9

The State Duty to Protect Human Rights: Operational Principles—The State-Business Nexus (UNGP Principles ¶¶ 4-6)

9.1 Introduction—The State Business Nexus
9.2 UNGP Principle 4
- 9.2.1.UNGP Principle 4: Text
- 9.2.2.UNGP Principle 4: Commentary on Text
- 9.2.3 UNGP Principle 4: Official Commentary
- 9.2.4 UNGP Principle 4: Authoritative Interpretation/Commentary
  - 9.2.4.1 The *Travaux Préparatoires* and the 2010 Draft
  - 9.2.4.2 Pre-Mandate Text
- 9.2.5 Other Glosses
- 9.2.6 Applications

9.3 UNGP Principle 5
- 9.3.1. UNGP Principle 5: Text
- 9.3.2.UNGP Principle 5: Commentary on Text
- 9.3.3 UNGP Principle 5: Official Commentary
- 9.3.4 UNGP Principle 5: Authoritative Interpretation/Commentary
  - 9.3.4.1 The *Travaux Préparatoires* and the 2010 Draft
  - 9.3.4.2 Pre-Mandate Text
- 9.3.5 Other Glosses
- 9.3.6 Applications

9.4 UNGP Principle 6
- 9.4.1. UNGP Principle 6: Text
- 9.4.2.UNGP Principle 6: Commentary on Text
- 9.4.3 UNGP Principle 6: Official Commentary
- 9.4.4 UNGP Principle 6: Authoritative Interpretation/Commentary
  - 9.4.4.1 The *Travaux Préparatoires* and the 2010 Draft
  - 9.4.4.2 Pre-Mandate Text
- 9.4.5 Other Glosses
- 9.4.6 Applications

9.5 Conclusion

9.1 Introduction

After the unnumbered introductory section entitled "General Principles" which serves as a chapeau to the framing and structural principles that follow,[1] the thirty one substantive principles follow. These are divided along the lines of the Protect-Respect-Remedy Framework

[1] Discussed Chapter 6.1.

introduced in the 2008 SRSG Report 8/5 (Protect, Respect, Remedy)[2] and the premises on which they were elaborated,[3] which were welcomed by the UNHRC.[4] The "State Duty to Protect Human Rights" includes UNGP Principles 1-10; the "Corporate Responsibility to Respect Human Rights" includes UNGP Principles 11-24; and "Access to Remedy" includes UNGP Principles 25-31.

The State duty to protect human rights focuses on the nature of State obligation with respect to the core objectives of the UNGP to prevent, mitigate, and remedy adverse human rights impacts. Its ten principles consists of a set of "Foundational Principles" (UNGP Principles 1-2),[5] and four sets of functionally differentiated operational principles. UNGP Principles 1 and 2 set out the foundational principles for the State duty to protect human rights. These consisted of a mandatory duty to protect against human rights abuse, and a corresponding strongly suggested undertaking to set out clearly State expectations the business ought to conform to their own responsibility to respect human rights.[6] The extent both of duty and undertaking are bounded, in turn, by the UNGP General Principles' focus on State international legal obligations and the legal compliance obligations of enterprises.[7]

The operational principles are best understood as an integrated set of operating instructions from which to build a State Duty system from the bottom up. Each stands alone, but at the same time each is a prerequisite for undertaking the more specific operational challenge of the principles that follow. Thus, for example, the specification of regulatory techniques and their functionality in UNGP Principle 3, the "General State Regulatory and Policy Functions," are essential for understanding he range of options for dealing with the challenges of UNGP Principles 4-6 and the "The State-Business Nexus." Both then inform the specific operational challenge in "Supporting Respect for Human Rights in Conflict-Affected Areas," (UNGP Principle 7). These together lay out the range of internal regulatory challenges for fulfilling the State duty with respect to which the institutional challenge of "Ensuring Policy Coherence," (UNGP Principles 8-10) ought to be attained in both a domestic and in the international context in which the State operates.

Nonetheless, the operational principles are just that—guidance respecting the tools available to States connected to the broad objectives of the foundational principles to the fulfillment of which their deployment is to be directed. UNGP Operational Principles serve as the expression of the SRSG's second mandate from the UN Human Rights Council to operationalize the Three Pillar framework introduced by the SRSG in his 2008 Reports.[8] This

---

[2] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 (7 April 2008); available [https://undocs.org/en/A/HRC/8/5]; last accessed 25 February 2024.
[3] Discussed Chapter 3.2.4.2.
[4] Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/Res/8/7 (18 June 2008) [https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf] (hereafter the UNHRC 2008 Resolution). Discussed Chapter 3.3.2.
[5] Discussed Chapter 7.
[6] Discussed Chapter 7.
[7] Discussed Chapter 6.
[8] Discussed Chapter 3.2.4.

operationalization was to be undertaken through the elaboration of "'practical recommendations' and 'concrete guidance' to states, businesses and other social actors on its implementation."[9] The resulting framework, condensed to a short text and longer Official Commentary, provide a dense set of principles, expectations, and interpretive challenges. The fundamental interpretive characteristic of the UNGP as a whole, however, remains unchanged. The principle is grounded in a fixed set of objectives, but they produce a set of pathways toward its realization that create a sometimes quite broad range of discretionary choices that can be used to reflect sometimes substantial differences in conditions on the ground and in the conceptual framing of political-economic models. Those discretionary choices, then, can also produce a certain amount of incoherence at the international level, which reflect the sometimes irreconcilable differences between fundamental premises among political systems and the way in which they identify and value actions and effects with human rights impacts.

The four sets of operational principles include "General State Regulatory and Policy Functions," (UNGP Principle 3);[10] "The State-Business Nexus;" (UNGP Principles 4-6);[11] "Supporting Respect for Human Rights in Conflict-Affected Areas," (UNGP Principle 7);[12] and "Ensuring Policy Coherence," (UNGP Principles 8-10).[13] Its conceptual genesis was developed in two of the SRSG's 2007 Reports.[14]

This Chapter considers the "The State-Business Nexus;" (UNGP Principles 4-6) operational principles to the UNGP's State duty to protect human rights. On an initial reading, the title of this set of Operational principles seems to make little sense. The entirety of the State duty to protect human rights can be understood broadly as the essence of the State business nexus with respect to human rights. At first blush, then, It would make little sense to speak about specific State-business nexus principles. A closer reading of the principles, however, suggests their purpose. UNGP Principle 3 focused on the framework within which the State should access and apply its public authority—the authority of the State as a political, regulatory collective. UNGP Principles 4-6, on the other hand, focus on the State's action or duty as a market participant rather than as a market regulator.[15] The State can participate as a market

---

[9] UNHRC Resolution 8/7 2008--Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/Res/8/7 (18 June 2008) [https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf] ; ¶ 4(a).
[10] Discussed in Chapter 8.
[11] Discussed in Chapter 9.
[12] Discussed Chapter 10.
[13] Discussed Chapter 11.
[14] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Business and human rights: mapping international standards of responsibility and accountability for corporate acts, A/HRC/4/35 (19 February 2007); available [https://undocs.org/en/A/HRC/4/35]; last accessed 25 February 2024; 2007 SRSG Report Mapping 4/35 Addendum 1-- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions Addendum 1: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries A/HRC/4/35/Add.1
(13 February 2007); available [https://undocs.org/en/A/HRC/4/35/Add.1]; last accessed 25 February 2024. Both are discussed at Chapter 3.2.3.
[15] Organization for Economic Cooperation and Development (OECD); OECD Guidelines on Corporate Governance of State Owned Enterprises (Paris, OECD, 2015); Larry Catá Backer, Sovereign investing in times of crisis: global

participate when it owns, operates or invests in enterprises or when it facilitates economic activity. UNGP Principle 4 focuses on the relationship of the State with its owned or controlled enterprises, or those State instrumentalities that facilitate economic activity by operational enterprises. UNGP Principle 5 applies to the State's contractual relationships with enterprises with which it contracts to provide services, especially with respect to those services ordinarily or traditionally provided by a public entity. UNGP Principle 6 applies to contractual relationships with enterprises form which it purchases goods or services, whether those contracts are characterized and public to private in character. Each are aspects of State insertion into markets as participant rather than regulator, but in different ways. Each intervention in markets, in turn, requires a distinct set of additional actions that may be expected not where the State engages generally as a regulator but in specific instances as a participant in the ac6ivities it regulates. At one level it appears to constitute a bridge between the 1st and 2nd Pillars. On another level it suggests the essential polycentricity of the UNGP—in this case where the State is expected, simultaneously to undertake its duty as a public institution, while it also attempts to undertake the necessary expectations of respecting human rights as it undertakes actions as a participant in production. At one end of the spectrum of possible inter-relation, it is possible to extend the State's toolkit to its private relationships. At the other end, it is possible to develop a firm division between the way in which the State fulfills its duty as a public body and the way in which the State conforms its behaviors to the expectations of the corporate respect for human rights. Between the two the UNGP Principles 4-6 offer a substantial amount of flexible options.

9.2 UNGP Principle 4 Text

9.2.1. UNGP Principle 4 Text

UNGP Principle 4's text develops guidance where the State operates both as a regulator and as a market actor, directly or indirectly.

> 4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment
> insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

* * *

9.2.2. UNGP Principle 4: Commentary on Text

---

regulation of sovereign wealth funds, state-owned enterprises, and the Chinese experience (2010) Transnational Law & Contemporary Problems 5-142.

The objective embedded in UNGP Principle 4 is to "protect against human rights abuses." Everything else in the black letter of this Principle is meant to be understood in relation to this objective. In that sense the language makes clear that its focus is only on that objective—with respect to the rest UNGP Principle 4 has nothing to say. That focus, in turn, aligns the scope of UNGP Principle 4 to that of UNGP Principle , through the exact repetition of the scoping-objectives phrase "to protect against human rights abuses." That, in turn, connects both UNGP Principles 1 and 4 to the overall framing of the UNGP as set out in its General Principles—grounded in a mandatory core built around a State's international legal obligations and an economic enterprise's fundamental obligation to comply with law and respect human rights.

While UNGP Principles 1 and 4 are perfectly aligned with respect to the objectives toward which they direct State action, that alignment does not carry over to the nature or force of that objective. UNGP Principle 1 speaks to the objective of protecting against human rights *abuse in mandatory terms*. That aligns UNGP Principle 1 with the General Principles core obligation of States as grounded in their international legal obligations , which States may but need not extend. On the other hand, UNGP Principle 4 speaks in *discretionary terms*. However, with respect to UNGP Principle 4's obligation "to protect against human rights abuses" is discretionary, or at least does not carry the same mandatory intent. It is true enough that "should" is the past tense of "shall" and that it is sometimes (especially outside the United States) as a subjunctive tense or (in English) mood.[16] More often it is understood as expressing a duty or obligation that is more closely related to "ought" than to "must."[17] One compels the State duty to protect human rights in UNGP Principle 1; one suggests, requests, and demands that States set out expectations for business enterprises (UNGP Principle 2) or that they undertake the actions specified in UNGP Principle 4, thereby declaring their importance—but not their mandatory character.[18]

Having specified the quality of the demand for State action (recall this is an operational principle), and its object ("protect against human rights abuse"), UNGP Principle 4 then undertakes three additional steps. The first is to describe just what it is that the State is urged to undertake. In this case it is to "take additional steps" with respect to the demand as a function of its object. The second is to identify those entities or undertakings with respect to which that demand of UNGP Principle 4 is made. The third is to additionally consider a specific manifestation of application, by requiring, "where appropriate" the undertaking of "human rights due diligence" by some or all of the identified actors or entities. Each of these three elements to the demand expressed as UNGP Principle 4 is considered in turn.

"*Take additional steps*." The obligation urged on States within the aegis of UNGP Principle 4 are "additional steps." The black letter of the Principle does not further define this term. But it is possible to suggest at least some of its contours. First, the steps to be taken are meant to be "in addition;" the issue revolves around the baseline against which additional steps might be identified. A reasonable interpretation would focus on the steps that States are

[16] 'How To Write In The Subjunctive Mood' Thesaurus.com (30 June 2021); available [https://www.thesaurus.com/e/writing/whats-the-subjunctive-mood/], last accessed 4 July 2024.
[17] Ibid. (used to describe hypotheticals, express wishes, make suggestions, requests, or demand, and declare statements of importance).
[18] See also Chapter 7.3.2.

required to take within the scope of their international legal obligations and within the framework of UNGP Principle 1. That would take one to UNGP Principle 3; that is, it would focus on the breadth of regulatory and policy measures specified in that Principle.[19] At least as a first cut, the mandatory obligations of UNGP Principle 1 may be actualized or fulfilled through the smart mix of measures described in UNGP Principle 3. Those, then are the basic steps that a State takes.

But UNGP Principle 4 does not have as its object the regulatory role of the State as that role attaches to the duty to fulfill human rights obligations in international law. Instead, UNGP Principle 4 speaks to "additional steps" as a function of a specific set of relationships. The text of UNGP Principle 4 specify the relationships with respect to which additional steps ought to be taken to "protect against human rights abuse." These include (1) where "business enterprises . . . are owned or controlled by the State;" and (2) where business enterprises "receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies." In this context, the State is not acting wholly as a regulatory exercising a political function. Instead the State is itself engaged in the chain of ownership or control finds itself in a position of substantial influence over business enterprises that have two streams of obligations. The first is to comply with all applicable law; the second is to respect human rights. With respect to those relationships *within* economic activity UNGP Principle 2 may provide the foundational basis for understanding the scope and nature of "additional steps." These may be constructed around UNGP Principle 2's request/suggestion/demand that States set out clearly the "expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations." Those expectations pick up the foundational and operational principles of the 2nd Pillar corporate responsibility to respect human rights.

The basic thrust of UNGP Principle 4, then, is to urge—strongly—that additional measures ought to be taken by States in two specific contexts. The first is where the State owns or controls a business enterprise; the second is where the State provides substantial support or services to enterprises (a form of control) through its administrative apparatus. Two are identified—export credit agencies and agencies that provide export credit, insurance or guarantees—that is agencies that invest directly or indirectly in enterprises. These measures are in addition to those set out in UNGP Principle 3 because of the character of the State-business relationship that triggers the application of UNGP Principle 4. Those additional measures lead to the rules and practices and expectations built around the corporate responsibility to respect human rights. These are the only additional expectations built into the UNGP—and the expectation that the State, as a regulatory entity, would have specified expectations with respect to business compliance with its 2nd Pillar obligations (UNGP Principle 2) sets the stage. Those expectations (in UNGP Principle 2) are operationalized in the context of State involvement in economic activity (directly or indirectly as a participant) through UNGP Principle 4. The connection between UNGP Principles 2 and 4, and the 2nd Pillar Principles (UNGP Principles 11-22) on corporate responsibility are manifested by the reference to the imposition of mandatory human rights due diligence regies through these relationships, "where appropriate." Note here that the imposition of mandatory human rights due diligence in this context arises from and through the State's specific relationships with particular companies. This is not a matter of

[19] Discussed Chapter 8.

general regulation through law (the stuff of UNGP Principle 3), but rather of the use of contract and relationship (private) power in arranging the relationships between the State as owner or controller and enterprises owned, controlled, or invested in.

UNGP Principle 4 has as its object "business enterprises" with respect to which the State asserts ownership, control, facilitation, or insurance interests. It bears recalling that the term "business enterprise" is substantially undefined other than as "specialized organs of society performing specialized functions" (UNGP General Principles). The travaux Préparatoire speak primarily to collectives organized for the purpose of producing goods or supplying services for economic gain,[20] as did the predecessor "Norms" project.[21] The UN Working Group on Business and Human Rights, among others, refer to the Organization for Economic Cooperation and Development definition, which is encased in its effort to develop guidance for the governance of State owned enterprises, especially in the context of their relationships to the State, and in markets.[22] These understandings may well provide the minimal baseline for the application of UNGP Principle 4. Yet there is nothing in the UNGP that limits its application to human rights abuses only by traditionally constituted and operated business enterprises. UNGP Principle 1 makes that clear in its black letter.[23] Indeed, there is nothing that limits privatization to traditional enterprises,[24] or that limits the scope of the State expectation in UNGP Principle 4 to traditional for profit business enterprises.

And there it is. UNGP Principles 1 and 3 and UN Principles 2 and 4 work together as the primary axes of State duty as a mandatory set of obligations that must be fulfilled and as a "suggested/demanded" set of expectations that ought to be undertaken. Together each of these axes produce the symmetry inherent in a State duty that looks to international legal obligations for its mandatory mandate and to international normative guidance for its discretionary mandate. One starts with the rough connection between UNGP Principles 1 (foundation) and 3 (operational). This connects the public law/policy function of the State as a regulatory and political organ with the operating instructions for fulfillment. Here one encounters the State as a political organs whose international legal obligations serve as the baseline for the imposition of mandatory measures, the palette of which is specified in UNGP Principle 3. This is mimicked in the relationship between UNGP Principle 2 (foundational) and 4 (operational). In this case one encounters the State more as an actor within transnational streams of economic activity which then connects it to the structural environment within which it is possible to apply the forms and techniques for respecting human rights in markets where the State is specifically and actively participating rather than primarily and generally regulating economic activity. As a consequence, what UNGP Principle 4 makes clear is that what the State may undertake as a regulatory with respect to enterprises as a whole, the State may undertake in its role as

---

[20] Discussed Chapter 3.2.
[21] Discussed Chapter 4.1-4.2.
[22] Organization for Economic Cooperation and Development, OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition (Paris, 2015); cited in Working Group on the issue of human rights and transnational corporations and other business enterprises, Report the duty of States to protect against human rights abuses involving those business enterprises that they own or control, A/HRC/32/45 (4 May 2016), ¶¶ 9-10.
[23] Discussed Chapter 7.2.
[24] See, e.g., Sarah Armstrong, 'Punishing Not-For-Profit: Implications on Nonprofit Privatization in Juvenile Punishment,' (2002) 4(3) Punishment & Society 345-368; Daniel C. Levy, 'Latin America's Think Tanks: The Roots of Nonprofit Privatization,' (1995) 30(2) Studies in Comparative International Development 3-25.

owner/controller or investor/facilitator with respect to the particular enterprises with which it has a relationship specified in UNGP Principle 4.

9.2.3. UNGP Principle 4: Official Commentary

The Official Commentary adds detail—and intention—to the text of UNGP Principle 4. It starts with the reaffirmation of two principles. The first, aligned with the UNGP General Principles was expressed as a reaffirmation that States are the primary duty-bearers under international human rights law. This was reflected as well in the travaux préparatoire of the SRSG, as well as in the UN Human Rights Council mandate documents.[25] The Commentary also seeks to draw consequences from the Commentary's recognition of the collective obligations of States as "the trustees of the international human rights regime." That "international human rights regime" is meant to be broadly understood to include not just the work product of international bodies but also the authority of those international organs themselves. The idea appears to be that inherent in the human rights regime is the further corollary that States, as trustees owe the system the obligation to be guided by the collective instruments they have created and those individuals who people those organs. That would include mandate holders, like the SRSG himself. Certainly States may embrace authoritatively anything and everything that emerges from international organizations; it has a legal obligation with respect to only some of that production. Either position is consonant with UNGP Principle 4 specifically and the UNGP generally.

The Commentary, however, appears to have a different objective in drawing attention both to the State's international legal obligations and their institutional obligations as a sort of trustee of the international system in which it participates. That requires a consideration of the consequences of drawing a dividing line between the State in its official political capacity as the "duty-bearers under international human rights law" and the risk that its control, ownership or investment relationships might cause the human rights abusers of the entities it owns, controls or invests in to be attributed to the State. The Commentary suggests that the relationship between the State as a political entity and business enterprises in whom it invests, controls, or owns, may collapse under some circumstances. "Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations."[26] Of course, that conflation may do more than trigger a State's duty as a function of its international legal obligations. It has implications for sovereign immunity, as well as may affect non-human rights based treaty obligations.[27] The nature of these implications will vary by the type of State-business relationship exists as well as the context in which adverse human rights impact have arisen. The challenge is especially acute were the relationship between State and enterprise are not founded on control or ownership relationships. The Commentary notes: "Where these agencies do not explicitly consider the actual and potential adverse impacts on

[25] Chapters 2.2, 3.2-3.3, 5.1, and 6.3.
[26] UNGP Principle 4 Commentary.
[27] Discussed Larry Catá Backer, "The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy," 2017) Vanderbilt Journal of Transnational law 50(4):827-888.

human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

More importantly, in terms of a comprehensive reading of the UNGP, the so-called State-business nexus in this specific context sets up the question of the consequences of hybridity. The issue is a simple one, though in application it can become quite messy. In some respects in these instances a State undertakes a dual role. On the one hand the State retains its paramount role as a regulator, invested with the superior political authority over it territories and jurisdiction. On the other hand, the State may not always operate as a regulator but may itself be subject to its own regulation (and those of other States) where it chooses to engage in activities in the market. The conceptual and operational difficulties arise in the context of the UNGP which distinguishes between a State duty grounded in international legal obligations, and a corporate responsibility to respect human rights grounded in private law and the expectations of the market. The former implicates UNGP Principles 1 and 3; the latter implicates UNGP Principles 2 and 4. In the dual context identified in UNGP Principle 4 (ownership/control, and investment or facilitation of specific *entities*) it produces a double "should" on the State—first as a regulator (UNGP Principal 2) with respect to all enterprises within its territories and jurisdiction (however that is understood), and then as a participant (UNGP Principle 4) with respect to the specific entities over which it has a relationship of ownership/control or investment/facilitation.

In both cases the object (the "should" or "ought") is the same—the importation of the expectations and framework operationalization structures of the 2nd Pillar corporate responsibility to respect human rights. With respect to the former that is undertaken through the exercise of the State's public power (UNGP Principle 3); with respect to the latter that is undertaken through the exercise of a State's private authority (in the same way as controlling or facilitating enterprises under the 2nd Pillar framework) and undertaken through private law. Nonetheless there is a difference that is emphasized in the Commentary. Ownership/control or investment/facilitation *acts as a human rights impacts intensifier* and the *measure of that intensification is a function of risk severity*. Thus with respect to the imposition of mandatory measures within the State/business relationship, the Commentary notes that a "requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights." This reflects the severity of risk standard built into the human rights due diligence framework, in this case especially UNGP Principle 14.[28]

Left undefined in either the blackletter or the Commentary were the key terms of UNGP Principle 4—" owned or controlled by the State" and "receive substantial support and services." In both cases there is a spectrum of interpretive possibility. At one end, the term "owned or controlled" can be defined to include every enterprise with respect to which the State exercises any level of ownership (through shares, including "golden shares"[29] and any level of control that is not strictly speaking a function of the State's general regulatory power, but are

[28] See discussion Chapter -.
[29] See, e.g., Thomas Papadopoulos, 'Privatized Companies, Golden Shares and Property Ownership in the Euro Crisis Era, (2015) 12 ECFR 1-18.

specifically directed. At the other, the term might be limited to include only those enterprises with respect to which the State owns a majority interest in a company or where under agency principles the enterprise effectively has no autonomy to act other than at the direction of the State. More likely, some middle ground will likely be used. One basis might rely on analogies to the "commercial activity" exception to State sovereign immunity with respect to the sorts of entities and their activities .[30] Another might be grounded in principles of agency. In any case, that determination will likely be dependent on the legal principles of a State and will likely vary from State to State. The same applies to the determination of standards for falling within the "receive substantial support and services" trigger. Again, at one end of the interpretive spectrum, a State might determine that any support or services is "substantial"—on the other end, "substantial" might be understood as a much higher threshold.

The black letter of the UNGP Principle 4 is silent with respect to any of this. It only suggests the categories of State agencies whose involvement in particular enterprises ought to be covered: "export credit agencies and official investment insurance or guarantee agencies." That is mirrored in a slightly expanded form in the Commentary: "export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions." That suggests that the Principle builds in a substantial flexibility in approach. That flexibility, in turn, suggests that, absent coordination at the international level, the triggering thresholds of UNGP Principle 4 may vary considerably from State to State.

9.2.4 UNGP Principle 4: Authoritative Interpretation/Commentary

9.2.4.1 The 2010 Draft UNGP. What became UNGP Principle 4 in its final form was circulated in the Draft UNGP as its Principles 6 and 8.[31] The final form of UNGP Principle 4 diverged from its draft form in some respects. These differences may shed light on the meaning and plausible interpretation of text, or at least limit the scope of the plausibility of textual interpretation and application.

First, as initially drafted, the Principle's expectation was that States "take steps" to ensure respect for human rights,; the final version added the critical word "additional." The draft Commentary included the term "appropriate steps" to ensure respect for human rights. The difference may be important. "Additional" steps suggests steps suggests an additive principle, increasing or augmenting from a baseline or starting point. "Appropriate" on the other hand, suggests some especially suitable or proper in the context in which such action or measures are judged. UNGP Principle 4, then, veered from an emphasis on measuring the States the State is expected to take from ones grounded in suitability, to ones that augment.

---

[30] David P. Stewart, The Foreign Sovereign Immunities Act: A Guide for Judges (2nd ed; Washington, D.C.: Federal Judicial Center, 2018), pp. 50 et seq..

[31] 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. Discussed Chapter 2.3.4.

Likewise, both 2010 Draft Principles 6 and 8 had as their objective to "ensure respect for human rights" which was modified to provide only that the steps "protect against abuses." To ensure suggests an undertaking that is specific, with overtones of insuring against, thus suggesting a connection with remedy. Protect speaks to shielding from harm, to guard against. Ensure might be read as speaking to remedy; protection appears to speak first to prevention and mitigation. They both target the same object—in this case human rights harms, but the former term may be more specific and reactive while the latter more general and proactive. That would accord, though with the general thrust of UNGP Principle 1 that articulates the fundamental premise of a State duty to protect rather than to ensure. On that basis the modification might have been made to align both language and concept. IN the process it maintains the distinction between the duty assigned to States and the responsibility assigned to enterprises even where, as in Principles 4-6, they are interwoven.

That shift, in turn, appears to add weight to an interpretation that views the "additional steps" language in the final version as intended for State measures in addition to those available under UNGP Principle 3. And, indeed, the second paragraph of the Draft Commentary seems to drive home that point. It is built around the suggestion that the State, as an owner or controlling entity ought to be able to take advantage of that authority to ensure that the entity it owns and controls respects human rights—not, to emphasize the point, as a regulator, but as an owner (shareholder) or controlling entity (contract).

Second, the 2010 Draft version of what became UNGP Principle 4 was limited to relationships based on ownership or control. The final version added the facilitation and insurance relationships: "that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies." The language, as modified, was originally set out in 2020 Draft Principle 8. As originally drafted 2010 Principle 8 imposed a "take appropriate steps" standard with the objective of "ensuring respect for human rights" by business enterprises receiving "support and services" by the State. Not just any sort of generalized support made available to everyone, but the target was more specific—it focused on specific support for the economic activities undertaken by a business enterprise, especially with respect to its transnational activities (and thus the exemplars offered "export credit agencies and official investment insurance or guarantee agencies"). In both of the 2010 draft Principles that were amalgamated into UNGP Principle 4, the objective was to "ensure that human rights are respected." In the final version the "ensure that" language was dropped in favor of the more flexible protect against" language. Thus what started out as a standard-objective of "taking steps to ensure" (2010 Draft Principle 6 in ownership or control relationships) and "taking appropriate steps to ensure (2010 Draft Principle 8 in facilitation or guarantee/insurance relationships) became "take additional steps to protect." That may also explain the reason that in neither the 2020 Draft or final versions was there a reference to the application of "ensuring" principles to the State instrumentalities administering these support or service activities; perhaps because those State organs are themselves subject to the general duty to protect human rights.

This aggregation might provide a basis for a broad reading of the scope of re4lationship that trigger the expectation direction to "take additional steps" of Principle 4. It also suggests, by adding facilitation and insurance relationships, that virtually any relationship which gives the State *leverage* over specific entities is sufficient to trigger the expectations of UNGP Principle

4. The notion of leverage inserted here—though without specifically identifying it as leverage (and that may be important as limiting the scope of interpretation)—would then invite comparison or alignment with the notion of leverage developed in UNGP Principle 19.[32] Within the corporate responsibility to respect human rights provisions, the concept of leverage is elaborated as a factor in determining "appropriate action" that an enterprise ought to take to prevent and mitigate adverse human rights impacts revealed by their impacts analysis.[33] And, indeed, the Commentary to UNGP Principle 4's final version speaks to the exercise of leverage as related to the agencies expectation, in these specific relationships, to "consider the actual and potential adverse impacts on human rights of beneficiary enterprises." The Commentary appears to suggest that when States fail to undertake this consideration, a critical element of human rights due diligence to be undertaken by enterprises,[34] they put themselves at risk, which in effect may be abated by exercising their leverage to mandate that enterprises undertake human rights due diligence. This the connection here, implied in the Commentary, is not to UNGP Principle 2, but rather to UNGP Principle 19 in this context.

9.2.4.2 Travaux Préparatoire and Pre-Mandate Text. The interpretation of UNGP 4 might be best understood against the backdrop of the SRSG's extension of mandate by the UN Human Rights Council.[35] It also is embedded in discussions and lacunae within the mandate period respecting the comprehensiveness of applicability of the UNGP to business with respect to enterprises owned, controlled, operated, facilitated or insured by the State.[36]

9.2.5 Other Glosses.

As in interpreting other UNGP Principles, one must again distinguish between glosses on the UNGP, and efforts to argue for one or another best reading among the range of plausible approaches to an interpretation and application of the UNGP. Arguments toward a "best" or "sound" interpretation does not go to the meaning or understanding of the UNGP itself but rather to debates about its application in specific times, places, and spaces. It is with that in mind that it is worth exploring what others have contributed to the meaning of Text and Commentary.

In a prior gloss on UNGP Principle 4, this author suggested the primary element of interpretation as built around the *concept of expectations* at the heart of UNGP Principle 5.[37] At the same time, the concept of expectations is quite elastic within Principle 4 and gives rise to a number of possible routes to compliance that mimic, in some respects the elasticity of

---

[32] Discussed Chapter --.
[33] UNGP Principle 19(b)(ii).
[34] Initially considered Chapter 2.4.3.
[35] UNHRC Resolution 8/7 2008--Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/Res/8/7 (18 June 2008) [https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf] (hereafter the UNHRC 2008 Resolution). Discussed at Chapter 3.3.2.
[36] Chapter 5.3.2 and 5.3.
[37] Larry Catá Backer, 'Guiding Principle 4: The Obligations of States in Markets With Respect to Enterprises Owned, Controlled, or Supported by the State,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 35-41.

approaches built into UNGP Principle 3.[38] That flexibility permits not just States but also international organs a measure of latitude to develop programs that, in their estimation, represents the best or a better approach to applying UNGP Principle 5. In particular, the efforts of the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (UNWG)[39] to develop a position on an appropriate approach to the application of UNGP Principle 4 serve as a potentially influential example.[40] UNWG noted the connection between UNGP Principle 3's toolkit and the object for the use of that toolkit in UNGP Principle 4.

9.2.6 Applications

9.3 UNGP Principle 5

9.3.1. UNGP Principle 5: Text

UNGP Principle 5's text develops guidance where the State delivers services through third parties. It covers privatized governmental activity, certainly, but also any service offered by the State whether they might have been considered traditionally delivered by government or not.

> 5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

* * *

9.3.2.UNGP Principle 5: Commentary on Text

UNGP Principle 4 focused on the relationship between States and business enterprises with which they have an ownership or control relationship or that receive substantial support and services from the State, that give rise to a strong expectation that States take "additional steps" within those relationships to protect against human rights abuses by the enterprises in those relationships. UNGP Principle 5 takes up another aspect of a private ordering relationship between States and enterprises. UNGP Principle 5 articulates a strong suggestion (the "should") with respect to business enterprises with which they contract "to provide services that may impact upon the enjoyment of human rights." As such, while UNGP 4 considers relationships

[38] Discussed Chapter 8.
[39] Discussed Chapter 2.2.
[40] Backer, 'Guiding Principle 4: The Obligations of States in Markets With Respect to Enterprises Owned, Controlled, or Supported by the State,' supra, pp. 35-36.

(ownership, control, investment, facilitation); UNGP Principle 5 focuses on a specific subset of contractual relationships between the State and business enterprises.

First, the text makes clear that while the Principle makes a strong suggestion, and raises considerable expectations around conformity to, it does not treat the substantive direction of UNGP Principle 5 as a mandatory measure. This aligns Principle 5 with the rest of the foundational and operational principles of the UNGP State Duty Pillar other than that the State, as a mandatory measure, must "protect against human rights abuse" through the use of the full extent of its powers and at a minimum as required by application of the international human rights law obligation to which the State either bound itself or is otherwise bound. The State in this case "should" not "must" undertake the measures specified in the body of the Principle.[41]

Second, the operational standard embedded in UNGP Principle 5 is an "exercise adequate oversight" standard. This differs from UNGP Principle 4's "take additional steps" standard." The former focuses on monitoring, assessment and accountability with respect to legal and guidance (policy) standards; the latter (along with UNGP Principle 3) focuses on the actualization of those standards through law (public or private), policy, or the relational tools available among actors in markets. Note here that the standard speaks to "adequate" oversight rather than a higher or lower standard. I lower standard might have used "reasonable"; a higher standard might have used the term "exercise oversight through the best practicable and available means."

Third, it is unclear whether the "exercise adequate oversight" is an objective or subjective standard. If it is treated as a subjective standard the notion of adequacy may be measured against national capacity—and that capacity may be deemed to be a function of the political-economic model of the State and the State's capacity to develop and operate a particular set of means of oversight. An objective standard would be developed at the international level from a starting premise of "one size fits all." But even then, an objective model may create tiers and other levels of judging adequacy—effectively rationalizing a set of identified factors to be considered under a subjective model (rendering them, in effect objects of objective analysis).[42]

Fourth, the "exercise adequate oversight" standard is undertaken "in order to meet" the State's "international human rights obligations." States are in any case required to meet their international human rights obligations (a principle emphasized in UNGP General Principles).[43] On the other hand States have a substantial discretionary space for determining how those obligations will be fulfilled. It is that space between obligation and application that UNGP Principle 5 appears to seek to manage—or at least direct in specific ways.

Fifth, UNGP Principle 5 is triggered when a State contracts with, or legislates for, "business enterprises to provide services that may impact upon the enjoyment of human

[41] In the "should" and "must" divide, see discussion Chapter 9.2.2.
[42] Consider in this respect the issue of interpretation and application of standards of conduct in the Paris Agreement. See Christina Voight, 'The Paris Agreement: What is the standard of conduct for parties?' (2016) 3 Questions of International Law (online) available [https://www.qil-qdi.org/paris-agreement-standard-conduct-parties/], last accessed 4 July 2024.
[43] Discussed Chapter 6.

rights." At one end of the interpretive spectrum there is hardly a contract or legislation that does not impact on rights (whether or not the local jurisprudence, or international law might characterize them as human rights is another matter). On the other hand, the trigger may be limited to those narrower kinds of contracts or legislation that touch on services more traditionally tied to or which give rise to a specific expectation that they relate to governmental services as the range of those services is understood in a particular State. Again, the reality likely lies somewhere in between. And there is a caution—as the jurisprudence of the U-S-made clear, efforts to more precisely draw lines between what constitutes governmental services and what may not is a difficult task at best.[44] And there is a second caution—it is not clear that the issue of the extent of State services to which UNGP Principle 5 applies is to be determined under international or domestic law.

Taken together, the various parts that constitute the direction (and suggestion) of UNGP Principle 5 become clearer. States have a mandatory obligation to fulfill their international human rights obligations. State may augment and domesticate these international human rights obligations, but the aggregate of those obligations cannot be avoided. Enforcement is also a matter of international law in the first instance, augmented as it suits a State. The State's duty to protect human rights along those lines may not be avoided by privatizing State functions. It is the function that forms part of the State's international legal obligations, rather than the manner in which that function is realized. With respect to those services, and to the extent that they touch on a State's international legal obligations, the State's duty to take mandatory measures (UNGP Principle 1) applies, even if the State is no longer the direct provider of services. In that context, UNGP Principle 5 speaks to the need for a State, as part of its international legal obligations, to manage those relationships with human rights in mind. It offers a baseline standard for that purpose—"exe4rcise adequate oversight" to those ends.

9.3.3 UNGP Principle 5: Official Commentary

The Official Commentary to UNGP Principle 5 provides a brief elaboration of its function by reference to the intent of the drafters. First the Commentary emphasizes the principle that a State does not cease to bear its international legal obligations as they affect or touch on human rights merely because they organize their operations in a way that they engage non-state actors to actually deliver services. " States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights." The intent, then, has two parts. The first is to retain the connection between the State duty and State functions even when they are delegated or performed, at the instance of the State, by non-state actors. The second is that the core of the focus of UNGP Principle 5 is on the privatization of public services. It is important to note that the Principle speaks to framework and minimum expectations. The State may, under the principles extend the extent of their duty as they like, and may invoke any of the methods of State or private arrangements to ensure fulfillment of the obligation to protect against human rights abuse (UNGP Principle 1).

The Commentary notes that the risk for States "may entail both reputational and legal consequences for the State itself," even as the non-State enterprise retains its responsibility to

[44] Discussed Linda Tsang and Jared P. Cole, Privatization and the Constitution: Selected Legal Issues, (25 September 2017) Congressional Research Service Report R44965.

respect human rights. Underlying that in the 1st Pillar context is the expectation that the State will ensure that it can establish expectations in that regard—an obligation underscored in UNGP Principle 2. And, indeed, the Commentary alludes to UNGP Principle 2's fundamental direction to "clarify the State's expectations that these enterprises respect human rights."

More interesting, perhaps, is the suggestion in the Commentary that States may comply with their "exercise adequate oversight" by contracting out oversight to non-State actors. The Commentary notes that "States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms." It is likely, of course, that the State expectation to "exercise adequate oversight" would apply, in this context, to the engagement of "independent monitoring and accountability mechanisms." Neither the Commentary nor the black later of UNGP Principle 5 speaks to the automation of governmental services or to monitoring and accountability mechanisms. This presents a potentially more complex issue. In that context the monitoring , as well as the provision of services, may require a greater focus on data, data acquisition measures, coding, and application of automated systems. Nonetheless the standard would overwise remain unaffected.

Lastly the Commentary speaks to a "may impact" standard for triggering the expectations un UNGP Principle 5. That suggests, in turn, that the "exercise adequate oversight" standard applies to a broader range of action. It builds in the expectation of risk minimization, the prevent, mitigate, and remedy principle embedded into the black letter of UNGP Principle 1. Adequate oversight, then, embeds monitoring and accountability mechanisms not merely within the remedial mechanisms elaborated in the 3rd Pillar Principles (UNGP Principles 25-31) but also the administrative and guidance mechanisms of UNGP Principle 3, and with it, an alignment with a State's administrative apparatus.

9.3.4 UNGP Principle 5: Authoritative Interpretation/Commentary.

9.3.4.1 The 2010 Draft. What became UNGP Principle 5 in its final form was circulated in the Draft UNGP as its Principle 7.[45] The final form of UNGP Principle 5 diverged from its draft form in some respects. These differences may shed light on the meaning and plausible interpretation of text, or at least limit the scope of the plausibility of textual interpretation and application.

As initially drafted, what became UNGP Principle 5 was focused much more narrowly on State outsourcing and its relationship to fundamental State international legal obligations at the heart of the UNGP State duty Pillar. The two points—(1) "Because States do not relinquish their international human rights obligations [2] by outsourcing the delivery of services"—suggested that at the time the draft was circulated, the intention was to focus on State service

[45] 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. Discussed Chapter 2.3.4.

outsourcing as a function of their international legal obligations around which the mandatory provisions of the UNGP (Principle 1) ae built. The suggestion is that the public character of those services does not disappear because the provision of those services have been delegated to a non-State actor.

As such, the State duty may linger. The character of that "lingering" appears to have been at the core of the expectations around which UNGP Principle 5 are built. From the perspective of the 2010 Draft of (then) Principle 7, the implication appears to be that the State duty lingers, at least from the perspective of the State as the contracting party to services it had undertaken and now delegated. The blackletter of the draft principle appears to emphasize this reading: "they should ensure that they continue to exercise adequate oversight in order to meet those obligations." Nonetheless the duty is one step removed, and now assumes more the character of the responsibility to respect. The State fulfills its duty through "adequate oversight" (in both the draft and final versions. That oversight has public character (UNGP Principle 2) in the articulation of expectations. But it may have a private character as well. Nothing in the blackletter suggests that the State cannot effectively constitute an accountability mechanism by mandating human rights due diligence measures on the part of the contracting party. Draft Principle 7 did not include the possibility of legislating mandatory human rights due diligence (inherent in the authority under UNGP Principle 3 and part of the expectations in the final version of UNGP Principle 4). Neither version, though, limited the use of private or public authority in the construction and operation of systems of oversight—and human rights due diligence is effectively a system of monitoring and accountability. On the other hand, because of the differences in text of UNGP Principles 4 and 5 (in both draft and final form), a State may reasonably read UNGP Principle 5 as limiting the scope of adequate oversight to monitoring and accountability systems—what the Commentary describes as "adequate independent monitoring and accountability mechanisms."

Second, the final version of UNGP Principle 5 carries over the "may impact upon the enjoyment of human rights" standard. The reinforces the premise that the State duty (as well as the corporate responsibility includes a positive as well as a negative obligation, and that it includes an obligation to prevent and mitigate, as well as remedy adverse impacts. That standard then has consequences respecting the character of oversight and accountability mechanisms. The Commentary in both the 2020 Draft and the final version of the Principle notes that "States should ensure that they can effectively oversee the enterprises' activities," suggests, that whether it is undertaken through regulation or through the toolkit of private law in markets, a measure of oversight the character of which may be gleaned by a reading of the UNGP, but which is otherwise unspecified. Nonetheless, it invites, at a minimum, the expectation of an imposition of oversight and monitoring by the third party vendor, and accountability mechanisms to report on the effectiveness of systems to avoid impact with respect to its past, present, and future activities. The model for such systems, of course, is the human rights due diligence framework of UNGP Principles 16-22.

Read together, then, both the "may impact" and the "effective oversight of enterprise activity" standards suggests an alignment between the exercise of the State duty (with respect to the State as an actor—oversight, assessment, objectives and standard setting within its territory/jurisdiction) and the exercise by the State of its responsibility to respect human rights (with respect to the State as an actor within the spaces it regulates—markets and entities). From

a systems perspective, however, that produces a range of plausible alternatives. It would be plausible to assume, then, that in this context, the State could (by contract or legislation) compel human rights due diligence by service providers. Or it could be equally plausible to assume that the State could compel (again by contract or legislation) some equivalent approach, perhaps grounded solely in specifying objectives and reporting but leaving a margin of appreciation of providers to develop and apply their own contextually relevant systems.

Alternatively, the State need not do anything. The Commentary in the final version (though not in the 2010 draft) provides for outsourcing accountability and oversight measures the way that UNGP Principle 5 recognizes the outsourcing of others services by the State. That might produce a double accountability expectation—with either the State to the third party responsible for oversight of the independent monitoring and accountability mechanisms. If these "mechanisms" are provided by a business enterprise they would have their own responsibility to respect human rights independent of their contractual obligations but extending to them. If they are State entities the State duty might attach. If they are non-profit enterprises results could vary. Like the State itself with respect to its own duty, the State could extend a form of immunity from judicial oversight and remedial action by rights holders whose rights have been impacted. It might extend the right to seek remedy only to State organs. Or it might insulate them entirely from reedy other than through actions for breach of contract. In that case appropriate contractual provisions cognizable within the domestic legal order would have to be inserted.

At its broadest, the State could establish an administrative techno bureaucracy to oversee the development and assessment of expectations and then devolve the establishment and operation of systems to techno bureaucracies to be established within the enterprise. In that case one might envision the deeply intertwined system of techno-bureaucracies at both the State and enterprise level engaged in dialectics of standard setting, system rules, monitoring, and accountability. One consequence of this approach, of course would touch on remedy. In such a broad context it might be necessary to read the remedial pillar as affording access to effective remedy against both the enterprise and the State with respect to those matters over which they have been vested or vested themselves with authority. However, as note din the preceding paragraph, remedy may be unavailable to rights holders. And they might either be exercised by the State (against itself), through waivers of immunity or exceptions to immunity respecting abuse of administrative power or by enforceable contract provisions.

9.3.4.2 The Travaux Préparatoires and the Pre-Mandate Text. The SRSG referenced State owned enterprises in its initial Report in 2006.[46]

9.3.5 Other Glosses

The UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, in a 2018 Report,[47] considered the nature of privatization and its human rights effects. These may be

[46] Discussed Chapter 3.2.2.
[47] United Nations General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights (2008) UN Doc A/73/396.

useful in informing the reading or application of UNGP Principle 5. Alston noted that the definition of privatization ranges from a very narrow conception centering on the sale or disposition of State utilities or other economic sector, to a quite broad definition to "include not only tangible private involvement along a spectrum of contractual arrangements, but also organizational or ideological transformations of the public sector."[48] The core issue respecting definition also touches on issues of whether privatization also includes notions of displacement or supplementation, each with its own human rights effects.

Alston also examined the human rights effects of privatization. He noted the absence of monitoring and assessment, even in the face of UNGP Principle 5 even as evidence suggested negative effects of privatization in context.[49] Alston echoed the urging of the UN Secretary General and the High Commissioner for Human Rights that such displacements ought not to take place without human rights impacts assessments.[50] Interestingly, though reference was made to Sustainable Development Goals 1-4, 6, and 16, no reference was made to UNGP Principle 5.[51]

Humberto Cantú Rivera provides a useful gloss on UNGP Principle 5.[52] He addressed three issues. The first touched on his sense of the nature and scope of State obligation in the context of privatization. The second touched on the interpretation of those obligations within universal and inter-American treaty systems. The third looked to the connection between the obligations of UNGP Principle 5 and remedy.

With respect to the first, Cantú quite perceptively notes that the basis of a State's international legal obligation sunder the two International covenants are themselves grounded in quite different expectations. The International Covenant for Civil and Political rights is grounded in a "respect an ensure" standard. The State's obligations under the International Covenant for Economic, Social, and Cultural Rights, on the other hand, are based on a "progressive realization" standard.[53] He notes that these standards are undertaken under the more general principles that impose on States a generalized obligation to prevent, mitigate, and remedy infringements of human rights . In the context of privatized activity, Cantú suggests that the State duty ought to be understood as "obligations of result."[54] The Inter-American system, Cantú notes, packages these into three distinctive forms of duty: a duty to adopt legislation, a heightened duty to monitor compliance, and a duty to ensure remedy.[55] While

---

[48] Ibid., ¶ 5.
[49] Ibid., ¶¶ 31-37. Of particular concern was the privatization of carceral systems. Ibid., ¶ 33.
[50] Ibid., ¶ 38, citing, United Nations General Assembly, Report of the Secretary-General and the United Nations High Commissioner for Human Rights, Right to Development A/HRC/36/23 (26 July 2017) ¶ 55 ("Privatization of health, education, social security, water, and personal liberty and security services must not take place at the expense of equitable access to these services and the protection of human rights, and should be subject to human rights impact assessments." Ibid.)
[51] Ibid., A/HRC/36/23, ¶ 55, n. 53.
[52] Humberto Cantú Rivera, 'Guiding Principle 5: The Content of the State Duty to Protect in the Context of Privatization,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 42-48.
[53] Ibid., p. 43.
[54] Ibid.
[55] Ibid., pp. 43-44, citing Inter-American Commission on Human Rights (IACHR), Business and Human Rights: Inter-American Standards (2019) OAS Doc CIDH/REDESCA/UNF.1/19, ¶ 19.

these may be mandatory, or perhaps more so under the interpretive umbrella of the OAS system, these developments suggest the discretionary possibilities that may plausibly be made under the interpretive canopy of UNGP Principle 5.

With respect to the second, Cantú aligns an interpretation of UNGP Principle 5 against the international legal obligations on States that emerge from other international instruments that touch on privatization to which the State may bind itself or be bound, or at least with respect to which international actors—special procedures or bodies, have had something to say about privatization and the nature of the State's duty in the face of privatization.[56] These bodies have noted the potential human rights harms attendant on privatization, and thus the connection between that potential and the extent of the State duty within the four corners of UNGP Principle 5. All of this, of course, reinforces the UNGP Principle 5 Commentary's focus on human rights risks as a basis for determining the way that the discretionary expectations of UNGP Principle 5 ought to be applied. They do not, however, establish a mandatory baseline against which the compliance of a State with its duty may be measured as a matter of legal compliance. They do, though, establish the factual context within which such compliance might be considered and, to the extent they touch on mandatory obligations written into other international legal instruments, would be effectively applied through the measures identified in UNGP Principle 5. This was made particularly noteworthy with respect to the OAS system.[57] In this Cantú evidences the way in which other human rights systems, at the regional and international level, might "reinforce and refine" the expectations elaborated in UNGP Principle 5.[58]

With respect to the third, Cantú aligns UNGP Principe 5 with the 3rd Pillar remedial provisions of UNGP Principles 25-31.[59] Here he suggests the importance of State-based non-judicial remedies. Among these, Cantú notes the relevance of National Human Rights Institutions. Certainly UNGP Principle 5 does not suggest that this is impossible, but neither does it suggest that such an alternative ought to be mandatory. Special attention is drawn to the relevance of the effectiveness criteria of UNGP Principle 31 for any measures or expectations developed under UNGP Principle 5.

In a 2022 Report of the High Commissioner for Human Rights,[60] it was noted that UNGP Principle 5's oversight and monitoring provisions applied with equal force to technology companies in their provision of services to the State. The suggestion was that the nature of the service was immaterial, in the sense that the tech services did not represent outsourcing. That accords with a broader reading of UNGP Principle 5's blackletter that could be read as including all arrangements under which the State contracts for services.[61] That leaves the issue of overlap with UNGP Principles 4 and 6. Traditionally that overlap could plausibly be resolved

---

[56] Cantú Rivera, 'Guiding Principle 5: The Content of the State Duty to Protect in the Context of Privatization,' pp. 45-47.
[57] Ibid., citing Matina Rebeca Vera Rojas v Chile, (5 October 2018) Report on the Merits No. 107/18 (IACHR).
[58] Cantú Rivera, 'Guiding Principle 5: The Content of the State Duty to Protect in the Context of Privatization,' p. 47.
[59] Ibid., pp. 47-48
[60] United Nations High Commissioner for Human Rights, Report: The Practical Application of the Guiding Principles on Business and Human Rights to the activities of Technology Companies A/HRC/50/56 (21 April 2022).
[61] Ibid., ¶ 20.

in one of two principal ways. The first is to develop standards for distinguishing services and relations by defining the core of the application of each principle. The other is to treat the three principles as cumulative or additive. An act or relationship might well be subject to all three principles, since each imposes different expectations on both the State and business entities.[62]

9.3.6 Applications

9.4 UNGP Principle 6

9.4.1. UNGP Principle 6: Text

UNGP Principle 6's text develops guidance where the State procures goods or services from business enterprises..

> 6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

* * *

9.4.2.UNGP Principle 6: Commentary on Text

UNGP Principle 6 considers the third category of State-business nexus relationships. This one touches on what are generally understood as procurement and procurement related transactions. The Principle, however, is written to include more than procurement activity—reaching every sort of commercial transaction between a State and business enterprise. All though share a single characteristic—they all involve the acquisition by the state of goods or services.

Like its siblings, UNGP Principles 4 and 5, UNGP Principle 6 shares some common interpretive elements. Foremost among them may be the operationalization trigger "should." This expectant standard has been discussed in the earlier context.[63] But there are differences in the operative trigger for the "should." Where UNGP Principle 4 speaks to taking additional steps to protect against human rights abuse, and UNGP Principle 5 speaks to exercising adequate oversight in order to meet their international human rights obligations, UNGP Principle 6 speaks to promoting respect for human rights. The differences are significant—at least with respect to the framing of minimum requirements built into each of these expectations.

---

[62] See as an example, Northen Ireland Human Rights Commission, Public Procurement and Human Rights in Northern Ireland (Northern Ireland Human Rights Commission, November 2013), pp. 22-25.
[63] Discussed Chapter 9.2.2, and 9.3.2.

More precisely, for regulating control, ownership and facilitation relationships (UNGP Principle 4), State are expected to utilize the full measure of their authority as public and private actors to ensure conformity to both duty and responsibility. The core assumption is that, with respect to these relationships, the alignment of public and private activity are at their closest, and at the limit merge into the State—and thus invoke the (mandatory) elements of State duty under UNGP Principle 1 and the expectations duty under UNGP Principle 2.

For managing the provision of services through private enterprises , including business enterprises (UNGP Principle 5), a State is expected to develop an administrative structure for supervision. That supervision need only be adequate—by whatever standard that is measures (and one may measure it by international standards, national, local, or private standards). On the other hand it might invite the elaboration of a complex system of administrative guidance and supervision overseen by a functionally differentiated techno bureaucracy. Supervision may also include the elaboration of complicated measures guiding and limiting the discretion of those with whom service provision is contracted.

On the other hand, for entering into commercial transactions with third parties, the State is required only to "promote respect for human rights." That promotion, in turn, necessarily connects UNGP Principle 6, with the more elaborate expectations in UNGP Principle 2 in which the expectation is to set out clearly what that respect for human rights entails.[64] The two provisions (UNGP Principles 2 and 6), then, ought to be read together, and against UNGP Principles 4 and 5.

There are two remaining interpretive questions. The first touches on the meaning of commercial transactions. Generally speaking, commercial transactions include the sale, lease or license of goods or services, or transactions in documents of title for something of value. Every State has some version of a regulation of commercial transactions and contracts. While UNGP Principle 6 does not speak to the human rights related elements of the structures of State commercial law regimes, it would seem that UNGP Principle 3 read together with UNGP Principle 6 would suggest that a State seeking to fulfill the expectations of both would find in the reform of its commercial transaction law the means for promoting respect for human rights. That would certainly be a plausible reading of both. Alternatively, the expectations might require nothing more, for a State willing to try to fulfill the expectations, than exhortation.

There are a large category of activity, however, that do not comfortably fir into the definition of commercial activities as they apply to business enterprises, but which may have a character that ought to bring them within the scope of UNGP Principle 6. These include any Grant program or activity in which the State allocates funds, primarily but not exclusively, to non-profit entities to further certain policy objectives. The State is effectively exchanging funds for something of value—the activity of the grantee. They are buying services. Certainly a State could take the position that its grant programs have enough elements compatible with commercial transactions to warrant the extension of its application of its policies and rules respecting respect for human rights to non-profit enterprises engaging in grant related transactions both with the State and between the grantee and other entities.

---

[64] Discussed Chapter 7.3.

The second touches on what constitutes a business enterprise for purposes of UNGP Principle 6. If, in fact, enterprises, including non-profit enterprises can be pulled within the scope of UNGP Principle 6 as a function of the character of their transactions with the State, it seems plausible to extend the meaning of a business enterprise to those entities, regardless of their character as a profit or non-profit enterprise to all enterprises engaging in such activities with the State. In this sense it is the character of the interaction or activity rather than the form or structure of the enterprise that determines, first, whether it has a responsibility to respect human rights in its activity, and second whether they are included in the sub-set of business enterprises with respect to which the State may be subject to heightened or specific expectations about promoting respect for human rights.

One last point. Much of the commercial transactions of States are also subject to regulation—laws, statues, prac6ices and to some extent administrative oversight. Certainly, through the UNGP lens, the State has a duty to ensure that those regulatory structures fulfill their duty to protect human rights. That requires the State to conform to its own international legal obligations, at a minimum, when engaging in commercial activities. UNGP Principle 6, though, goes farther, by advancing the expectation, in line with the expectation in UNGP Principle 2, that the State ought to also promote respect for human rights (a 2d Pillar responsibility) by the entities with which it engages in commercial activity. Indeed, there is a substantial literature about the human rights elements of procurement activity.[65]

9.4.3 UNGP Principle 6: Official Commentary

The Commentary to UNGP Principle 6 focuses on procurement. The Commentary notes that "This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises." The focus of the Commentary is on the use of contract provisions to promote human rights, especially in procurement, "with due regard to States' relevant obligations under national and international law." This aligns with the SRSG's research during the course of the mandate.[66] At the same time it raises some interpretive points.

First, it is unclear what the intention was with respect to the term "due regard" with respect to a State's "relevant" obligations under national and international law (recall the minimal benchmark for the mandatory reach of the State duty under UNGP General Principles and UNGP Principle 1). "Due regard" has had some treatment in the literature with respect to its meaning and application within international instruments.[67] For example, Forteau considers how the phrase "due regard" has sometime been considered a stronger expectation than "reasonable regard" though some courts have treated them as equivalent. In enough instances

[65] See, e.g., Joel Slawotsky, 'Leveraging Human Rights Due Diligence in Corporate-State Procurement: The Exemplar of the Pfizer-Israeli COVID-19 Vaccination Program,' (2023) 8(3) Business and Huan Rights Law Journal 352-368; Fiona McGaughey, Rebecca Faugno, Elise Bant, and Holly Cullen, 'Public Procurement for Protecting Human Rights,' (2022) 47(2) Alternative Law Journal 143-149; Ola Martin-Ortega, 'Public Procurement as a Tool for the Protection and Promotion of Human Rights: a Study of Collaboration, Due Diligence and Leverage in the Electronics Industry,' (2018) 3(1) Business and Human Rights Journal 75-95.
[66] Discussed Chapter 3.2.3 – 3.2.5.
[67] Matias Forteau, 'The Legal Nature and Content of 'Due Regard' Obligations in Recent International Case Law,' (2019) 34 The International Journal of Marine and Coastal Law 25-42.

to have significance, however, Forteau argues that the term are "aimed at ensuring conciliation between conflicting concurrent, or overlapping elements."[68] This, he notes, applies as well to "due diligence",[69] a subject taken up in the consideration of UNGP Principles 16-22. One can get a better sense by considering the meaning of the word "due"—something that is owed, a sense that is replicated in both the Spanish (*debido*) and French (*dûment*) versions of UNGP Principle 6. One speaks here of a duty or obligation, in this sense of something to which a thing or action is entitled, particularly with respect to the care with which something is undertaken. In this case the word is modified by "regard" (in the Spanish version *atención*; *compte* in the French version)—something that ought to be noticed or considered. Thus one speaks here of an obligation to consider a State's international legal obligations.

9.4.4 UNGP Principle 6: Authoritative Interpretation/Commentary

9.4.4.1 The 2010 Draft. What became UNGP Principle 6 in its final form was circulated in the Draft UNGP as its Principle 9.[70] The final form of UNGP Principle 6 diverged from its draft form in some respects. These differences may shed light on the meaning and plausible interpretation of text, or at least limit the scope of the plausibility of textual interpretation and application.

The 2010 Draft Principle retained the "seek to ensure respect for human rights" standard that was significantly modified. As finalized, UNGP Principle 6 referenced a "promote respect" rather than an "ensure respect" standard. This suggests that the initial intention, to strengthen the intensity of the expectation imposed on Sates with respect to their transactions in markets, was reduced to a promotion standard. It is possible to read into this a variety of interpretive possibilities.

The first, and perhaps most likely form the text, is that a promotion standard reinforces and returns the State, in this respect, to its general regulatory role and to the expectations of UNGP Principle 2 and to the smart mix of measures—undertaken in the State's capacity of apex regulatory (subject to its international legal obligations) within its territory/jurisdiction under UNGP Principle 3. In this reading it is not that the role of the State with respect to its contracts and transactions has been diminished, it may just be that they are subsumed within the general duty and expectation of the State as set out in UNGP Principles 1-3.

Other plausible readings also suggest themselves. The Commentary to the final version of UNGP Principle 6 draws attention to the availability of contract as a means of promoting

---

[68] Ibid., 29.
[69] Ibid., p. 30, citing Pulp Mills on the River Uruguay (Argentina v. Uruguay) [2010] ICJ Rep 14, pp. 55–56, at [101].
[70] 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. Discussed Chapter 2.3.4.

respect for human rights when the State engages in market transactions for goods and services (or than those subject to UNGP Principle 5 or in addition to those requirements). This would align the "promotion" language with the "additional steps" language of UNGP 4 in the sense that promotion and additional steps focuses the State on that toolkit of contract and private law methods at the heart of the 2nd Pillar and available to entities in markets. Which are in addition to or which promote the techniques and approaches under the 2nd Pillar. A variation on that reading would establish a baseline for the contracts or private measures approach by limiting its scope to that of the State's international legal obligations. That may be important especially where there are differences among States with respect to the scope of their international legal obligations, or where the sum of those international legal obligations are not identical to the baseline international human rights instruments at the heart of the 2nd Pillar corporate responsibility to respect as set out in UNGP Principle 12.[71]

Second, the focus on procurement within the broader categories of State commercial activities remained unchanged form 2010 Draft principle to its final form. That brings into focus the distinctions between procurement and other forms of commercial activities in which States engage. Procurement contracts tend to form their own sub-field of commercial transactions, sometimes overseen by a functionally differentiated administrative apparatus.[72] As a regulatory sub-field in many States, States ought to have the obligation to fulfill their duty to protect against human rights abuses through the reform of these regulatory systems. Within them, as well, compliance with State policies (including the protection of human rights) ought to follow whether they are embedded in procurement regulations themselves of through them into the contracts between States and providers. Because these vary across States,[73] the use of the broader term makes sense.

9.4.4.2 Travaux Préparatoire and Pre-Mandate Text. The SRSG's early reports noted the lack of any meaningful consideration of human rights criteria in many aspects of State engagement in market activities.[74] In his 2007 Report, Addendum 1,[75] The SRSG considered the notion of promotion and promotional efforts. "Such measures include steps to provide human

---

[71] UNGP Principle 12 identifies these are "the International Bill of Human Rights and the principles concerning fundamental rights set out in the International labour Organization's Declaration on Fundamental Principles and Rights at Work." Discussed chapter 12.

[72] In the United States procurement resources are managed through the Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. See Federal Acquisition Regulations FAR FAC No. 2024-05 (effective date 22 May 2024); available https://www.acquisition.gov/far/part-1.

[73] The World Bank Group maintains a "Global Public Procurement Database, available [https://www.worldbank.org/en/news/feature/2020/03/23/global-public-procurement-database-share-compare-improve], last accessed 5 July 2024.

[74] Discussed Chapter 3.2.3.

[75] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions Addendum 1: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries A/HRC/4/35/Add.1
(13 February 2007); available [https://undocs.org/en/A/HRC/4/35/Add.1]; last accessed 25 February 2024.

rights education for private actors or at least to encourage such actors to consider human rights in their activities."[76] But it also includes awareness raising, not just among rights holders but within organs of collective influence—social media, internet and the like.[77] This is meant serve as a necessary predicate to legislation by educating the electorate and those who ought to be invested in the project.[78] These practices, distilled from the actions and expectations of treaty bodies, appear to have provided the pragmatic basis for the understanding of the concept of "promotion" in the UNGP.

9.4.5 Other Glosses

Mihaela Maria Barnes produced a commentary on the State-Business nexus, considering the interpretation of UNGP Principles 4-6.[79] Barnes noted the interrelated nature of UNGP Principles 4-6 and the intent to treat them as a disaggregated whole. She also noted the utility of related international instruments toward informing an interpretation of UNGP Principles 4-6 as applied in context. More interesting, perhaps, was the use of the UN International Law Commission's work to inform interpretation.[80] With these, she suggests a broad reading of the Principles, individually and as a whole. In that context she noted that, in his report, Dante Pesce, the n Chair of the UN Working Group, suggestion that "It is high time for States to show concrete leadership, and require the enterprises they own or control to be role models on human rights."[81]

Annamaria La Chimia[82] adds the suggestion that inherent in UNGP Principles 4-6 is the expectation that States ought to use their leverage in their business relationships in a way that mimics the same expectation of business in the context of their systems of human rights due diligence.[83] La Chimea also suggests a broad reading of UNGP Principle 6 with respect to its scope and the sorts of entities the Principle ought to bring within its terms. More interesting is the suggestion, with relevance to all of the UNGP, that the Committee on Economic, Social and Cultural Rights (CESCR) General Comment on State Obligations[84] within its own purview

---

[76] Ibid., ¶ 68.
[77] Ibid., ¶ 69.
[78] Ibid, ¶ 70.
[79] Mihaela Maria Barnes, 'The United Nations guiding principles on business and human rights, the State Duty to protect human rights and the State-business nexus,' (2018) 15(2) Revista de Direito Intenacional 42-64.
[80] United Nations International Law Commission, Draft articles on responsibility of states for internationally wrongful acts, with commentaries. (2008), <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.
[81] UNITED NATIONS. Human Rights Council. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: report of the working group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea. 2017. (A/HRC/35/32/Add.1). p. 5; discussed in Barnes, supra, , pp. 45-46.
[82] Annamaria La Chimia, 'Guiding Principle 6: Respecting Human Rights Through Commercial Transactions,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 49-55.
[83] Ibid., p. 50.
[84] Committee on Economic, Social, and Cultural Rights (CESCR), General Comment No. 24: State Obligations Under the International Covenant on economic, Social and Cultural Rights in the Context of Business Activities (2017) UN Doc E/C.12/GC/24

might serve as persuasive authority for interpreting UNGP Principle 6. In particular, CESCR is read as persuasive authority supporting an interpretation that includes within the meaning of the State the entirety of its apparatus, at whatever level of governance constituted. It also extends that reading to cover, effectively, all of the entities with respect to which the State has an ownership, control, influence or insurance relationship under the aegis of UNGP Principle 4.[85] This interpretive approach likely extends the definition of the State to its fullest and comes closest to embracing the Marxist Leninist view that there is, in fact, no distinction between political and economic entities. Of course, at its limit it collapses the distinctions between the State duty to protect and the corporate responsibility to respect human rights—essentially treating both as elements of a mandatory State duty. That is plausible—but so is its opposite position: that the State and its apparatus ought to be narrowly defined to include only those institutional elements treated as part of the State by way of its own domestic constitutional order and insisting on a form and quite definitive distinction between State duty and corporate responsibility—one looking inward and the other outward. The UNGPs generally and UNGP Principle 6 does not choose between them or any position in between. The SRSG's travaux Préparatoire suggest an inclination based on his reading of the trajectories for development,[86] but grounded in his more cautious principled pragmatics.[87] The same approach applies to identifying commercial transactions. The procurement process itself is understood as a hybrid of sorts—where the State duty and corporate responsibility can meet and where a "smart mix of measures " (UNGP Principle 3 can be used to blend regulatory, policy, contract and guidance instruments.

9.4.6 Applications

9.5 Conclusion

Chapter 8's focus on UNGP Principle 3, the "General State Regulatory and Policy Functions" suggest the range of regulatory means available to the State to fulfill the mandatory duty to protect human rights set put in UNGP Principle1 (mandatory at a minimum to the extent of the State's international legal obligations), and the strong suggestion to clearly describe the expectations that constitute respect for human rights by economic enterprises expressed in UNGP Principle 2. With respect to UNGP Principle 3, the text is first considered, followed by an examination of the official commentary as a means of adding some content to the text and perhaps suggesting intent. In both cases textual ambiguity and spaces for substantial interpretive scope are considered. Layered onto this is a consideration of authoritative interpretation and other glosses.

Chapter 8 describes the arsenal of regulatory measures available to States to meet their mandatory obligations to protect human rights (UNGP Principle 1) and to advance their expected obligation to manage expectations around the corporate responsibility to respect human rights at least within their territory/jurisdiction (UNGP Principle 2). But the Principle

[85] La Chimia, 'Guiding Principle 6: Respecting Human Rights Through Commercial Transactions,' p. 50-51.
[86] Discussed Chapter 3.2.
[87] Discussed Chapter 3.1. The difficulties of balancing interpretation discussed Chapters 5.1-5.2.

does more than that. It introduces key sub-principles in its black letter. Among them are the principle of "periodic assessment" of regulation and policy which was to be guided by the application of an "adequacy" standard. It tied this principle of periodic assessment to an obligation to "address gaps" revealed by periodic adequacy assessments, but not necessarily to resolve or bridge them completely. It also articulated a principle of regulatory coherence, built around the superiority of the State obligation to build a regulatory system around the duty to prevent/mitigate/remedy adverse human rights impacts, though it did not specific how these were to be identified and measured. It elevated policy and guidance efforts as an essential tool of the State duty and adopted a principle of communication as a necessary means of fostering respect for human rights by business (though the concept could be generalized).

UNGP Principle 3 also introduced concepts and principles through its Official Commentary that, in some respects, have exceeded the influence and authority of its black letter. Principal among these was the concept/principle of a "smart mix of measures" that from the germ of an idea embedded in a 2009 Report to the General Assembly of the SRSG has become a key element (conceptual and practical) around which debates about the use and approaches to the regulatory palette offered in UNGP Principle 3 might be "best" deployed. The smart mix principle also appears to reinforce the principle, expressed in the UNGP General Principles, of State international legal obligation as a source and organizing framework for the expression of the fulfillment of their duty to protect human rights through State based regulatory-guidance measures. State international legal obligations, then, may serve to define and drive national regulatory measures. Yet this reveals a potential difficulty as States approach their international legal obligations in quite distinct ways. The effect on convergence within the smart mix matrix at the international level may be more difficult--and its effects on the coherent ordering of regulation along value/production/supply chains may be made more difficult. This solution invited by the UNGP framework itself, is pragmatic--accept current practice and use those practices as a means of effectuating change as a function of their connection to the principal objectives of this project--to prevent/mitigate/remedy adverse human rights impacts. Lastly, UNGP Principle 3 remind one of the complexities of reconciling the growing body of human rights related or impacting principles, measures, laws, and expectations. That was illustrated by the difficulties around transparency--communication of expectations. The consequences is a resort to balancing. Yet human rights balancing presents its own challenges, ones which the UNGP do not directly address.