaching text. Text, then, serves as a sort of pictogram of a historical

[3] Etymology Online guidance, available [https://www.etymonline.com/word/guidance] last accessed 31 March 2024.
[4] Ibid.

cultural moment, the premises and expectations of which are locked into the meaning of words. As time lengthens the space between the moment of drafting/enactment and the moment of use, that historical premise becomes harder and harder to apply.

Given enough time, historically based meaning making becomes a two-step process: one must first determine what the cultural premises producing meaning (including grammar, turns of phrases, slang, and the like), and second, one must use that to extract a historically aligned embedded meaning from text and its context. Alternatively, In others, those who authoritatively approach text will jettison any sort of historically based meaning methods. Text is autonomous of those who produced it, used it, or imposed meaning on it in other times, places, and circumstances. Text can only mean what it means to those seeking to use it at a particular time, in a particular context, and for a particular issue.

More often than not, guidance on textual interpretation is necessary to better ensure that the text is read in the way their author(s) intended. Here, alignment between intent, objectives, and textual meaning is critical. In yet other contexts, guidance is necessary as a means of directing the trajectories of application, or the choices that ought to be made when text appears to require a balancing among factors, or principles. Nonetheless, there is nothing that compels textual analysis as a function of the intention or desires of those who drafted it; nor any particular sacredness attached to the time, space, and place in which such text is used to memorialize its objects. The tension between the meaning of text as an autonomous expression of binding obligation or guidance or as the memorialization of the intention and direction of its authors creates a large space in which interpretation—and the politics and ideologies through which the authoritative character of interpretation is buttressed within a social group—becomes usefully flexible. It is not that the meaning of text or its character as a vessel for intent is problematic—it is rather that both can be equally authoritative as it suits the social group through which interpretation is given its collective meaning and enforced within a particular time, place, and space.

Again, to those ends, guidance is necessary—and the institutionalization of forms of guidance developed. For purposes of this Commentary such guidance in authoritative text usually takes one of four forms. The choice of form may affect the authority of the guidance in and as text., but generally as a function of the predilections (ideological, social, political, institutionally strategic, economic, and the like) of the human collective that seeks to draw on that guidance. That level of influence of authoritative textual reading, in turn, has a direct effect on the way in which it is received and applied by other collective bodies, principally courts, stakeholder communities, and their apparatus of normalizing meaning (academics, consultants, propaganda offices, allied or oppositional civil society elements, and the like). Irrespective of the interpretive output of the intertwining of these social systems in the context of their interpretive objectives, other public and private bodies may also gauge the extent of authoritativeness in judging the extent to which guidance may be treated as discretionary or mandatory.

The first is to embed the guidance in or around the relevant text. This might be understood as micro or targeted guidance. It is usually found within the provision that requires special attention. For example, definitions of key terms, or of terms of art, are common. Sometimes it can be undertaken more subtly through cross referencing other provisions, judicial decisions, memoranda or the like. This

guidance is at its most authoritative when it, itself, forms part of text. The difficulty, of course, is that text used to authoritatively interpret text becomes, itself, an object of interpretation.

The second is to set out this guidance in text that may be attached to but not a n equally binding part, of the authoritative text to which it refers. A good example are regulatory preambles. In some jurisdictions preambles may be required for the purpose of justifying and explaining regulatory action.[5] Constitutional preambles in the United States announce purpose of the text that follows but are not understood as autonomous sources of substantive rights.[6] Other states take different positions on legality, but not on the role of the preamble to provide guidance in interpretation and application of the text, and perhaps also respecting historical legitimation,[7] and that of the political structures within which interpretation is structured.[8] That justification function applies as well to the framing of political authority in Marxist-Leninist orders.[9] Or they may point to normative principles that are incorporated within the text. Over all of this issues of interpretation hover—if not of the text, then of the preamble and through the preamble to text. This is especially the case with international instruments.[10]

The third is to create some sort of "chapeau" provision within the body of the authoritative text, setting out the general principles, or intent, or other guidance , as itself the text through which all other text is to be read. In this sense the chapeau creates a framework for the interpretation of what follows. It does that in a structural way—the text itself constrains the reading of what follows in ways that contradict or avoid the provisions of the chapeau. Like all other text, of course, the meaning of the chapeau (and its effect context that follows) is also subject to interpretation—sometimes following the words of the chapeau and sometimes with reference to the intent that brought it into text.[11]

The fourth is to produce additional documents, not attached to or made part of the authoritative text, from which people are invited to draw guidance about intent, objectives, expectations, and

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[5] See, e.g., in the United States 1 C.F.R. ¶ 18.12 ("inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal", ibid., ¶ 18.12(a)). And yet the scope of their authority remains contested. See, Kevin M. Stack, "Preambles as Guidance," (2016) 84 The George Washington Law Review 1252-1292.
[6] Milton Handler, Brian Leiter & Carole E. Handler, "A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation," (1991) 12 Cardozo L. Rev. 117. In other common law states, see, e.g., Anne Twomey, "The Application of Constitutional Preambles and the Constitutional Recognition of Indigenous Australians," (2013) 62(2) International and Comparative Law Q. 317-343.
[7] Nomo Claire Lazar, 'Time Framing in the Rhetoric of Constitutional Preambles,' (2021) 33 Law & Literature 1-21.
[8] Arnaldo Sampaio de Moraes Godoy, "Global Constitutionalism. An introduction to the comparative study of Constitutional preambles: Europe," (2018) 10(3) *Revista de Estados Constitutionais, Hermenéutica e Teoria do Direito* 238-250; Liav Orgad, "The Preamble in Constitutional Interpretation," (2010) 8(4) International Journal of Constitutional Law 737.
[9] Xiaodan Zhang, "The Leadership of the CCP: From the Preamble to the Main Body of the Constitution—What Are Its Consequences for the Chinese Socialist Rule of Law?," (2020) 12(1) Hague Journal on the Rule of Law 147-166.
[10] Max H. Hulme, 'Preambles in Treaty Interpretation,' (2016) 164(5) University of Pennsylvania Law Review 1281-1343, 1331-1332.
[11] Cf., Arwel Davies, 'Interpreting the Chapeau of GATT Article XX in Light of the New Approach in Brazil-Tyres,' (2009) 43 J. World Trade 507-539.

meanings as conceived by the authors of the text. Legislative history[12] or *travaux préparatoires*,[13] are identified as products of this type. These are meant to embody intent—and with it the primacy of the premise that intent rather than text ought to be the basis for understanding and applying "law." That is, that law ought not to be reduced to objects (words) but rather that the objects (words) are the triggers for the memory of the intention embodied within them. In the United States the ideological end points of this difference between premises that privilege text or intent were nicely framed by the battles between Supreme Court Justices Scalia and Breyer in the United States.[14] Those battles, and the need for guidance of guidance, has analogues elsewhere relevant to approaching issues of interpretation of the UNGP. Indeed, the impulse to use of legislative history in international instruments appears to be emerging.[15]

International treaty interpretation, at least in its formal manifestation tends towards interpretive *bricolage*. These are textualized in Articles 31 and 32 of the Vienna Convention.[16] Article 31 imposes a requirement of good faith in interpretation project to be measured as a function of the "ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[17] The term "context" is further defines as the treaty text, preamble and annex.[18] In addition agreements or instruments relating to or made in connection with the treaty are also subsumed within "context."[19] Of course, special meanings apply where the parties can prove intent.[20] Beyond text, intent may be discerned, with application to text where textual interpretation "leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable."[21] To those ends "supplementary materials" are identified: "including the preparatory work of the treaty and the circumstances of its conclusion."[22] In some cases, supplementary materials include as well so called soft

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[12] Nicholas R. Parollo, 'Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950,' (2013) 123(2) *The Yale Law Journal* 266-411; Victoria F. Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules,' (2012) 122(1) *Yale Law Journal* 70-152.

[13] Pratyush Panjwani, 'The Role of Travaux in Interpreting BIT Provisions: Are Tribunals over-Prepared to Resort to Preparatory Works' (2019) 20 J World Investment & Trade 473-512.

[14] See, James J. Brudney and Corey Ditslear, 'Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect,' (2008) 29 *Berkeley Journal of Employment and Labor Law* 117-173. In the United Kingdom, see John J. Magyar, 'The Slow Death of a Dogma? The Prohibition of Legislative History in the 20th Century (2020) 50(2-3) *Common Law World Review* 120-154.

[15] See, e.g., Jerzy Jendrośka, 'Access to Justice in the Aarhus Convention: Genesis, Legislative History and Overview of the Main Interpretation Dilemmas, (2020) 17 *J. Eur. Envtl. & Plan. L.* 372-408.

[16] United Nations (1969) 'Vienna Convention on the Law of Treaties,' Treaty Series 1155 (May): 331.

[17] Ibid., Art. 31(1).

[18] Ibid., Art. 31(2).

[19] Ibid., Art. 31(2)(a) & (b). In addition subsequent agreements "regarding the treaty ," subsequent practice "in the application of the treaty," and applicable "relevant rules of international law" are also ingredients in the interpretive stew pot. Ibid., Art. 31(3).

[20] Ibid., Art. 31(4).

[21] Ibid., Art. 32 (a) & (b).

[22] Ibid., Art. 32.

law instruments and particularly those "adopted by states parties with a view to authoritatively interpreting the obligations contained in treaty provisions."[23]

Nonetheless, international hierarchies of legalities, as embodied in the legalities of treaties, do not represent a singular perspective on guidance. The international system itself, bifurcated along political and social (public and private) lines suggests both a private ordering of guidance as well as hybrid approaches.[24] Private ordering, of course, has become a function of civil society actors, at least in liberal democratic states. Their authority has been, if grudgingly at first, recognized and incorporated into the working styles of the United Nations System[25]—although there the supremacy of the political remains an important element of that embrace.[26] The nature of that inclusion remains contextual and highly inter-subjective,[27] in ways that parallel the inter-subjectivity of text and its interpretation from out of its context as applied to a particular point in space, time, and place.[28] Those points of time, place, and space, define the performance of consultation and the textual ecologies of calls for inputs around or through which decisions about privileging input are made, rituals are instrumentalized as forms of legitimation, and the framing of the constraints around plausible interpretation based on the "bell curve" of input (and approaches to outliers) are constructed.[29] That, of course, described the essence of the inter-subjective development of the UNGP around the UNHRC resolutions respecting the SGSG mandate, the SRSG's complex but well-coordinated system of consultations, and the synthesis of those consultations in reports back to the UNHRC and the UNGA in response to which further guidance from and eventually endorsement of the SRSG project emerges.[30] The point here is not whether these forms and expressions of dialectics are efficient, valuable, legitimate, or themselves a deviation from the open textured principles of equality that might be understood to be at the heart (or at a heart-space) of human

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[23] Dinah Shelton, 'Normative Hierarchy in International Law,' (2006) 100(2) The American Journal of International Law 291-323, 321.

[24] Larry Catá Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order,' (2011) 18(2) *Indiana Journal of Global Legal Studies* 751-802.

[25] See, e.g., United Nations (2004) We the Peoples: Civil Society, the United Nations and Global Governance [online]; available [https://www.globalpolicy.org/images/pdfs/0611report.pdf]; last accessed 30 March 2024.

[26] Helmut K. Anheier, 'The United Nations and Civil Society in Times of Change: Four Propositions,' (2018) 9(3) *Global Policy* 291-300. Instructive is the quite different perspective, and the consequential guidance to the Report, United Nations (2004) We the Peoples: Civil Society, the United Nations and Global Governance that one can read in the transmittal letter of Fernando Henrique Cardoso Chair of the Panel of Eminent Persons on United Nations–Civil Society Relations (ibid., pp. 3-4), suggesting a broad role for civil society in global governance, and the Note of Secretary General Kofi Anon (ibid., pp. 1-2) considering the complementary role of civil society in advancing the work of the U.N.

[27] Sara Hellmüller, 'Meaning-Making in Peace-Making: The Inclusion Norm at the Interplay between the United Nations and Civil Society in the Syrian Peace Process,' (2020) 26(4) *Swiss Political Science Review* 407–428; Nicolas Hachez, 'The Relations between the United Nations and Civil Society: Past, Present, and Future' (2008) 5 *Int'l Org L Rev* 49.

[28] For a pragmatic example and its dynamic character, see, e.g., Renata Siemieńska, 'Two Decades of Participatory Democracy in Poland,' in Matthias Freise and Thorsten Hallmann (eds), *Modernizing Democracy: Associations and Associating in the 21st Century* (NY: Springer, 2014).

[29] See, e.g., Keren Wang, *Legal and Rhetorical Foundations of Economic Globalization: An Atlas of Ritual Sacrifice in Late-Capitalism* (New York: Routledge, 2019); Sha Li, 'Rereading *Analects* 2:3: Law, Rites, and Dignity in Confucius,' (2023) 73(4) Philosophy East and West 916-936; Sor-hoon Tan. '2011. "The Dao of Politics: Li (Rituals/Rites) and Laws as Pragmatic Tools of Government,' (2011) 61(3) *Philosophy East and West*:468–491.

[30] See discussion supra Chapters 2-4.

rights, but rather the effect of these performances on the shaping of the context of text that emerges at the end of these rituals, and the constraints or pathways to their interpretation and application.

Marxist-Leninist systems also cultivate the private, at least within the confines of what is permitted within the norms and practices of a political apparatus organized along Leninist lines. The development of 'whole process people's democracy' provides an example from China.[31] Caribbean Marxism provides another.[32] Guidance in the former case can be ritualized around tightly organized mass social organizations that collectively represent all elements of a governance group and whose input is received by and utilized under the guidance of the vanguard elements, itself organized as a communist party. In the latter case, the rituals of consultation in significant matters are sometimes sought through rituals of plebiscite.[33]

To all of this must be added a general suspicion cultivated by the caste of members of the social collectives assigned a leading role in the interpretation of text. To control the modalities of interpretation, and the normative premises that guide the guidance, is to control the substance of the text itself. In the field of international law the singularity of the edifices of interpretation that is characterized as compelling, or at least authoritative, and the structures of rules to rationalize those efforts, is sometimes noted with a measure of irony: "the claim that they actually direct behaviour of legal operators is met with scepticism not only by proponents of critical approaches or other variations of rule-scepticism, but also by international legal scholars who otherwise believe in international law's normative power."[34]

These interpretive strains are relevant to an understanding of the role and purpose of the chapeau, and the nature of guidance as a matter of expectations and function (what is to be guided) and force (what deference is owed this guidance). Even mandatory guidance has permissive or interpretive edges. Those edges can acquire a variety of forms and effects depending on the guidance lens applied. Those edges in this case might bring one back from the text and its official commentary to the travaux préparatoire and the converge of intent between drafters and endorsers, or expose spaces between them permitting a broader range of plausible interpretation (and thus of commentary).

6.1.2. General Principles Textual Commentary

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[31] Jieren Hu, and Tong Wu, '"Whole-Process People's Democracy" in China: Evidence from Shanghai,' (2023) [https://doi-org.ezaccess.libraries.psu.edu/10.1007/s41111-023-00245-9]; last accessed 31 March 2024.
[32] Larry Catá Backer, *Cuba's Caribbean Marxism: Essays on Ideology, Government, Society, and Economy in the Post Fidel Castro Era* (Little Sir Press, 2018).
[33] Larry Catá Backer, Flora Sapio, James Korman, 'Popular Participation in the Constitution of the Illiberal State--An Empirical Study of Popular Engagement and Constitutional Reform in Cuba and the Contours of Cuban Socialist Democracy 2.0,' (2020) 34 *Emory International Law Rev.* 183-276.
[34] Fuad Zarbiyev, 'The 'cash value' of the rules of treaty interpretation,' (2019) 32(1) *Leiden Journal of International Law* 33-45.

At first reading, the text of the chapeau provision appears straightforward. It is meant to describe several key principles that must inform the text (and textual interpretation) of the Principles that follow. A closer reading, however, reveals areas where it is possible to read the text in more than one way.

6.1.2.1 The "Grounded in Recognition" Clause. First, "These Guiding Principles are grounded in recognition" of the General Principles of this section. One would tend to race past these words to get to the heart of the grounding. Yet it may make sense to pause for a moment to consider what it might mean when one writes that something is "grounded in recognition of" something else. In this case, the "something" that is being grounded are the Guiding Principles themselves. The thing to which they are grounded are the general principles that follow. To ground something is to give an abstract thing (in this case the Guiding Principles) a firm theoretical or practical foundation (in this case the General Principles). None of this is problematic from the perspective of understanding or interpreting the text.

At its most straightforward reading, then, it is easy enough to read that opening section as meaning no more (and no less) than that the *General* Principles (which follow as subsections (a), (b), and (c)) are *connected* to the *Guiding* Principles that follow. The *character of that connection* is bound up in the understanding of two key words that are themselves connected in some way: one to the verb "to ground" (in this case to "grounded in" something) and the other is the "something"—recognition. Everything else that follows, the thirty one Guiding Principles, then, are embedded in and must be read through the General Principles. *Nonetheless*, the Guiding Principles are NOT grounded in the General Principles that follow. Instead, the thirty one principles are grounded *only in a recognition* of the General Principles that follow. But that poses an interpretive problem before one even arrives at the specification of these overarching principles read into the Guiding Principles that follows: that is, understanding the extent to which embedded. That leads inevitably to a consideration of the question relating to what the word "recognition" adds to the "grounding" of something (the Guiding Principles) in something else (the General Principles of the UNGP).

There is very little room for ambiguity in the understanding of "grounding" something in something else. Its etymology[35] underscores this conclusion. Originally as a noun, the term derives from the Old English *grund* (and related old Germanic variants) in the sense of a foundation or the bottom (as in an abyss or Hell). By the 1950s it had come also to mean a basic rule (e.g., *grundnorm*).[36] This carries over to its use as a verb as in the General Principles. Here the meaning touches on concepts of foundations, as in to lay a physical foundation or, figuratively, to base something (for example an argument) on something else. It also includes the concept of "establishing firmly."[37]

The grounding of the Guiding principles, however, is not in the General Principles themselves, but rather in their recognition. That is *that the object of the grounding is a recognition of principles rather*

[35] Etymology online, Ground, available [https://www.etymonline.com/word/ground], last accessed 30 March 2024.
[36] Hans Kelson, *Pure Theory of Law* (Max Knight (trans); Berkeley, CA: University of California Press, 1967). See also essays in Luís Duarte d'Almeida, John Gardner, and Leslie Green (eds), *Kelson Revisited: New Essays on the Pure Theory of Law* (Oxford: Hart, 2013).
[37] Etymology online, Ground, available [https://www.etymonline.com/word/ground], last accessed 30 March 2024.

than the principles themselves., It is in this sense that one can with confidence understand the object of the General Principles as the guiding principles or the foundational principles, on which the UNGP are established. It then becomes necessary to understand how the use of the word "recognition" (and its use cannot be gratuitous) modifies the grounding. Fundamentally, then, this poses the issue of the nature of the grounding, and consequentially, on the character of the relationship between the General Principles and the Guiding Principles that follow. To this end, a quick look at the etymology of the word "recognition" may be in order.[38] Its origins have been traced to the Latin *recognitionem* (nominative *recognitio*), which touch on a reviewing, or examination, the noun of the stem past participle *recognoscere*—to acknowledge, to know again, or to examine. It acquired several centuries ago the meaning of a sometimes formal acknowledgement of something or some act, ultimately to know (*cognoscere*) again (re-).

From there it may be possible to understand the meaning of the textual direction that "These Guiding Principles are grounded in recognition of." On the one side it is plausible to understand the phrase to mean that in reading the Guiding Principles one must acknowledge ("recognition") the foundational character of ("grounded in") the general principles that follow, but that those general principles inform but do not bind the Guiding Principles that follow. On the other, it is as plausible to invert this reading, so that one can understand that phrase to mean that in reading the Guiding Principles one must acknowledge ("recognition") the foundational character of ("grounded in") of the general principles that follow, but also acknowledge (re-cognize, examine again) their application to the reading of each of the Guiding Principles that follow. In one instance, then, the General Principles are meant to broadly acknowledge the foundations on which any reading of the Guiding Principles are to be undertaken (whether that is intentional or not) as collectively culturally compelling. In the other, the interpretation (and application) of the Guiding Principles that follow must be based on three general principles that follow. One acknowledges in a general sense; the other would bind. Between them, there is a wide interpretative gap; without more, these approaches and all the variations in between may be equally plausible from a good faith reading of the words that make up this phrase.

6.1.2.2. The Three Core General Principles. The three general principles which is the object of grounding and recognition recall the protect, respect, and remedy framework on which the Guiding Principles are organized, if not built.[39] The first speaks to the "States' existing obligations to respect, protect, and fulfill human rights and fundamental freedoms."[40] The second describes "The role of business enterprises as specialized organs of society, performing specialized functions, required to comply with all applicable laws and to respect human rights."[41] The third speaks to a "need for rights and obligations to be matched to appropriate and effective remedies when breached."[42]

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[38] Etymology online, recognition, available [https://www.etymonline.com/search?q=recongnition], las accessed 31 March 2024.
[39] For a discussion from the travaux préparatoires, see Chapter 3, supra.
[40] UNGP, General Principles (a).
[41] Ibid., (b).
[42] Ibid., (c).

These suggest a number of considerations for the UNGP that follow. The first touches on the borderlands of state, enterprise, and "none of the above." It is clear that each of these forms of human social relations are meant to stay in their own lane. The duties of the State and the responsibilities of business enterprises are distinct, as are the sources of their authority and the breadth of their operational authority. The second is that states that operate like enterprises will, to that extent, be subject to the constraints generally applicable to enterprises. The open question is whether that is in addition to or instead of the burdens of the State duty. That determination, plausibly can go either way. And, indeed the law of State sovereign immunity points in both directions.[43] The traditional view would incline toward an "in addition to" standard. The emerging consensus with its waiver for a number of State activities, including commercial activities" would open the door to a plausible argument that the "instead of" standard ought to apply.[44] A question yet to be considered in any depth focuses on the consequences for human rights law of private enterprises that might, by operation of regulatory delegations and guidance, effectively take on a governmental role. This reverse directions sovereign immunity might draw on the jurisprudence of constructive takings, either from domestic law or from the law of investment treaties.[45] In addition, the concept of matching rights and remedy is not situated in any place, space or time. Rights can emerge from any organ with rule making authority among a willing collective, whether public, private or religious. So might remedy. Yet that suggests another set of issues around the alignment of the hierarchical principles of General Principles (a) and (b) and the remedial principal. That is an issue that is resolved in favor of hierarchy—of the political and its legalities over the private and its contracts, or the market and its expectations. Lastly, the issue of temporality presents another ambiguity. For example, General Principle (a) speaks to existing obligations. A narrow reading would limit those obligations to the ones in effect at the time of endorsement. The more likely and broader reading would include all obligations heretofore or thereafter embraced by the State. But it does not include any obligations the State has declined—including those set forth in the reservations to treaties entered into by the State.

Most important, perhaps, is that one can also understand the three of these principles to *embody the idea or the signification of the UNGP as a whole*. This can be understood in a number of different ways. Most narrowly, as suggested above, it is meant to read into the UNGP the three part framework on the basis of which the SRSG fulfilled his mandate from the UNHRC. As such, the general principles sketch the UNGP generally as an aggregation of more precise elaborations of the three pillar framework, the acknowledgement (2008) and endorsement (2011) of which by the UNHRC.[46] That elaboration completes a self-referencing circle of mutual recognition within which interpretation and application of one (the more general three pillar principles) requires the elaboration, interpretation, and application of the other (the thirty one UNGP Principles), and vice versa. More broadly, the general principles invite one to understand the systemic nature of the enterprise of business and human rights by reference to its

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[43] See, Kate Sablosky Elengold & Jonathan D. Glate, 'The Sovereign Shield,' (2021) 73 *Stanford Law Review* 969-1046.
[44] Generally, Larry Catá Backer, 'The Human Rights Obligations of State Owned Enterprises (SOEs): Emerging Conceptual Structures and Principles in National and International Law and Policy (2017) 50(4) Vanderbilt Journal of Transnational Law 827-888.
[45] See, Steven R. Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law,' (2008) 102 *The American Journal of International Law* 475-528.
[46] Discussed Chapter 2, supra.

hierarchies, differentiations, and legalities. States respect, protect and fulfill within the scope of the general functions; business enterprises comply with law (from States) and respect within the scope of their specialized functions; and the resulting rights and obligations must be matched to remedy in the face of breach. More broadly still, it suggests the signification of human rights as the filter through which the conduct and purpose of States and business enterprises are to be measured. The State obligation drives its function; the business enterprises' specialized function is undertaken as a function of compliance. Remedial structures connect both to those who experience human rights harms.

6.1.2.3 The Interpretation of the Core General Principles: Application. The three principles are further elaborated in the body of the General Principles by four additional statement/principles. These are not identified as part of the General Principles which must be recognized as the foundation in which the Guiding Principles are grounded. Nonetheless, they appear in the General Principles and might be considered additional principles of construction and interpretation of the text of the UNGP which follow. They are not, however recognized as foundational. The difference may not be significant. However, the difference in their textual presentation may give rise to a distinctive range of application. The three core general principles are internal to the UNGP and therefore must be read with and into each of the thirty one principles that follow. The other general principles are external to the UNGP and speak instead to the way in which one might go about interpreting or applying them. These external principles are aid to interpretation; the core general principles form a part of what follows. The effect is small but significant—the three core principles must be used to read, construe, interpret, and apply, the remaining general principles—the three are as embedded in the remaining General Principles as they are in the rest of the UNGP. The remaining general principles, however, do not modify the three core principles. However they may affect the limits of the application of each other and they, too, must be read as a coherent whole.[47]

The first of these principles beyond the three part core goes to scope—the UNGP apply to all States and all business enterprises.[48] It does not apply to non-State actors per se, including international organizations and more specifically the organs of the United Nations system. Nor does it apply to civil society or religious institutions irrespective of the human rights impacts of their institutional activities. That does not prohibit its voluntary embrace by these organs—but it bears emphasizing that they were not the intended objects of its application. Business enterprises are not defined, except in General Principle (b) with reference to their manifestation (as specialized organs) and activities (specialized functions). Perhaps the definition may be approached by what organs or activities may not be included-- for example the work of religious organs or civil society which is not commercial in nature. That tracks with the movement in sovereign immunity that has begun to develop a jurisprudence of commercial activities. It is important, in that respect to remember that the form of the organization may not provide a blanket immunity. Thus, for example, a restaurant open to the public and run by a religious organization may be subject; but its adverse human rights impacts with respect to its conditions of labor (for example no women clerics) may not. The same applies to states, the most conventional application of which is the

[47] See Chapter 6.1.2.4 and UNGP General Principles, ¶ 4.
[48] UNGP, General Principles, ¶ 2.

state owned or state controlled enterprise, around which there is a large and lively academic discussion and jurisprudence. These concepts and their boundaries remain fluid; as does the jurisprudence. The effects on the application of the UNGP then follow. Nonetheless, the focus throughout the process was on traditional private business, motivated principally by financial objectives and constituted through the laws of domestic legal orders in which they are created or operate.

Yet to say that the UNGP applies to all States and all enterprises does not end the matter. It is possible to remain consistent with this principle and yet apply differing standards to States and enterprises as a function of their character or situation. That requires reading the applicability principle in this General Principle against the nondiscrimination principle in General Principle ¶5. [49] Nonetheless the nondiscrimination principle must be applied with sensitivity to the conditions of its objects and always with an eye toward achieving the core objectives of the UNGP. Though it may permit some flexibility as between nondiscrimination in opportunity to result, it does permit deviation based on the condition of the actors to which it is applied. As a consequence, and following the practices of international financial institutions, for example, it might be possible to apply the UNGP differently to small and medium sized enterprises than to the largest multinational enterprises. Likewise least developed States may approach their duty to protect in different form that, say OECD member states. This is reflected, for example in UNGP Principle 14 with respect to small and medium sized enterprises. And given the breadth and flexibility of General Principle (a), there is little that stands in the way of extending the responsibility to respect beyond business enterprises to the activities of civil society and religious institutions.

6.1.2.4 The Interpretation of the Core General Principles: Interpretive Coherence and Fundamental Objectives. The guidance principle on coherence amalgamates a number of what are now core concepts.[50] One is the idea, common to legal hermeneutics, that the UNGP "should be understood as a coherent whole." The direction is stated in "should" form: indicating a mandatory obligation on which the legitimacy of understanding will be based. The command or obligation to "understand" the text as a "coherent whole" embodies the ancient interpretive principle that the meaning of a word or phrase may be determined by its context–and the broadest context is the whole text within which the word or phrase is found. In its common law form it is connected to old canons of statutory interpretation, among them *noscitur a sociis*.[51] For the purpose of reading the UNGP, those old interpretive principles are generalized and *made intentional*. The intent, in the form of the obligation to read the text as a coherent could be said to change the character of the obligation from a passive one towards one that includes positive obligation. That is one must read the text as a coherent whole, rather than, for example, when it is necessary one might glean meaning by understanding the text as part of a coherent whole. One might read this part of the General Principles as an invitation, in the traditional manner, to take advantage of the traditional palette of interpretive techniques contextually relevant, now focused on the human

[49] Discussed Chapter 6.1.2.6, infra.
[50] Ibid., ¶ 3.
[51] Freya Baetens, 'Ejusdem Generis and Noscitur a Sociis in Municipal and International Law: Interpretative Cross-Fertilisation?,' in J. Klingler, Y. Parkhomenko, C. Salonidis (Eds.), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2019) 133-160;

rights impacts of economic activity. Alternatively, one might also plausibly read this text as a positive instruction to read and apply the text of each principle as an expression in a specific instance, of a single part of a unified vision made up of all principles working together simultaneously to advance some objective or ends. That, of course, is easier said than done. Except perhaps with the aid of big data tech. But the impulse ought to drive interpretation—at least to some extent. Thus, the instruction goes beyond context driven interpretation, and certainly beyond the list or categorical imperatives of *noscitur a sociis*.

Another is that this coherent whole "should be read . . . in terms of their objective." It is possible to read this as a simple statement of the obvious: that the UNGP should not be read against itself but rather in a way that furthers its purpose. That purpose is embedded both in the idea (or signification) of the UNGP as a whole. It is also embedded in each of the Principles, as well as in their interweaving. The direction to read text in terms of objective also suggests that intent plays a significant role, or ought to, in the construction and application of the UNGP as a whole, its individual Principles and their interactions. That leaves open the question, discussed more theoretically above,[52] about the sources of intent. The text of the UNGP, and certainly the text of the General Principles, provides little guidance. That suggests a broad sense of possibility that may be applied as a function of the legal traditions and practices of a political collective (including but to limited to States, given the governance role of enterprises in the new compliance oriented regimes envisioned by or through the UNGP), and on the basis of conceptual expectations about the way one authoritatively reads text. For some, this can plausibly serve as an invitation to read into the UNGP (at least as persuasive authority or evidence) the travaux préparatoire,[53] or more broadly all of the efforts undertaken in the context of business and human rights, especially to the extent they have been noted in the official actions of authoritative bodies—principally the UNGA and UNHRC. That brings the Norms back into the interpretive picture, if only as a negative or supplementary source.[54] For others, it can plausibly suggest that the objectives of the UNGP must be discerned strictly (more or less) from its own text—considered as a whole.

In whatever way one chooses to read this text, and several are suggested here, what might emerge most clearly is an intention, conveyed in text, to build overarching objectives into *all of the text* (for each principle, their interactions and the UNGP read as a whole). Thus, one does not merely read the principles as a coherent whole, but one with an overriding and privileged purposes. It is the manifestation and advancement of those purposes to which all of the text of the UNGP—all of its words—are directed. The General Principles proffer two foundational objectives against which text is to be read. The first goes toward "enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities."[55] The second objective is to contribute "to a socially sustainable globalization."[56]

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[52] See discussion, Chapter 1, supra.
[53] Discussed Chapter 3, supra.
[54] See discussion, Chapter 4, supra.
[55] UNGP, General Principles, ¶ 3.
[56] Ibid.

The objectives, however, are precisely ambiguous, as text. In the absence of a definition, for example, socially sustainable globalization might be understood as a protean construct. It consists of the joining of three concepts that together are to mean something more than or different from each of them individually. The first is "social," presumably a reference to the conditions of collective life (and perhaps that of the individuals within them which together may serve as a proxy for this notion of collective life) whose ordering in social relations produces organized human life. Unstated are two competing and ancient forms of understanding the social in this context. The first is that the "social" must converge into a single set of fundamental premises for its conception, ordering, and operation. The second is that social relations are a function of space, place, and time and that it is characterized by variation in its core ordering premises. Both positions have captured the imaginations of collective bodies with the authority to impose a view, and each has served as the privileged mode of understanding social relations and their artifacts (government, institutions, morals, political theory, etc.) through a lens of legitimacy based on adherence to the goal (convergence or variation).

The other is "sustainable," presumably centered on the worthy premise that institutions, premises, and the structures and framing of social relations and their collectives ought to survive beyond the life span of any generation. Yet it may imply more—that whatever it is that survives must also either (1) preserve those things of value which made it appealing in the first place,[57] or (2) enhance them as measured by the cluster of premises around which the social is built.[58] These translate into the key interpretive frameworks of the UNGP that are either complementary or in opposition: (1) "do not harm," a cornerstone of the SRSG's intent in moving his mandate toward and into the USGP, or (2) "adapting and extending" approaches. The first is operational and contextual, the second is systemic and comprehensive. The SRSG, writing after the endorsement of the UNGP suggested the latter framework. "My working hypothesis, when I set out on this journey was that it might be possible for such a UN mandate to generate an unfolding dynamic that would lead to greater protection against corporate-related human rights harm and contribute, thereby, to socially sustainable globalization."[59] The leaning toward the broader interpretation may well also be reflected in some of the language in the preambular materials of the UNHRC endorsement resolution,[60] and its text.[61] Yet that requires a bit of stretching, not enough, though, to make that reading implausible.

The third, "globalization," is presumably centered on trade, the nature and scope of which has become challenging for States to regulate or buffer through their authority over national markets; "what once was external trade between national economies increasingly has become internalized within firms as global supply chain management, functioning in real time and directly shaping the daily lives of people around the world."[62] A relevant consequence for the UNGP project was the resulting creation of spaces

[57] For example the UNGP "do no harm" principle. See discussion Chapter 3, supra, and 2008 SRSG Report 63/270 GA, ¶ 10.
[58] See discussion Chapter 3, supra, and 2007 SRSG Report 4/74 (HR Impacts Assessments).
[59] John Ruggie: Just Business: Multinationals and Human Rights (NY: WW Norton, 2013), p. 173.
[60] UNHRC 2011 UNGP Res, Preamble ¶ 6.
[61] UNHRC 2011 UNGP Res, supra, ¶ 4 and generally Chapter 2 supra.
[62] 2006 SRSG 2006 Report, ¶ 11.

where a coherent and comprehensive legal space cannot be effectively maintained.[63] This gap is vast between "the scope and impact of economic forces and actors" on one side and "the capacity of societies to manage their adverse consequences" on the other.[64] It is in those spaces that the social and the sustainable are directed. Yet because globalization as conceived is penetrative–that is it seeps into national markets through is not of them, the social sustainability of globalization touches on both economic activity within and across national regulatory spaces. And thus the objective of socially sustainable globalization emerges as a complex concept key elements of the interpretation and application of which can be plausibly contested.

To get there, the General Principles offer a process objective: enhancing standards and practices, with the (sub) objective of achieving tangible results measured against affected individuals and communities. This objective, then, contains three elements, each of which, and all of them together, must be read into the UNGP, and which must be judged, in turn, by the resulting quantum of contribution (positive or negative) to a socially sustainable globalization. The first one, enhancing standards and practices, appears straightforward. It is directed toward the instruments that ought to be used, investing them with purpose. But at the same time identifying them as key instruments for the realization of the UNGP project. This does not touch on character or quality, but merely on form. The second, the achievement of tangible results has two elements. The first touches on measurement; there must be a result attributable to standards and practices, the effect must be measurable. The means of measurement is unspecified; that opens a wide doorway from anecdotally episodic to big data tech enhanced quantitative measures. Whichever means of measurement is utilized, it must also be connected to affected individuals and communities. This suggests the need to demonstrate a linear connection (whether direct or indirect is perhaps defined by the specific Principle to be interpreted) from (1) standards/practice to (2) tangible results to (3) affected individuals/communities to (4) socially sustainable globalization. At least with respect to the UNGP human rights due diligence framework, that appears to be the essence of the operating style built into the corporate responsibility to respect,[65] and perhaps indirectly the state duty[66] to protect human rights.

6.1.2.5 The Interpretation of the Core General Principles: The No New Obligation Caution. The General Principles also recite a caution in interpretation. While it is possible to read the UNGPs as facilitating, or inviting, or creating structures for the advancement of law, norms, expectations, or practices around all of the activities that fall within the UNGP's scope, the General Principles include the caution about reading the UNGPs as creating "new international law obligations."[67] This caution underscore Core General Principle (a)'s recognition of the existing obligations of States. Though the

[63] See discussion Chapter 3; 2008 SRSG Report 8/5 (Protect/Respect/Remedy); and John Ruggie, UN Special Representative for the Secretary General for Business and Human Rights, Keynote Address at the 3rd Annual Responsible Investment Forum (Jan. 12, 2009) at 2.
[64] 2008 SRSG Report 8/5 (Protect/Respect/Remedy), ¶ 3.
[65] See discussion infra, Chapter 8.
[66] See discussion infra Chapter 7.
[67] UNGP, General Principles ¶4.

UNGPs are not to be read as creating new obligations, they are also not to be read as limiting or undermining existing State legal obligations.

Both the "no new obligations" and the "no limiting or undermining" standard underscore the fundamental principle of the State duty to protect human rights as grounded in those elements of international law which bind a particular State.[68] Indeed, the General Principle speaks only to "legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[69] There are three concepts embedded in that description. The first is that the caution applies to obligations a State may have undertaken. These are voluntary acts generally specified in an international legal instrument with binding effect as international law on a State. That binding effect extends only to the State, of course. And it is a function of the way in which a State receives international law within the jurisprudence of its own constitutional order. It also extends only to the extent it is reflects whatever reservations the State may have included.[70] The second is that the caution can extend to obligations to which a State may be subject irrespective of consent. Most commonly this refers to jus cogens obligations,[71] and obligations otherwise *erga omnes*.[72] Both remain quite dynamic concepts and subject to some development, and a substantial amount of scholarly commentary advancing views sometimes aligned with their expansion. The third is that the caution applies only to international law with regard to human rights. The issue of line drawing—that is developing standards for determining what constitutes international law with regard to human rights and what does not—may be quite challenging if only because it is possible to take a very broad view of international law arguing that all of it is made in regard to human rights (the human rights fundamentalist view), or a very narrow view arguing that only that which directly affects or invokes international human rights falls within this principle.

In any case applying the "no new law/no limiting or undermining law" principle to the interpretation of the UNGP, read as a coherent whole, applicable to all States and business enterprises (but not to international organs, civil society or human rights defenders), will require coordinating its several moving parts. The resulting interpretive possibilities can produce substantial variations. These will be based on the palette of international law that binds a State, that which might bind it (a function of how one reads the scope of that concept), and the breadth of international law to which it applies.

6.1.2.6 The Interpretation of the General Principle: Heightened Attention. The last of the general principles beyond the core three touches on the manner of interpretation as a function of social policy. It

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[68] UNGP, Principle 1 and Commentary. See discussion infra Chapter 7.
[69] UNGP, General Principles ¶4.
[70] On treaty reservations, see, e.g., Vienna Convention on the Law of Treaties (1969; entry into force 27 January 1980), UNTS vol. 1155, p. 331, arts. 19-23; Bounekhel Abdellah, and Aouachria Rokaya, 'The Role of the Practices of the International and Regional Human Rights Treaty Bodies in the Development and Codification of the Rules of International Law - The Reservation to Treaties as a Model,' (2023) 31(4) *African Journal of International and Comparative Law* 577-599.
[71] See, e.g., William A. Schabas, 'Le droit coutumier, les norms imperatives (jus cogens), et la Cour Européenne de Droits de L'Homme,' (2020) H-S *Revue québécoise de droit international* 681-704; .
[72] Marco Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations Erga Omnes and Erga Omnes Partes' (2018) 23 *J Conflict & Sec L* 383-404.

represents the affirmation of the bias in interpretation and application that must be avoided, and that which must be embraced. What must first be embraced is the principle of non-discrimination in UNGP implementation. That is fairly straightforward ad built into the jurisprudence and expectations of the vast majority of political, economic, and social organs. It is built into investment treaties and the constitutional law of States.

However, at the edges there may be variability in the understanding of and the conduct expected to conform to principles of non-discrimination. For example, it may be possible to tolerate discrimination in outcome if there is an intolerance in discrimination in opportunity. Likewise, there may be a principal of positive discrimination as a remedial measure (for example affirmative action or preferences based on collective characteristics which had previously been the basis of discrimination with adverse effects). And, indeed, the non-discrimination principle is itself subject to a "particular attention" standard. These adjudge discrimination against the "needs and challenges" of individuals and collectives identified as at "heightened risk of becoming vulnerable or marginalized." In addition a "due regard" standard is specified for risk differentiation grounded in differences "faced by women and men." These differentiations are reflected in the UNGP themselves. For example in UNGP Principle 3's State guidance to enterprises, and in UNGP Principle 7's framework for conflict zones. And yet, there are a number of areas where the non-discrimination rule may be more challenging—these tend to occur in jurisdictions where certain characteristics, traits, behaviors, or conditions are either not recognized or, if recognized suppressed. Sexual minorities in certain states, gender differentiation beyond the man-woman binary may be included in categories that in some States may be beyond the scope that non-discrimination may reach . This will then be the subject of the UNGPs themselves, where, effectively, the obligation to deal with the repercussions tend to fall on the enterprise under the rules of the 2nd Pillar Corporate responsibility to respect.[73]

6.2 Authoritative Interpretation/Commentary

Unlike the other thirty-one principles of the UNGP, the UNGP's General Principles do not have an official Commentary. The UNHRC Endorsement resolution, however, contains text that might usefully shed additional light on meaning.[74] The preambular materials of the UNHRC 2011 Endorsement Resolution stressed "that the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State."[75] This might be used to better understand the meaning of General Principle (a). The preambular language recognizing the role of regulation to "assist in channelling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms"[76] suggests the contours of socially sustainable globalization through the

[73] See discussion Chapter 7, infra; see also UNGP Principles 23-24.
[74] See discussion Chapter 2.1, supra.
[75] Human Rights Council, Resolution Adopted by the Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/RES/17/4 (6 July 2011); available [https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4] last accessed 12 February 2024 (hereafter the UNHRC 2011 UNGP Res), Preamble.
[76] Ibid.

enhancement of standards and policies.[77] On the one it the language underscores the principle of State supremacy built into both the State system and now reflected in the UNGP. On the other hand, it reinforces the idea of regulatory mixes as the fundamental basis for the interpretation of the UNGP as a coherent whole as a function of their objectives. Lastly, the UNHRC's endorsement resolution commended the development of the "Framework based on three overarching principles" and recognizing the "implementation, on which further progress can be made." These might be read as reinforcing the interpretation of the coherence and objectives principle[78] of the General Principles as a positive obligation to advance the objectives of socially sustainable globalization. For the SRSG, though, the limit was provided by the example of the Norms,[79] which "became engulfed by its own doctrinal excesses."[80]

There is a strong caveat here. While these textual references may be useful, and used by those advancing a specific interpretive project, they are not dispositive. They do, however, reinforce the insight that there are multiple ambiguities with potentially significant effect both on an understanding of the General Principles and on the application of the General Principles to the rest of the UNGP. That insight, strongly applicable to an understanding of the General Principles, and through them, the UNGP, was summed up by the SRSG in his 2010 draft Report: "there is fluidity in the applicability of international legal principles to acts by companies. But most of this fluidity involves quite narrow, albeit highly important, areas of international criminal law, with some indication of a possible future expansion in the extraterritorial application of home country jurisdiction over transnational corporations."[81]

The *Travaux Préparatoire*[82] offer substantially more material which might be extracted for the purpose of informing textual meaning, and more importantly, justification from text for a preferred or attempted application. The conceptually rich materials developed during the long history of debate and initiates around the broad concept of business and human rights—and their legalization at the international level,[83] provide another rich source material which can be attached to the text to advance one of several plausible meanings and to justify one of several plausible approaches to application.

6.2.1 The *Travaux Préparatoire* and the 2010 Draft UNGP.

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[77] UNGP, General Principles, ¶ 3.
[78] See discussion supra, Chapter 6.1.2.4.
[79] 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). Discussed supra Chapter 5.
[80] 2010 SRSG Draft Report UNGP-- Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Draft Guiding Principles for the Implementation of United Nations "Protect, Respect, and Remedy" Framework, A/HRC/--- (N.D. circulated from November 2010) available [https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf'; or "https://menschenrechte-durchsetzen.dgvn.de/fileadmin/user_upload/menschenr_durchsetzen/bilder/Menschenrechtsdokumente/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf], last accessed 25 February 2024, ¶ 59; discussion supra Chapter 2.
[81] Ibid., ¶ 64.
[82] Discussed Chapter 3,supra.
[83] Discussed Chapter 4, supra.

In the 2010 Draft Principles,[84] what became the General Principles in the final version of the UNGP was entitled an "Introduction" which like its final version was meant to provide a framing element to the substantive principles that follow. Like its final version, the 2010 Draft Principles Introduction had two principal purposes. The first was to set out the nature and character of the three fundamental substantive parts of the Guiding Principles and the relationship between them. The second was to elaborate a set of interpretive principles that were meant to guide individuals and entities that will apply the Guiding Principles as regulators or participants.[85]

The text of the two deviated in several important ways.

First, the description of the role of the State changed substantially, from "States' primary role in promoting and protecting all human rights and fundamental freedoms, including with regard to the operations of business enterprises" to "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms." The emphasis in the text shifted from the role of the State to the character of State obligation.

Second, though both texts refer to business enterprises as specialized organs of society with mandatory compliance obligations, the 2010 Draft Principles included the further obligation to "meet the societal expectation to not infringe on the human rights of others." The final version referenced instead the obligation to "respect human rights." It might be noted, however, that there was an alignment between the two terms.[86]

Third, the emphasis of the remedial principle was substantially altered from "The reality that rights and obligations have little meaning unless they are matched to appropriate and effective remedies when breached" in the 2010 Draft Principles to its final version as "The need for rights and obligations to be matched to appropriate and effective remedies when breached." Gone was the reference to the meaningfulness of rights and obligations.

Fourth, the final version of the UNGP General Principles added the reference to the scope of applicability, absent in the 2010 Draft Principles. It picked up some of the language that was meant to define the term "business enterprise" which was dropped from the final version.

Fifth, the last section of the "coherent whole" principle was modified to change the relationship between the objective of enhancing standards and practices in a way that serves to achieve tangible results for affected persons and collectives and socially sustainable globalization from one in which the object was "to support the

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[84] 2010 SRSG Draft Report UNGP-- Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Draft Guiding Principles for the Implementation of United Nations "Protect, Respect, and Remedy" Framework, A/HRC/--- (N.D. circulated from November 2010) available [https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf'; or "https://menschenrechte-durchsetzen.dgvn.de/fileadmin/user_upload/menschenr_durchsetzen/bilder/Menschenrechtsdokumente/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf], last accessed 25 February 2024 (hereafter the 2010 SRSG Draft Report UNGP).

85. 2010 SRSG Draft Report UNGP, supra, p.5.

[86] Special-Representative, Mandate on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'The UN Protect, Respect and Remedy Framework for Business and Human rights: Relationship to UN Global Compact Commitments,' *United Nations Global Compact* (May 2010), http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/UNGC_SRSGBHR_Note.pdf , last accessed 21 April 2024 ("The corporate responsibility to respect human rights means to avoid infringing on the rights of others and to address adverse impacts that may occur" Ibid).

social sustainability of business enterprises and markets" in the 2010 Draft Principles to one in which the object was to contribute "to a socially sustainable globalization." Gone were the references to the objects of sustainability, most notably the reference to "markets" and in its place a new sort of term of art—"socially sustainable globalization."

Sixth, respecting the no creation/no limits" principle, the final version retained the language of the 2010 Draft Principles respecting the use of the UNGP to limit or undermine State legal obligations under international law. It did however add the further limit, the "creating no new international law obligations" principle.

Seventh, the general approach of the nondiscrimination provision was retained but with some significant additional language that foregrounded the risk principle in the UNGP, at least indirectly. For one, the term "Vulnerable and marginalized groups" in the 2010 Drat Principles became "individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized." Additionally, "gender considerations" in the 2010 Draft Principles became "different risks that may be faced by women and men."

The Introduction to the Draft Principles described the ordering relationships among the three systems that constitute the governance regime of human rights applied to business. It suggested the autonomy of the law-state system and the social-norm system, but also suggested an unequal relationship between them, existing "independently of States' duties or capacity."[87] This aligned with what by 2010 the SRSG described as the configuration between the three pillar framework and the "the two human rights principles championed by the Global Compact."[88]

The Guiding Principles are founded on the recognition of the "States' primary role in promoting and protecting all human rights and fundamental freedoms, including with regard to the operations of business enterprises."[89] It also specified that the principles be interpreted in light of the fundamental dual "role of business enterprises as specialized organs of society performing specialized functions."[90] In this dual role, business enterprises are understood to be "required to comply with all applicable laws and meet the societal expectation to not infringe on the human rights of others."[91] It also suggests the intimate connection between rights systems and remedies, as well as the central role of remedies in connecting the state duty to protect and the corporate responsibility to respect human rights.[92] Lastly, it suggested an unequal engagement in the development of the

87. See, e.g., Special-Representative, Mandate on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'The UN Protect, Respect and Remedy Framework for Business and Human rights: Relationship to UN Global Compact Commitments,' *United Nations Global Compact* (May 2010), supra ("While companies may take on additional responsibilities voluntarily, and operational conditions may dictate them in specific circumstances, the corporate responsibility to respect human rights is the baseline responsibility of all companies in all situations. It exists independently of States' duties or capacity" ibid.). *See generally* Gunther Teubner, 'The Corporate Codes of Multinationals Company Constitutions Beyond Corporate Governance and Co-Determination,' *in* Rainer Nickel (ed) *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Antwerp: Intersentia, 2010), pp. 203-214. *But see* Peter Goodrich, *Anti-Teubner: Autopoiesis, Paradox, and the Theory of Law*, 13 SOC. EPISTEMOLOGY no. 2, 1999, at 197-214.

88 Special-Representative, Mandate on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'The UN Protect, Respect and Remedy Framework for Business and Human rights: Relationship to UN Global Compact Commitments,' *United Nations Global Compact* (May 2010), supra ("Principle 1 calls upon companies to respect and support the protection of internationally proclaimed human rights; and Principle 2 calls upon them to ensure that they are not complicit in human rights abuses").

89. Draft Principles, *supra* note **Error! Bookmark not defined.**, at intro. (a).

90. *Id.* at intro. (b).

91. *Id.*

92. The Introduction refers to the "reality that rights and obligations have little meaning unless they are matched to

norm systems under which states and corporations operate. With respect to states, "[n]othing in these Guiding Principles limits or undermines any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[93] With respect to the state duty to protect human rights, the Guiding Principles were understood as a framework or a set of organizing principles, but not as the development of law, understood in the traditional sense of either domestic or international law. But with respect to the social norm system under which corporations operate, that is, with respect to the corporate responsibility to respect human rights, there is no corresponding explicit limitation. This follows from the dual obligation of corporations– to follow applicable law and to meet their obligations under the social-norm system to which they are bound,[94] the latter framed by and embedded in international human rights law and norms.

The interpretive principles described in the Introduction were to provide the roadmap for moving from theory to practice; to manage the operationalization of the Guiding Principles while setting out the borders within which the Guiding Principles system is meant to work. To understand and apply these interpretive principles is to recognize both the form and function of the system the SRSG is putting into place. First, the Guiding Principles introduce a unity principle as the foundational presumption of the Guiding Principles. Though divided into twenty-nine principles in three sections in draft form, the Guiding Principles are to be "understood as a coherent whole."[95] It also introduces two principles of construction. The first introduces a textual interpretive principle: the Guiding Principles "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."[96] This is an inward looking interpretive principle that seeks to manage the meaning of the principles as a comprehensive and coherent body of self-referential standards, substantially complete in themselves.[97] The second introduces an effects-based interpretive principle: the Guiding Principles should be read "to support the social sustainability of business enterprises and markets."[98] This is a functionalist interpretive principle, one that looks out from the principles as a coherent body to their effects on those they are meant to affect. It also underscore the importance of markets as the space within which enterprises take responsibility. That distinction between the regulatory space of States (territory and formal legality) and that of enterprises (markets, private law and norm guidance from national and more importantly international norms and expectations) was meant to define the "border" between State and market, but also the ways in which they were interlinked. Both were to be augmented by another functional interpretive principle: that the Guiding Principles

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appropriate and effective remedies when breached." *Id.* at intro. (c).

93. *Id.* at 5.

94. The SRSG has emphasized the contextual and operational conditions that may affect both the extent and character of the baseline obligation of corporations under the social norm system to which they are bound. *See* Draft Principles, *supra* note **Error! Bookmark not defined.**, at 14. But the absence of limits does not suggest an open-ended substantive effect of the Draft Principles on corporate responsibility. The corporate responsibility is, to some extent, also bounded by the growing network of norms that reflect an emerging global consensus about corporate behavior with respect to human rights. The SRSG has noted the strong connection between the substance of the corporate responsibility to respect and the UN Global Compact. "In this regard, the UN Protect, Respect and Remedy framework provides further operational clarity for the two human rights principles championed by the Global Compact. Principle 1 calls upon companies to **respect** and support the protection of internationally proclaimed human rights; and Principle 2 calls upon them to ensure that they are not complicit in human rights abuses." *Special-Representative, Mandate on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 194. ("Other guidance materials that can help with implementation of the responsibility to respect (and the voluntary commitment to support) human rights can be found at:
http://www.unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html").

95. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 5.

96. *Id.*

97. *See generally* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (Gunther Teubner ed.,1988).

98. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 5.

"should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, and challenges faced by, vulnerable and marginalized groups, and with due regard to gender considerations."[99]

The final version keeps the form and general objectives of the Draft Principles' Introduction, but in its final form was substantially reoriented to emphasize the primacy of the state role in human rights and a substantial reduction on the scope of that obligation.[100] Moreover, it now recasts the corporate social norm systems as autonomous bases of governance norms in a more marginal role. First, the state no longer has a role in promoting and respecting all human rights; instead its role is reduced to obligation. Specifically, the Guiding Principles now recognize merely the "States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms."[101] The political scientist or sociologist might say that the formal changes in language do not necessarily affect the scope and character of the state's obligations in effect. The lawyer might suggest that the changes indicate a positive intention to reduce the scope of state obligation—not all human rights and fundamental freedoms, but only "existing obligations to respect, protect and fulfill human rights."[102]

Second, the obligations of business enterprises were changed in one quite significant respect—no longer required to "meet the *societal expectations* not to infringe on the human rights of others,"[103] such enterprises are required now only to "comply with all applicable laws."[104] The substitution of the phrase "respect human rights" in the final version, then could be read as both expanding and realigning the source of those expectations from markets and social collectives, to the State and public policy. That reorientation would then be effectively subordinated to the constellation of State obligations rather than to the potentially broader "primary role" in the 2010 Draft Principle. The difference in text can then support an interpretation in which legalism, obligation and risk (the latter as can be understood with respect to application of the UNGP to those whose rights might be adversely affected). While a subordination, legalization argument can be made, an equally plausible reading suggests that there is no effective difference in effect between the draft and the final UNGP in this respect. That would require arguing that there is an equivalence between "primary role in promoting and protecting" on the one hand and "existing obligations to respect, protect, and fulfill" on the other. It would also require that the idea of "socially sustainable globalization" includes within its terms the responsibility to support the sustainability of enterprises and markets.[105]

The General Principles of the Guiding Principles, then, might be viewed as moving toward the muting of an important but contentious aspect of the "Protect, Respect and Remedy" Framework—the autonomous obligations of business organizations to comply with global social norms in the business.[106] The tag reference to the additional obligation to "respect human rights" is likely meant to preserve a wisp of the polycentric principle in the "Protect, Respect and Remedy" Framework. But that is an interpretive stretch at best. Moreover, the General Principles retain a potentially important lacuna—the omission of non-state actors that are organized but not in

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99. *Id.*
100. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 6.
101. *Id.*
102. *Id.*
103. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 5; Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 6.
104. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 6.
105 It might usefully be noted that the term market appears twice in the UNGP text and Commentary. The first is in the Commentary to UNGP Principle 18 (gauging human rights risk) where "market entry" is a trigger to impact assessment. The other is in the Commentary to UNGP Principle 26 (State Based Judicial Mechanisms) in which a reference is made to the costs of market based mechanisms contributing to practical and procedural barriers to access to remedy.
106. *See, e.g.*, SRSG 2008 Report, *supra* note **Error! Bookmark not defined.**, at 51.

business. Still, with the definition section omitted, it might be possible to extend the definition of business enterprise to include businesses that are not profit making organizations, especially for example, civil society organs that operate large institutional apparatus, at least to the extent that they operate like businesses by hiring employees, owning property, and engaging in transactions.

Considering the changes from the 2010 Draft Principles to its final version, it is possible to make the argument that its scope has been reduced, or redirected. The added emphasis on risk, legality might be used to further both arguments. The Principles of Coherence and Sustainability remain substantially unchanged in the final version of the Guiding Principles.[107] However, in line with the substantial change to the description of the fundamental character of the State duty to protect human rights, the final version substantially extends the limitations on the effects of the Guiding Principles, both at the time of enactment and, importantly, as an ongoing enterprise. The Guiding Principles broaden the Draft Principles such that the Guiding Principles would not be read to limit or undermine the legal obligations of states under international law and substitute a much broader limitation.[108] The Guiding Principles, then, must be read within the nexus of state obligation in the context in which human rights activity occurs. It may not serve as a basis for moving customary practice along. It becomes invisible.[109]

6.2.2 The Pre-Mandate Texts and the Signification of the UNGP Through its General Principles.

The utility of the pre-Mandate texts were emphasized by the SRSG in his 2006 SRSG Report .[110] The SRSG distinguished the text of the UNGP from that of the Norms[111] in a number of ways. The first was to contrast the fundamental legalism of the Norms, "drafted in treaty-like language,"[112] with the normative framing structures which he meant to elaborate. That suggests an important first element of signification of both (1) the idea of the UNGP, and the way in which one ought to approach its text. What the SRSG meant to avoid the signification of the UNGP as a legal document—subject to the quite constraining cultures of reading and signifying legal text. The SRSG meant the UNGP to be read as framing structures, describing norms and specifying objectives while avoiding legalism's obsession with the one correct or best answer.[113] What was to be avoided were "doctrinal excesses," "exaggerated legal claims," and perhaps most importantly, "conceptual ambiguities."[114] The conceptual ambiguity that was most

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107. Draft Principles, *supra*; UNGP, General Principles.

108. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 6.

109. The "no creation" principle can be understood narrowly as stating the obvious—the Guiding Principles are not law binding on states, but it can be understood as soft law with a potential effect on behavior leading to changes in international conventional or customary law. On the other hand, it can be read broadly to suggest that actions under the Guiding Principles cannot be applied to effectively create international law or custom.

[110] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises E/CN.4/2006/97 (22 February 2006); available [https://undocs.org/en/E/CN.4/2006/97], last accessed 25 February 2024. Discussed supra Chapter 3.2.2.

[111] 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).

[112] 2006 SRSG Report, ¶ 56.

[113] For a discussion of that impulse, see, Larry Catá Backer, ' The Mechanics of Perfection: Philosophy, Theology, and the Foundations of American Law,' in Francis J. Mootz, *On Philosophy and American Law* (CUP, 2009), pp. 44-52.

[114] 2006 SRSG Report, ¶¶ 59-60.

concerning was the disjunction between the Norms' claim to merely Reflect" and "restate" international legal principles while claiming that the Norms represented the first initiative that would impose direct mandatory duties on states by way of an international instrument.[115] The SRSG rejected the claims towards what he might characterize as the Norms' transformative legalization through treaty like forms.[116]

This provides a useful clue for those who wish to take it up respecting the conceptual baseline of the UNGP as specified in the General Principles That baseline can be summarized like this: while *the UNGP would not create new law or legal obligations, it would create a framework within the parameters of which such new law or legal obligations—whether formally through the states or in market practice hardened by private contract, for example—could be realized.*[117] Following this back to the General Principles, it suggests that the UNGP ought to be read—coherently and as a whole—as providing an essential framework for approaching the management of economic activity as a function of human rights, but not in mandating a particular or specific form in which the specifics of the management ought to be realized or fulfilled.

Another significant area of distinction, beyond the impulse toward legalism in the Norms and its consequences, was in the acknowledgement of the significance of the market as a regulatory space. With that acknowledgement came the further recognition of the importance of so-called voluntary or soft law measures as drivers of markets based expectations. Those expectation could be hardened within the market through contract, even as they remained "soft" within the realm of public legalities.[118] More to the point, the General Principles focus on "standards and practices" from which "achievable tangible results" could be measured, also serve to harden soft law norms and principles.[119] These reflect insights drawn from a rapidly developing academic literature from the end of the last century. It has taken a variety of forms. One is as legal pluralism.[120] The related notions of transnational legal orders has also captured some of its spirit.[121] But both ultimately embed plural law as ultimately attached to, eventually in some cases, the State and its legalities.[122] Academic consideration of the polycentric turn in governance

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[115] Ibid., ¶ 60.
[116] Ibid., ¶ 64 ("None of these changes, however, support the claim on which the Norms rest: that international law has been transformed to the point where it can be said that the broad array of international human rights attach direct legal obligations to corporations, a claim that has generated the most doubt and contestation.").
[117] Ibid., ¶ 65. Here the SRSG suggests that there is nothing that impedes States from transforming international law into forms through which non-state actors might directly bear international obligations. His point appears to be that this cannot be undertaken on the sly—through efforts like the Norms or what became the UNGP—they require express State action.
[118] Ibid., ¶ 61.
[119] See Sally Engle Merry, 'Firming Up Soft Law: The Impact of Indicators on Transnational Human Rights Legal Orders,' in in Terrance Halliday and Gregory Schaffer, *Transnational Legal Orders* (CUP, 2015), pp. 374-399.
[120] See, e.g., Paul Berman, 'Global Legal Pluralism: A Jurisprudence of Law Beyond Borders (CUP, 2012). See, also the generative dialog in Sally Engle Merry, 'Legal Pluralism,' (1988) 22(5) *Law and Society Review* 869-896; contrast Brian Z. Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism,' (1993) 20(2) Journal of Law & Society 192-217.
[121] See generally essays in Terrance Halliday and Gregory Schaffer, *Transnational Legal Orders* (CUP, 2015).
[122] See, e.g., Larry Catá Backer, 'Are Supply Chains Transnational Legal Orders? What We can Learn from the Rana Plaza Factory Building Collapse,' (2016) 1(11) *UC Irvine Journal of International, Transnational, and Comparative Law* 11-65.

suggest a broader flexibility in interaction, and potentially greater autonomy between regulatory regimes.[123]Left open, of course, is the relationship between these regulatory spheres. Yet the difference can be significant, in this case shifting the discourse of human rights and business from law/justice centered to "a technocratic and rational based on the language of economics and management."[124]

This last point nicely frames the significant conceptual stakes in the interpretation and application of the UNGP through the lens of the UNGP General Principles. On the one side is the (traditional) tilt toward legality, mediated by the structures and operations of States through law, and coordinated by treaties that reflect State consensus now written into law that ought to be transposed into their domestic legal orders. This speaks the language of justice and legal principles framed and enforced by and through the State and its organs. This is reflected in the changes to the General Principles from its 2010 Draft Principles that refocused its approach to better center legal obligation, compliance and law. On the other side is the recognition of the polycentricity of regulatory systems. Perhaps more importantly is the acknowledgement attached to that recognition of plurality in collective regulatory life expressed in forms other than the traditional legal text. This speaks the language of compliance, accountability, and the almost automated data driven functions of assessment against objective or ideal. Here the lawyer and administrator gives way to techno-bureaucracies, data driven management, and objectives based assessment. This is reflected in the focus on objectives based compliance and the privileging of metrics based tangibility in results as a function of those objectives.

The General Principles can be read both ways—open to an emphasis on legality and jurisprudential principles or on techno-bureaucracies and data driven management. It makes space for both. That mimics the openness of the General Principles to potentially transformative legal measure that could go in any direction—from the governmentalization of the enterprise to the privatization of the state. Its objectives and goals remain undefined, producing a large space into which broad experimentation with definitions with ideological, national, or other characteristics may be indulged, within the framework. Indeed, that might be the most important "take away" from the General Principles. They very well serve their purpose of providing a guiding framework for the guiding framework that are the substantive Principles of the UNGP. By that is meant that, beyond its provision of quite visible general guardrails, the General Principles, and through them the UNGP, can be read as facilitating multiple perspectives, agendas ideologies, and objectives. The only limits are the guardrails themselves. The terms and relationships have some content—but individuals and organized collective actors are invited to add flesh to this frame as it suits them—and then do it all over again as time, taste, context, and need changes.

The General Principles provide the guardrails—and they are quite flexible though not infinitely so. They may be reduced to the following major points:

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[123] See, e.g., Larry Catá Backer, 'The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity,' (2012) 17(2) *Tilburg Law Review* 177-199.
[124] Sally Engle Merry, 'Firming Up Soft Law: The Impact of Indicators on Transnational Human Rights Legal Orders, supra, p. 374.

(1) the framing of State duty around its legal obligations under international law (and likely as well its constitutional order);

(2) the characterization of enterprises as functionally differentiated organs, but necessarily embedded within any one or more States whose responsibility is centered on compliance first, and a more general (and coherent) respect for human rights second, understood as deriving from the "do no harm" principle;

(3) the fundamental requirement that human rights and obligations be matched (it does matter how just that it be effective) to remedy (judged as a function of appropriateness and effectiveness;

(4) the universal application of the UNGP framework to all States and enterprises leaving open the question of differential application;

(5) the imposition of an interpretive principle that starts from a principle of textual "coherent wholeness" which must be read, collectively and in all of its disaggregation against the objective of (a) standards and practices based goals assessable by reference to achievable and tangible results for affected individuals and collectives and (b)contribution to socially sustainable globalization (the precise definition of which is left open);

(6) the caution that neither new international law obligations ought to be extracted from the UNGP whether of a kind that requires assent or to which a State may otherwise be subject; nor may States use the UNGP as a means of avoiding or undermining their international legal obligations; none of these terns are defined with any level of specificity; and

(7) the UNGP must be read within and applied under a principle of nondiscrimination, though the measure of discrimination is left undefined, and the possibility of contextually based variation is accepted; that variation is treat is to be risk based but the risk based analysis may itself be triggered by exogenous factors tied to individual or collective vulnerability or marginalization.

There it is. That, in a nutshell is the idea and spirit, the signification, of the UNGP. The rest is operationalization and the fleshing out of the guardrails set out in these General Principles.

6.4 Conclusion.

The interpretive stage is now set for the thirty-one principles of the Guiding Principles. First, the Guiding Principles are to be read in light of the existing obligations of states, as they might vary from state to state. Second, the subsidiary position of business enterprises within states is affirmed as "specialized organs of society performing specialized functions"[125] whose principal obligation is derivative. The Guiding Principles are to be

125. Guiding Principles, *supra* note 41, at 6. Here the original broad understanding could be easily turned on its head—now as specialized social organs with specialized functions, the General Principles can as easily lend themselves to affirm the subordinate place of business enterprises within states as they can lend themselves to the affirmation of business enterprises as social organs that exist within and outside of states, a position suggested in the SRSG's 2008 and 2009 Reports at 6.

interpreted through the foundational principle that business enterprises must obey the law of the state that applies to them. Third, rights and obligations are to be matched with "appropriate and effective" remedies, but oddly, to be triggered "when breached."[126] Fourth, the Guiding Principles "apply to all states and to all business enterprises."[127] Fifth, interpretation of the Guiding Principles is to be guided by the overarching principles of coherence, tangibility, and sustainability. Sixth, the Guiding Principles cannot be read either as the creation of new international law, nor, potentially, as the place from which such international law might arise; nor may it limit or undermine the legal obligations of states, even where these obligations are incompatible with human rights obligations. And seventh, the Guiding Principles impose a principle of non-discrimination, not to be applied for the benefit of states but rather for the benefit of individuals.[128]

126. *Id.* It is not clear what this means. It can as easily suggest ex post as ex ante triggers for the remedial right. If the former, that would substantially decrease the scope of the Principles in framing preventative measures. With respect to the state duty, of course, that might be appropriate; with respect to the corporate obligation, that would seem at odds with the focus of human rights due diligence. On the other hand, this turn of phrase might also suggest a separation between the remedial function and the preventative one.

127. *Id.*

128. *Id.*