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UNGP-- The State Duty to Protect Human Rights: Operational Principles—Supporting Business Respect for Human Rights in Conflict-Affected Areas (UNGP Principle ¶ 7)

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10.1 Text of the General Principles

SUPPORTING BUSINESS RESPECT FOR HUMAN RIGHTS IN CONFLICT-AFFECTED AREAS

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

10.2 The Signification of the State Duty to protect human rights in the absence of the State.

The UNGP are grounded in a core set of premises through which its entire rationalization of the discourse, principles, policies, and applications of its business and human rights project is organized and which provides the lens through which and *understanding of its text*—especially of official text—*is possible*. In Chapter 6, in relation to the role of the UNGP General Principles in the organization, interpretation, and application of the UNGP Principles, introduced the concept of *collective authoritative hermeneutics* as a narrative/normative framework for understanding both the UNGP General Principles themselves and the 31 Principles that follow.[1] That authoritative collective hermeneutics was, in turn, a function of the interplay of two key factors in collective meaning making within human social orders––the modalities of interpretation (what does text mean and where does one draw for that exercise), and the identification of those with authority to make and guide meaning for the collective.

Collective meaning making is given form, and its boundaries are expressed, through text and act, guided by those with authority to guide both in accordance with the principles on which text and act are ordered. For the UNGP, that makes the document both dialectical and self-reflexive. It is a framework that creates nothing new but that change is possible as the identified actors operating accordioning to the principles and expectations specified, undertake to fulfill their duty and responsibility in the (always changing) contexts in which they operate. The framework does not change, but creates a space within which action is possible around a central object—"to protect against human rights abuse" (UNGP Principle 1. In the language of the UNGP General Principles:

> Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

The meaning universe of the UNGP, made up of the building blocks of authoritative collective hermeneutics, is built around two key objects—States, and business enterprises. These are the conceptual anchors. One cannot conceive of the UNGP without the State; likewise there is no conceptual framework possible in which business enterprises are absent. In both cases—and this is quite relevant for the conceptual basis of UNGP Principle 7—if either the State or the business enterprise did not exist, it would have to be invented.

[1] Chapter 6.2.

If the conceptual perception of the UNGP project rests on States and business enterprises, then these objects must be vested with form and function relevant to a critical functionally differentialized conceptual space for which they are deployed—human rights built from out of a set of ideal states and objectives specified in international instruments which are both legal and normative. There are two places form which form and function may originate. One is within the operating systems of State and enterprise; the other is through a superior authority. For States that superior authority would be the international State system and its objects (international legal obligations, normative pronouncements, narrative production and the like). For the UNGP that is deeply embedded in the UNGP General Principles discussed in Chapter 6. For enterprises, likewise, that superior authority would be found in the expectations and practices of markets in which it operates and which are developed from the common experiences and interactions between functionally differentiated fields of production, their customers, lenders, regulatory authorities, and each other. This is the essence of the framework built into the Second Pillar and bound up in the SRSG's notions of social license discussed in his 2008 Framework Report.[2]

The UNGP General Principles remind its readers that *both States and business enterprises are instruments*: the State is a generalized organ of society performing generalized functions; the business enterprise is a specialized organ of society performing specialized functions. *Both instruments are also understood within the confines of their purpose*: States respect, protect, and fulfill human rights; business enterprises comply with the law of States and to respect human rights. Both States and enterprises contribute to the goal of matching rights and obligations to appropriate remedy.

The two key objects, and their objectives, form the basis around which it is possible to create the perception universe of the UNGP. And that brings one back to the authoritative collective hermeneutics at the heart of the UNGP project. The UNGP creates the basis for an ideal conception of the human rights spaces within which States and business enterprises may be perceived and expected to perform their roles; that idealized conceptual framing confers meaning which is both intended and in fulfills that meaning by acting in accordance with its own perception of itself. In this case that States and enterprises act in accordance with the expectations which are themselves a function of the structural intention of the web of international human rights which give States and enterprises purpose. One experiences meaning and objects within meaning structures exactly as one intends them to be experienced; how one perceives shapes what is perceived.[3] In the case of the UNGP, one conceives an intentional meaning universe which one then perceives according to the intention-given form in the UNGP's text. Perception of the aggregated organization, expectations, identification, and interpretation of the UNGP system the experience of which establishes the perception; each reinforces the other.

But what happens when one of the fundamental ordering premises of that perception universe disappears? That, in effect, is the challenge that serves as the central core and the purpose of UNGP Principle 7—what happens when the State disappears from the context in which the State is the central element in the articulation and application of the State duty within a territory? This Chapter 10, and with respect to UNGP Principle 7, one speaks more specifically to the semiotics of perception—the constitution of key objects (states, business entities, humans), their significance (as a junction of duty, responsibility of actors), and collective

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[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, ¶¶ 49-50.
[3] Edmund Husserl, Logical Investigations (J.N. Findlay (trans); London: Routledge1970 (1900)), Vol. 1 (Vol. II of the German edition); pp. 199-200.

meaning (human rights). And one speaks more specifically still to *the way in which the UNGP may be required to operate where the State disappears*.

At a fundamental level, the possibility of the disappearance of the State is inconceivable. States do not disappear; neither for that matter, do economic enterprises within the perception framework if the UNGP. They may change their character—and indeed the travaux préparatoire have suggested this as a core objective around which principled pragmatism and the open textured text of the UNGP were meant to foster.[4] To entertain the possibility that a State might disappear then, gives rise to a contradiction at the heart of the UNGP (and the State project on which it rests). That is, the absence of the State within the UNGP conceptual universe creates a contradiction that might threaten the conceptual structures and narrative framework principles on which perception of the possible—the expectations, duties, character and forms of the universe of business and human rights constituted through the UNGP—that produce its perception universe. In the absence of the State the UNGP, "understood as a coherent whole" (UNGP General Principles) loses its coherence.

Neither State nor enterprise can disappear, either from the collective imaginaries of social collectives, nor, as a product of those imaginaries, the UNGP; at least not in the current historical stage of human development. Nonetheless, it makes sense to pause a moment to consider what may be meant by the disappearance of the State within the perception universe that is the UNGP system. While *States* (one deals with the disappearing enterprise in later chapters) do not disappear, particular States , organized and recognized as such, may disappear in the sense of ceasing to exist, or they may depart do far from the ideal of the "properly functioning State" that they may be imagined as *not wholly present*—in the sense of being in the same place as other States. This state of affairs may be contrasted to that of states of perception about the community of States as a whole (and with that their collective organization and operation within historically contextual State systems). This community is perceived and thus assumed to be *omnipresent* in the sense of being everywhere present, in all places, acts, and things at the same time.

In this context, then, and as a basis for understanding the thrust of UNGP Principle 7, it may be most useful to think about the disappearance of the State as effectively the disappearance of the perception of the State as it is embedded, in idealized form, within the body of the UNGP. From that baseline it is possible to tease of the nature and effect of states of disappearance or absence from the UNGP system, the consequences of which are at the heart of the direction built into UNGP Principle 7.

First, a State may become absent, either totally or in degree. It may be completely absent when it ceases to exist. That cessation may be accomplished through conquest or by the voluntary acts of those who inhabit the territories of the State to merge into another State. Where the State ceases to exist by a voluntary act of its peoples and institutions it has no effect on the UNGP, its structures or division of rights and obligations. Like a merger between two companies, what had been a State and its obligations and rights become, on union, those of the surviving State. In that sense there is no absence of a State within the territories and for the peoples who now are absorbed into another. On the other hand, the obliteration of a State by conquest, in whole or in part, may have a different effect. In that case there is, sometimes, a distinction between the existence of a State in fact and as a formal matter. Likewise, acts of conquest and occupation may give rise to adverse human rights impacts that affect international legal obligations, including those referenced in the UNGP. The extent of that separation of de facto and de jure existence is a function of the acts of other States within the State system and the responses of those international institutions within which they operate together. IN this case, however, the space once taken up by

[4] Discussed Chapter 3.

that (conquered) State becomes contested, in whole or in part. And that contestation affects the assignment of duty under the UNGP, as well as the duties and obligations of other States and business enterprises.

Second, even in the absence of conquest, a State may suffer some manner of internal disintegration which effectively causes it to disappear, in whole or in part, with respect to its ability to undertake the duties and expectations of the UNGP. In the imaginaries of the State system, these graduations of presence and disappearance are understood as a function of an ancient construction of the fundamental characteristics of a fully present State generalized from its textualization in 1933 Montevideo Convention[5] –ironically on the eve of the last great global effort to re-image the State system and the States within it, one that served to give birth to the State system of the current stage of global historical development. These touch on the "possession"[6] of four characteristics–(1) a permanent population; (2) a defined physical territory; (3) an institutionalized state apparatus; and (4) a capacity to enter into relations with other States.[7]

While aggregated these characteristics might be understood, roughly as the constitutive character of the State, their disaggregation suggests that the issue of State presence is not a binary condition. That is, the idea that a State is or isn't present, fully, may suggest the limits of the notion of State presence for the purposes of the UNGP, but it ignores the reality of levels of presence and absence suggested by each of the Montevideo Convention characteristics. A State may have a defined physical territory, but some portions of that territory may be under occupation either by other States or by rival elements seeking to constitute the operational element of a State[8]. A State must have a fixed population, but that population may be partially present within a fixed territory or in a diasporic condition. Like its territory, portions of a State's that population may be under the control of and subject to multiple institutionalized State apparatus. A fixed territory with a permanent population with more than one government apparatus may find that it may be represented simultaneously by, and other States may enter into relations with, one of more of these governments;[9] and sometimes not.[10] Governments can exist in exile, and though absent from the territory of the State may still be recognized as its representation as a function of the willingness of other States to enter into relations with it.[11] Governments may represent revolutionary forces in control of some population and territory but not the whole of what may constitute the State. Sometimes States

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[5] Convention on Rights and Duties of States adopted by the Seventh International Conference of American States. Signed at Montevideo, December 26th, 1933, entered into force 26 December 1934, reaffirmed by Protocol 23 December 1936, Treaty Series 1761, pp. 411-412. It is noted that the Montevideo Convention and its postulates have garnered its fair share of critical commentary over the past century. The object in its reference is neither to defend or critique it, but rather to acknowledge its power over collective meaning among the community of States and its actors as a matter of perception rather than as a matter of "legality," however people come to understand and apply that term to themselves and then to impose that understanding on others. For an interesting point of reference, see, Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents,' (1998-1999) 37 Columbia Journal of Transnational Law 403.
[6] Perhaps best understood in this context of holding or having control of–the essence of presence as an active conscious state.
[7] Ibid., Art. 1.
[8] Kenneth A. Schultz, 'What's in a Claim? De Jure and De Facto Borders in Interstate Territorial Disputes,' (2014) 58(6) Journal of Conflict Resolution 1059-1084.
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[10] 'Maduro Board' of the Central Bank of Venezuela v 'Guaidó Board' of the Central Bank of Venezuela [202] EWCA Civ 1249; discussion in Andrew Sanger, 'Who Controls Venezuela's Gold? De Facto and De Jure Recognition of a Foreign Head of State, (2021) 80(1) The Cambridge Law Journal 11-14.
[11] Stefan Talmon, 'Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law,' in Guy S. Goodwin-Gill and Stefan Talmon (eds) The Reality of International Law: Essays in Honour of Ian Brownlie The Reality of International Law: Essays in Honour of Ian Brownlie (OUP, 1999), pp. 499–538.

fiction without a government;[12] the State is present but without any apparatus through which its international obligations may be assigned. And sometimes, nations can exist without a State—a modern example includes the Crimean Tatars and the Circassians, both permanent populations disconnected from the fixed territory once theirs and then absorbed by another State. The connection between the territory and the State did not disappear, but the connection between that territory and the State/population that had been there may.[13]

Third, the concept of "possession" when connected to the Montevideo Convention defining characteristics raises additional substantial issues for the UNGP framework. These center on the challenge of assigning the State duty somewhere when the State is not present in whole or in part, with respect to those characteristics or otherwise for lack of capacity (another form of absence even when otherwise present). Generally, on a theory of "from like to like" one might be forgiven for building into the UNGP framework an interpretation that would (re) assign a State duty where it is absent to another State. In the context of the UNGP, that may be one or another State along production or supply chains. In that sense, the chain of private production through enterprises determines the chain of assignability of the State duty where the State connected to a specific territory is not entirely present. That is more than conceivable as an extension of the notion of extraterritoriality described somewhat though cautiously positively by the SRSG and even more cautiously built into the UNGP's foundational Principles, and especially UNGP Principle 2.[14] But it is also possible to reassign State duty to the enterprises on the ground who would be expected to step into the shoes of the absent State to the extent of that absence and undertake those duties or otherwise fill in the gaps to the extent necessary. This is also contemplated in the UNGP within the corporate responsibility to respect human rights framework, and especially through UNGP Principles 12 and 23. This interpretive possibility then leads to a broader one—that in the case of State absence, the State duty might be transferred—with all of its consequences—to those who purport to exercise some (though to all) authority of States recognized under the Montevideo Convention.[15] That, certainly would be an option when there is a contest for control of the State government apparatus among factions. More interesting would be the imposition of the State duty on States that project military power abroad—for example in the form of advisors or military assistance. But it might extend as well to other sorts of assistance—for example where international financial institutions impose sufficiently comprehensive conditions on loans, together with oversight measures, enough to suggest an effective transfer or sharing of authority within a State.

Fourth, the issue of the presence or absence of the State for purposes of the UNGP framework ought to be understood as distinct from the equally interesting issue of the nature and application of sovereignty.[16] Beyond the obvious, though sometimes neglected, core of the concept—that sovereignty concerns the premises around the role, personality, premises and perception of something (person, abstraction, institution, divinity, etc.) who is understood to incarnate overlordship or dominion, again as that term is understood within a historical time, place

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[12] Ken Menkaus, 'Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping,' (2007) 31(3) International Security 74-106; Ken Menkaus, 'State Failure, State-Building, and Prospects for a "Functional Failed State" in Somalia,' (2014) 656 The Annals of the American Academy of Political and Social Science 154-172.
[13] Charlotte Hills and Renée Gendron, 'Circassia: Remembering the Past Empowers the Future,' (2019) 23(2) Iran and the Caucasus 199-215.
[14] Discussed Chapter 7.
[15] For a general discussion without reference to the UNGP, see Sascha Dov Bachmann and Martinas Prazauskas, 'The Status of Unrecognized Quasi-States and their Responsibilities Under the Montevideo Convention,' (2019) 52(3) The International Lawyer 393-438.
[16] Jorge E. Nuñez, 'State Sovereignty: Concept and Conceptions,' (2024) International Journal for the Semiotics of Law [https://doi.org/10.1007/s11196-024-10170-y].

and space.[17] In the current time the State is thought to exercise dominion or overlordship, that is understood and bounded by the meaning and limitations of dominion in current times. States, in this sense, are sovereign political actors—that is, they are superior in authority, rule, and rank. Yet they can exercise only such authority or only to the extent that the core premises of the then contemporary rules of the ordering political system permits. For purposes of the UNGP and its interpretation/application, this basic understanding, in this way, suffices. It distinguishes the State from notions of sovereignty in the sense that while the State is Sovereign within the space set aside for its dominion, the extent and exercise of that dominion is located elsewhere. For States that includes the ordering political system, memorialized in its constitutional order, and the extent to which States are bound (and here one returns to the UNGP) it has undertaken to be bound by legal obligations originating in institutions and agreements among overlords of equal rank—and the institutions and organs they have together, created and vested with authority. It is thus in the stricter sense of overlordship and dominion that one might, for purposes of the conception and application of the UNGP, speak about sovereignty and the State. That concept of embedded overlordship is a critical premise of the State duty. The premise is critical not because of any particular attraction to the joinder of overlordship and the State, but precisely because (principled pragmatism)[18] the State is conjoined with certain conceptions and attributes of dominion and overlordship where it matters to the UNGP—in their authority to protect and fulfill human rights directed to them in the form of international legal obligations.

It is only a very small step from notions of absence, in its complexity, to the resulting gap that the UNGP would have been required to fill, if only to protect the integrity—the solidity—of the *State* duty to protect human rights. The SRSG did not think in these terms, of course.[19] The fundamental approach was that the absence of the State within a territory or with respect to the fulfillment of its duty might best be understood and remedied by other states. And the context in which absence was framed was "conflict"—not absence. And not just conflict—instead the focus was more specifically targeted "on conflict affected areas." That is the essence of UNGP Principle 7. With respect to the rest, it seems, the rest of the UNGPs would be expected to be used to fill the gaps flexibly.

10.3. UNGP Principle 7: Commentary on Text

UNGP Principle 7 starts with an explanatory justification. That alone makes it unusual among the UNGP State duty Principles. Most of the other State duty UNGP Principles follow the "States should" form, with the exception of UNGP Principle 1 which follows the "States must" form. And UNGP Principle 3 which starts with an "objectives" clause ("In meeting their duty to protect"). The result is, or could be interpreted as indicating a deviation from the core premises, trajectories, expectations, and structures that constitute the "well operating" system overseen by well-ordered States. UNGP Principle 7, then, might be understood as grounded in exception; and exceptions produce waivers from standard expectations and practices. UNGP Principle 7's opening clause, then can be interpreted as notice to its readers that one is *entering a state of exception*, one that turns its attention

[17] For example, discussed in Julia Costa López and Benjamin de Carvalho, 'Introduction: The Emergence of Sovereignty: More than a Question of Time,' (2018) 20(3) International Studies Review 489-519.
[18] Discussed Chapter 3.1.
[19] Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Business and human rights in conflict-affected regions: challenges and options towards State responses A/HRC/17/32 (27 May 2011); available [https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other]; last accessed 25 February 2025. See discussion Chapters 2.3.2, and 5.2.5.

to the suspension, the absence, or disappearance of the State, and that consequently that makes its necessary to meet its threat by filling in the gap left by that absence, disappearance or suspension.[20] It is, in this sense, that one might approach the breadth and focus of the exceptional state to which the text of UNGP Principle 7. It is offered up as a pathway toward the "expected", in its narrow sense of "regularity" but also in its broader sense of "ordered" in accordance with the expectations of the system premises on which the good operation of the UNGP are based.

The opening clause of UNGP Principle 7 also serves as notice that all states of exception are understood not merely as a deviation from the cluster of expectations that produce good order, but also a precisely understood space of exceptionality toward the overcoming of the challenge of which the text of UNGP Principle 7 is directed; *and no farther*. UNGP Principle 7 acknowledges one precisely drawn set of exception to the state of good order built around the State. It ignores the rest. This is accomplished through descriptive definition. It undertakes this definitional confinement in two ways—by reference to the risk at the heart of the targeted disorder, and by defining the key characteristic of the disorder to which the palliatives of UNGP Principle 7 are directed. Each is considered in turn.

UNGP Principle 7 applies a *severity standard* as the measure triggering the provisions for the state of exception that constitute the body of its guidance. In this case the trigger is the premise that "the risk of gross human rights abuses is heightened." One notes tree critical terms to the trigger. *The first is risk*. One speaks here to potential as well as actual risk; that is the temporal element in the assessment of risk—not just actual or realized risk, but future risk. Risk also speaks to likelihood. That itself becomes complicated—a small risk of a significantly several human rights abuse may be equivalent to a large risk of less severe adverse human rights impacts which cumulatively or in the aggregate may be significant. This calculus of likelihood and its measure brigs the second element into sharper focus. *The second is "gross human rights abuses*." The trigger here requires a distinction between ordinary and gross human rights. Some States have sought to define what constitutes a gross violation of human rights by reference to the specific acts that may fall within its definition and in this way define its borders.[21] Academic analysis has suggested that international bodies, including international courts, take into account several factors: "the type of the violated rights and the character of the violation, the quantity of victims, the repeated occurrence of the violation and its planning, and the failure of the government to take appropriate measures relating to the violation in question."[22] Interestingly, the UNGP Principle 7's reference is NOT to gross and systematic, but rather only to gross abuses.[23] That might suggest that the trigger is primarily qualitative (gross) rather than quantitative (systematic). On the other hand, the "systematic element may be embedded in the notion and application of risk. *The third is bound up in the concept of "heightened."* Heightened can be understood in its ordinary sense of "increased" in either intensity or degree, that is to become higher.

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[20] Georgia Agamben, *State of Exception*, (Kevin Attell (trans), University of Chicago Press, 2005), originally published as Stato d eccezione: Homo sacer II (Turin, Bollati Boringhieri, 2003).

[21] U.S. Department of State, Human Rights Reporting Gateway Information, Gross violation of human rights, available [https://hrgshr.state.gov/en/info] last accessed 20 July 2024 (extrajudicial killings, forced disappearance, rape by security forces, torture, and other forms of cruel, inhumane, degrading treatment or punishment).

[22] Roger-Claude Liwanga, The Meaning of Gross Violation of Human Rights: A Focus on International Tribunals' Decisions over the DRC Conflicts, 44 Denv. J. Int'l L. & Pol'y 67 (2015); citing Cecilia Medina Quiroga, *The battle of Human Rights: Gross, Systematic Violations and the Inter-American System* ((Dordrecht, Martinus Nijhoff, 1988), p. 11; and M. E. Tardu, 'United Nations Response to Gross Violations of Human Rights: The 1503 Procedure,' (1980) 20 Santa Clara Law Review 559, 582-84.

[23] Dinah Shelton, *Remedies in International Human Rights Law* (3rd[d] ed., OUP, 2015), pp. 120-139 ('Gross and Systematic Violations,').

Embedded within that severity standard trigger is the question of the manner in which the standard is triggered. The UNGP Principle 7 text is silent. The Office of the High Commissioner for Human Rights has suggested that it—including its own apparatus, the OHCHR Special Procedures, and Treaty bodies—can serve as the early warning system for human rights abuse severity.[24] States also may serve as warning triggers. Likewise, may business enterprises with highly functioning human rights due diligence systems operating effectively. Indeed, one might recall that the State duty's foundational principles impose a mandatory obligation on States to protect against human rights abuses within their territories and/or jurisdictions; that suggest an area of State interest that extends beyond their physical territories to include, for example, action abroad with internal effects.[25] The UNGP also anticipate that States will set out respect for rights expectations for enterprises in their global operations.[26] Together they might suggest that the State, other than the one in which a conflict affected area exists, might be in the best position to make the triggering determination. Moreover, those triggering determinations may be built into the expectations developed by States under UNGP Principle 2.

Nonetheless, it may appear that the trigger is built into the justification itself. UNGP Principle 7 applies its "heightened risk of gross human rights abuses" standard in "conflict-affected areas." There are several ways of interpreting this triggering standard. One way is to read it as suggesting that there is a presumption of a heightened risk of gross human rights abuses in conflict affected areas. In effect, all conflict affected areas are presumed to come within the provisions of UNGP Principle 7 unless that presumption is overcome—perhaps, in this context by the results of careful human rights due diligence. Another way to read this is to require the undertaking of a heightened risk analysis in conflict affected areas. In any case, the predicate for the actions specified in UNGP Principle 7 centers on a conflict affected area; the risk to be addressed is that of heightened like hood of the occurrence of gross human rights abuses. Yet another way to approach the trigger is to reverse the presumption—that the existence of a heightened risk of gross human rights abuses is presumed to originate in a conflict-affected area. That is, in the face of a heightened risk of gross human rights abuses one ought to presume the existence of a conflict affected area. Or, put differently, a conflict affected area and an area with a heightened risk of gross human rights abuses are aligned. That, for example, may be one way of reading the IECD Guidelines for Multinational Enterprises which transposed the UNGP into its system as Chapter IV.[27] Nonetheless, the OECD Guidelines distinguish between areas of *armed* conflict and of those a "heightened risk of gross abuse."[28]

That leaves open the issue of the meaning of the term "conflict-affected area."[29] The term assumes a critical role in defining the breadth of the application of UNGP Principle 7. One thing clearly emerges—that scope is potentially narrower than one grounded on State absence or disappearance in whole to in part, though it may

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[24] United Nations Office of the High Commissioner for Human Rights, OHCHR and Prevention, 'Human rights and early warning of violations, conflict or crisis,' available [https://www.ohchr.org/en/prevention-and-early-warning/human-rights-and-early-warning-violations-conflict-or-crisis], last accessed 20 July 2024 About Early Warning and Human Rights, ("Several human rights mechanisms have sought to develop early warning capabilities with a view to the early identification of human rights violations but also the consequent effects of conflict or crisis that such violations can generate. " Ibid.).
[25] Discussed Chapter 7.2.
[26] Discussed Chapter 7.3.
[27] Organization for Economic Cooperation and Development, Guidelines for Multinational Enterprises (Paris, OECD, 2015) (Commentary on Chapter IV, Human Rights, ¶45).
[28] Ibid.
[29] See Radu Mares, 'Corporate and State Responsibilities in Conflict-Affected Areas,' (2014) 83 Nordic Journal of International Law 293; Larry Catá Backer, 'Corporate Social Responsibility in Weal Governance Zones,' (2016) 14(1) Santa Clara Journal of International Law 297-332.

plausibly be read quite broadly as well, though with greater effort.[30] Its fundamental characteristics of the phrase are bound up in the interplay of its three parts: "conflict" which "affects" an "area." The term *conflict* has a quite elastic meaning. At one end one encounters the traditional reference to armed battle. At the other any sort of quarrel, variance, or opposition. The term "affected" suggested a quality to which some thing or space is endowed or constituted. "Conflict-affected" then suggests a space or condition endowed or constituted by the quality of opposition, battle, quarrel and the like. The term "area" suggests a space or open area, one into which characteristics might be projected. In this context, then, that the space that is conflict affected has boundaries beyond which it condition of opposition no longer applies. That space can be physical—as in a territory—or it can be abstract, as in a supply chain, a market, or any sort of virtual space, as long as it is a space in which it is possible to exercise conflict that produced human rights abuses. At its broadest, there is hardly a territorial space on the globe which does not include a conflict affected area—from crime ridden neighborhoods in the most developed States, to spaces of ethnically or identity based fracture and conflict, to spaces where the State is unable to consistently project political authority. It is evident that at a minimum, the text seeks to limit itself to a more narrowly defined territory (physical and abstract) of conflict understood, perhaps in more traditional terms. It is unlikely, for example, that the UNGP Principle 7 was meant to apply to crime ridden neighborhoods in New York or Paris. AT the same time one ought to ask the question—ought it not apply there? That depends, then on the nature of the absence of the State contemplated within the term conflict affected area. If it means functionally complete or substantial absence, and if a characteristic must include violence, then clearly much smaller subject of lawless areas are included. Still, at its edges and with respect to its core presumptions, the concept of conflict affected areas remains murky.

At last the baseline is clearly defined, as is its causative element that triggers what follows. First one focuses on risk (the possibility of an occurrence), but of a specific sort of risk—the predicate for UNGP Principle 7 is the existence of risk of a certain sort. Second, one limits the focus on risk to a functionally distinct consequence, in this case, is the focus is of "human rights abuses." Third, one measures the risk of human rights abuse by reference to a "heightened" standard. That is that the risk of human rights abuse must be greater, higher, or larger than a baseline assumption of the "rate" or "size" or "occurrence" of risk in the absence of the triggering condition. Fourth, the "heightened risk of human rights abuses in "conflict-affected areas." *That sets up a textual iterative loop within the predicate condition for UNGP Principle 7*: the cause and effect relationship between heightened risk of human rights abuse and conflict affected area. That is, both appear to be true: a conflict affected area is the expression of a heightened risk of human rights abuse AND a heightened risk of human rights abuse is the expression of a conflict affected area. Both exist simultaneously. For purposes of application that suggests that States and other actors may plausibly start from either end of the predicate conditions in applying UNGP Principle 7 in terms of predicate presumptions—either or both are true—a heighted risk of human rights abuse presumes a conflict affected area AND a conflict affected area presumes a heightened risk of human rights abuse. .

Once the relationship between conflict affected area and heightened risk of human rights abuse, UNGP Principle 7 describes the consequential expectations directed to States—"States should help ensure that business enterprises operating in those contexts are not involved with such abuse." The standard is not mandatory; the notion of the meaning of "should" has been examined earlier.[31] That expectations standard is to be applied is a "help ensure" standard. The breadth of the standard—not to "ensure" but to "help ensure" suggests that the obligation is undertaken in concert with those of others. That obligation to provide aid directed toward ensuring

[30] Discussed Chapter 10.1.
[31]

that something occur or not occur is itself based on an effort to make safe, to secure against a negative effect (in this case the heightened risk of human rights abuse).

The object of the help—and the entities with the laboring oar in the context of "conflict affected areas" are "business enterprises operating in those contexts." The separation between the State on which the UNGP Principle 7 expectations are imposed, the conflicts affected area, outside the territory and jurisdiction of that State, and the business enterprise whose own control/ownership or other relations have connected them to the conflict affected area , is to be maintained. In consequence. States are not expected to protect their power into conflict affected area; instead they are expected to undertake to help business enterprises with a presence in those areas (physical or virtual) in the ways described in the body of the text of UNGP Principle 7. UNGP Principle 7, then, appears to walk a fine line respecting intervention in areas in which a State has a diminished presence, or may be absent—at least where such spaces may come within whatever meaning of "conflict affected area" is embraced by the State engaged with its UNGP Principle 7 expectations. While the State may not directly project its authority out into conflict affected areas, it may aid (help to ensure) that those actors already present there can undertake their responsibility to respect human rights. Intervention, then, in the context of heighted risk of human rights abuse, is undertaken indirectly and at a minimum within the scope of the "help ensure" standard.

It is to be noted that UNGP Principle 7, loke the others making up the State duty principles, describe the minimum expectations (or mandatory duty). States may, within the constraints of international law, or their own domestic normative orders (to the extent that at a minimum these align with international legal obligations), project their regulatory authority (UNGP Principle 3) to the fullest extent of their capacity (functional power) or authority (formal power). However, through the lens of the UNGP and its normative framework, in the context of externalized conflict affected areas, States are expected to "help ensure" that private actors on the ground "are not involved with such abuses." That, itself also suggests another limitation—the State is NOT expected to help ensure that such abuses do not occur. Their minimum expectation is to help ensure that business enterprises operating in those areas *are not involved*.

The most likely expectation from this minimum expectation may apply to State owned or controlled enterprises or with respect to enterprises with respect to which the State facilitates or ensure activity in the conflict affected area. UNGP Principle 4 expectations, combined with those of UNGP Principle 7, may suggest a heightened intervention of the State to "take additional steps"—but as a market actor.[32] Still, those steps might include specific direction respecting the conduct and operations of enterprises that are State owned or controlled. And it would also require the State to take "additional steps" with respect to the conditions, for example, under which business enterprise operation in conflict affected areas are undertaken in the expectation of such facilitation or insurance schemes. To some extent, the range of application of expectation between UNGP Principles 4 and 7 converge in some respect, especially in connection with the denial of services provision of Principle 7(c) discussed in 10.3.3.

In other circumstances, UNGP Principle 7 elaborates four of the principle means by which the "help ensure" standard may be realized by a State. These include: (1) engagement with business enterprises; (2) provision of assistance to business enterprises; (3) the denial of public support or services to business enterprises that refuse the help; and (4) review and modification of State public measures for effectives in addressing the risk of heightened human rights abuse.

[32] Discussed Chapter 9.2.

10.3.1 The "Engaging" Clause.

UNGP Principle 7(a) sets out an early engagement strategy as among those that would meet the State's overall "help ensure" standard when business enterprises over which it exerts some sort of authority operate within conflict affected areas. States are expected to engage "at the earliest stage possible" with business enterprises. Note that the expectation here is not to provide, or deny or ensure—but to engage. Engage may be understood in its common senses as undertaking, attempting, participating in and the like. As such the expectation of the State is to undertake.

What is undertaken is to "help" business enterprises. Help may be understood by its common usages as supporting, aiding, assisting. There is no sense that helping is to be measured as a function of the success of the helping. That is reasonable especially since the enterprise, rather than the State, is the risk bearer and ostensibly an autonomous agent. The State may help, it may provide expectations of the forms and objectives of the aid, and it may withhold its support for failure to accept the aid and its terms. But the State by helping, is not undertaking the role of guarantor of the actions r the consequences of thew actions of the enterprise that is aided.

The "earliest stage possible" standard suggests reasonably enough something like an "as soon as possible" objective. The question, then, is how one measures what is soon enough to meet the standard. One way to approach the issue is to consider the extent to the text, when read together with UNGP Principle 2, might suggest some sort of positive expectation to develop mechanisms some reasonable effort to acquire the necessary data to try to make earliest as early as possible. Thus, if under UNGP Principle 2 the State has defined expectations about the timely acquisition of information for human rights due diligence, it may be possible to suggest that this information may be communicated to the State, and in this way provide data necessary to determine whether and when a conflict affected area requires intervention. This may not be necessary where the conflict is physical and well reported—civil wars, revolution, rioting, factional fighting and the like But it may be harder where the conflict is undertaken in more abstracted terrains. On the other hand, it is not clear whether the engaging standard is objective or subjective. That determination may be a function of capacity. Where States lack capacity for the sort of information gathering necessary to move forward what earliest stage , earlier may be later than in the context of a well capacitated State. And yet, again UNGP Principle 2 suggests that such an information gathering system is already a possible expectation with respect to business enterprises within their jurisdiction/territory which operate in conflict affected areas. Still "earliest" seems to be a flexible and certainly a contextual term.

The object of this "earliest stage possible" engagement is to "help" business enterprises " identify, prevent and mitigate the human rights-related risks of their activities and business relationships." At first blush, that suggests an alignment with the "help" expectations and the obligations of enterprises to undertake human rights due diligence as set out in UNGP Principles 17-22. And that is a reasonable reading of the "engaging." Nonetheless, it is also possible to read a parallel set of expectations that are grounded in the severity principle as a foundational interpretive principle of the UNGP 2nd Pillar Principles 14, 19, and 24. Severity of impact, to "judged by their scale, scope and irremediable character" (UNGP Principle 14 Comment), can reasonably be understood as related to the notion of "heightened" risk of *gross* human rights abuse. That relationship then suggests that the State, might reasonably be expected to provide aid in addition to what is normally expected as part of a human rights due diligence system operating in normal rather than extraordinary conditions. Severity principles, in the context of a heightened risk of gross human rights impacts, might require additional steps to ensure that identification, prevention, and mitigation of human rights related risks is effective. This is all undertaken not just to ensure the appropriate operation of a 2nd Pillar human rights due diligence system, but also

to meet the expectation that the help will contribute to conditions in which business enterprises "are not involved with such abuses" (UNGP Principle 7). The "not involved in such abuses" test would appear to fortify a reading that the sort of help expected of the State under UNGP Principle 7(a) would be in addition to that normally available under UNGP Principle 2.

UNGP Principle 7(a) is also the first place in the UNGP where the term "business relationships" appears. It is included as one of the objects for which the State's aid ("identify, prevent and mitigate the human rights-related risks of their activities and business relationships"). It is not the last. The term is defined in the Commentary to UNGP Principle 13 which describes the scope of the business enterprise's responsibility to respect human rights. Business relationships "are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services." Applied to UNGP Principle 78(a), it appears that the scope of a State's expectation to helpfully engage may extend beyond the expectation of States under UNGP Principle 2. Because the engagement to help is undertaken to aid an enterprise in the undertaking of its human rights due diligence, however, it makes sense for the scope of the State's help to match the extent of the scope of the enterprise's due diligence expectations. And again, the State's "helpful engagement" expectations under UNGP Principle 7(a) are to be undertaken in fulfillment of the chapeau expectation that States help ensure that in conflict affected areas business enterprises are not involved in human rights abuses.

10.3.2. The "Providing" Clause.

UNGP Principle 7(b) describes another means of helping ensure that business enterprises operating in conflict affected areas are not involves in gross human rights abuses by "providing adequate assistance to business enterprises to assess and address the heightened risks of abuses." The operational standard is "adequate assistance" and the standard is measured against the objective—assessing and addressing heightened risk of abuse. Adequate assistance is an elastic term, and it suggests a highly contextual analysis. Adequacy is also likely contextual, though it may invite assessment either under an objective or subjective standard.

The object of assistance are the means for the enterprise on the ground in the conflict affected area to "assess" and "Address". The two terms are critical elements of the human rights due diligence system. The first touches on the obligation, within human rights due diligence and addressed in UNGP Principle 18, to "identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships." The second touches on the elated obligation, again within the framework of human rights due diligence in the UNGP 2nd Pillar and addressed in UNGP Principles 19 and 20, to "take appropriate action," in part by assigning responsibility for addressing such impacts appropriately within a business enterprise (UNGP Principle 19), and by accounting for how business enterprises "address their human rights impacts" (UNGP Principle 20). UNGP Principle 7(b), then, is meant to express the expectation that in conflict-affected areas States (at least with respect to those enterprises operating within their territory or subject to their jurisdiction (UNGP Principle 2)), are to provide "adequate assistance" to the enterprise in order for the enterprise to fulfill its responsibility to respect human rights through an effective application of its contextually appropriate human rights due diligence system. The ultimate aim of this provision of assistance is to meet the apex objective of expectation—to "ensure that business enterprises operating in these contexts are not involved with" gross human rights abuses (UNGP Principle 7.

Notable in UNGP Principle 7(b), if only because it does not appear in Principle 7(a), (c), or (d), is the "special attention" drawn to "both gender-based and sexual violence. That it is not mentioned in the other

provisions of Principle 7 does not mean that they need not be applied. However, it is in the provision of assistance with respect to critical elements of business enterprise human rights due diligence actions that gender-based and sexual violence is given additional emphasis. One notes in this respect that the UN Human Rights Council mandates had foregrounded this issue almost from the start of the work of the SRSG.[33]

10.3.3 The "Denying" Clause.

UNGP Principle 7(c) describes another means of helping ensure that business enterprises operating in conflict affected areas are not involves in gross human rights abuses by underscoring the expectation that States are expected to enhance their assistance with punitive measures given the context and the risk of heightened gross human rights abuse. Principle 7(c) underscores the expectation that States can deny access "to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation." It is worth understanding the limitations or rather the narrowness of the expectation, at least as an operational baseline.

First, the denial expectation focuses on "public support and services." These may be tied to the support and services described in UNGP 4.[34] The text, though, does not create a strong presumption of the alignment between the support and services identified in UNGP Principle 4 and those intended to be covered n UNG Principle 7(c). There is likely flexibility on that point, in part, necessitated by the overarching objective of Principle 7 to ensure that business enterprises are not involved in or contribute to the heightened risks of gross human rights abuse. That, in turn, may require a broader scope in the definition of "public support and services" to include everything from recourse to the remedial mechanisms of the State, to the provision of consular and other services.

Second, the denial exception applies at a minimum only to enterprises that are (1) "involved with gross human rights abuses" and (2) "refuse to cooperate in addressing the situation." The limitation appears to imply some sort of assessment on the part of the State with respect to a specific enterprise before denial sanctions may be invoked. The issue of who bears the burden of that assessment and the development of burden shifting measures remains unclear. For example, a State could meet the intent of the denial limitation by shifting the burden of showing non-involvement and cooperation to the enterprise. That effectively would be based on a presumption that all enterprises are involved and uncooperative absent proof to the contrary, States might also use their own sources for making that determination. The vectors of presumption, of course, could be reversed—imposing a presumption of cooperation and on-involvement absent some sort of proof proffered by the State before denial action may be undertaken.

Hovering over the procedures for assessing and applying denial is the human rights system itself. Severity in a conflict-affected area would not ordinarily excuse State non-compliance with or waive the obligation to comply with core human rights principles on procedural rights. More directly, it may be possible to read into the denial process the principles for fairness elaborated in UNGP Principle 31. Though not directly applicable (though on might consider whether business enterprises ought to be afforded some sort of grievance type mechanism where the State invokes UNGP Principle 7(c)), it might be odd to read those principles out of any form of State determination with negative effect, especially one that must be grounded in some sort of fact based determination.

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[33] Discussed Chapters 2.2 and 3.3.
[34] Discussed Chapter 9.2.

10.3.4. The "Ensuring" Clause.

UNGP Principle 7(d) describes the final means of helping ensure that business enterprises operating in conflict affected areas are not involves in gross human rights abuses by reminding States of the need to undertake their own regulatory human rights due diligence, with special application to the risk of business involvement in gross human rights abuses. The obligation is to *ensure*—an obligation equal in intensity to the overarching Principle 7 obligation to ensure against business enterprise involvement in gross human rights abuses in conflict affected areas.

The focus of the expectation is on "current policies, legislation, regulations and enforcement measures." The scope of these is likely aligned with that of UNGP Principle 3.[35] One is examining here the full range of regulatory options available to States in meeting their mandatory obligations (UNGP Principle 1), as well as the foundational expectation with respect to business enterprises (UNGP Principle 2). It bears emphasizing that in at least one instance the scope of the measures that are the object of UNGP Principle 7(d) may be broader than those in UNGP Principle 3—where the State is in an ownership-control-facilitation-insurer relationship with a specific enterprise under UNGP Principle 4. In those cases one would expect that all "additional steps" expected to be undertaken would also fall within the ambit of the "ensure" standard of UNGP Principle 7(d).

The objective of the expectation is to ensure effectiveness of the State's "current policies, legislation, regulations and enforcement measures." Effectiveness is measured against "the risk of business involvement in gross human rights abuses." UNGP Principle 7(d), then, elaborates the expectation that, to fulfill the objective of ensuring that business enterprises are not involved in gross human rights abuses in conflict affected areas, that States ought to *also ensure* that—to that primary purpose—its application of public power are effective.

10.4 UNGP Principle 7: Official Commentary

The Commentary to UNGP Principle 7 starts with an emphasis on the concept of absence—the absence of the State—and its consequences. However, the focus on absence is quite narrowly described. "Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself – where the human rights regime cannot be expected to function as intended." This ought to be an important consideration about both the construction and interpretation of UNGP Principle 7. It is, as drafted, quite narrow in its conception of conflict. Nonetheless, the UNGP serve as a baseline and a set of minima. And that, perhaps, is the most useful way of interpreting both the black letter of UNGP Principle 7 and its Commentary. However, baselines and minima are important, both for establishing the framework of expectation and for understanding the way those functionally constrained expectations then shape the breadth of the specific provisions in the Principle.

What appears to be at the center of the Commentary's focus is the elaboration of the argument that business enterprises seek guidance from a State—some appropriate State—when they find themselves embroiled in commercial transactions in conflict affected areas. That idea—the business enterprises appear to relish guidance from the State—especially a "home" State in difficult circumstances, forms the core premise of the Principle. The Commentary explains: "Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts." UNGP Principle 7, then, is developed to meet a

[35] Discussed Chapter 8.2-8.3.

"market" need, the need for guidance, from States. The question, then, is what sort of guidance ought the UNGP provide the States with respect to the guidance they are expected to provide business enterprises ("their" business enterprises) in conflict-affected areas. And the answer: "Innovative and practical approaches are needed. In particular, it is important to pay attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict."

The Commentary makes clear that the guidance source ought to be the home State, and that this guidance expectation arises with respect to a conflict related "absence" of a home State in its own territory/jurisdiction.

> In conflict-affected areas, the "host" State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their "home" States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse. (Commentary UNGP Principle 7).

The Commentary, however, makes it clear that guidance need not be limited to "home" States ("neighboring States can provide important additional support"). All guidance, however—especially where States project their own authority in the space absented by the host State, would be guided by the expectations elaborated in Principle 7. Coordination, where multiple States seek at assert guidance is not specified either in the blackletter of the Principle of in its Commentary. It is likely, however that the principles of UNGP Principle 10. In any case, these are minimal expectations and the core framework. States, to the extent of their international legal obligations, and the tolerance of the politics of the time, place, and space, can do as they like or as they can, with the consequential repercussions of decision making in the political sphere. All, of course, subject to the general State duty to protect human rights.

The Commentary also aligns UNGP Principle 8 policy coherence principles with the guidance expectations built into Principle 7. The Commentary speaks to achieving "greater policy coherence and assist business enterprises adequately in such situations" in a number of concrete ways. This includes fostering closer cooperation among relevant ministries and theory administrative apparatus, coordinating ministerial policy in the hone State with the activities and guidance from embassies in the host State in which conflict affected areas exist. Guiding States are also to coordinate with whatever remains of the government of the host State or at least "host Government actor." The Commentary also underscored the need to include sanctions provisions in the guidance, to " attach appropriate consequences to any failure by enterprises to cooperate in these contexts." The Commentary adds detail to the "deny access" guidance of UNGP Principle 7(c). The Commentary notes, specifically, that where denying current benefits is not practicable, the State should consider "denying their future provision." Indeed, the Commentary appears particularly focused on the disciplinary elements of the expectation that they "ensure" that business enterprises are not involved in gross human rights abuses in conflicts-affected areas. The Commentary emphasizes "exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses.

Not noted in the Commentary, nor certainly in the blackletter, is the problem of coordination between home, and "neighboring" States each offering guidance respecting conflicts affected areas over which elements of those portions of the host State that has not been displaced or absent may also be seeking to assert authority. Coordination is essential here. Part of that coordination may be based on the underlying unity of the international human rights norms (UNGP Principle 12) around which the responsibility to respect human rights is based. But there is little in the UNGP that speaks to the resolution of conflicts when either interpretation of those baselines differ or where the guidance includes national aspirations, priorities, or interpretations. The problem is exacerbated where some of the States involved act in accordance with national law that may be subject to blocking

measures by other States. Part of the answer may lie in UNGP Pronciple10, which may be reflected in the Commentary's suggestion that "States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives." Beyond that, the UNGP provide little guidance; though its framework suggests both a stricter adherence to the contours of the corporate responsibility in this context and within the conflict affected area, and the expectation that all States will affirmatively engage in coordination as an aspect of fulfilling their mandatory duty to protect human rights.

The Commentary does not suggest that such interventions, at least respecting State duty under the UNGP, would be effected other than indirectly—through the business enterprises on the ground. It underscores the expectation that the State (principally the "home" State, but also "neighboring" States providing "important additional support" (noting the issue of the coordination challenge mentioned above) "should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas." Lastly, the Commentary notes the limitations of its scope: "All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law. It is important to note that no mention is made of what is meant by 'neighbouring.' The concept can be quite broad. At its most conventional and traditional sense it might mean those States adjacent physically to the conflict affected area. That idea can be broadened in physical space to any State on which the conflict-affected area may produce effects. And, indeed, the notion of an "effects test" is no stranger to issues of extraterritorial application of domestic law in areas such as competition law.[36] At its broadest, then, any State can be a neighboring State, without regard to physical proximity.

10.5 UNGP Principle 7: Other Authoritative Interpretation/Commentary

10.5.1 The 2010 Draft

What became UNGP Principle 7 in its final form was circulated in the Draft UNGP as its Principle 10.[37] 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 text of the Chapeau to UNGP Principle 7 is unchanged between the 2010 Draft and the final version except in one respect. In the 2010 draft, the text provided that "States should help ensure that business enterprises operating in those contexts *do not commit or contribute to such abuses*, including by"; that was changed in the final version to read "States should help ensure that business enterprises operating in those contexts *are not involved with such abuses*, including by." The question then, is what effect the change in the text

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[36] Katharine Kemp, *Misuse of Market Power Rationale and Reform* (CUP, 2018) (. 'A Comparative Analysis of Effects-Based Tests for Unilateral Anticompetitive Conduct,' pp. 154 – 200).

[37] 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.

from "do not commit or contribute" to "are not involved with." The most straightforward consequence of this change is to broaden the scope of the State expectation in UNGP Principle 7. It is possible to be *involved* in acts of gross abuse, even when one does not commit or contribute to them. The object, it seems, was to ensure that the principle of corporate responsibility to respect human rights extended beyond mere legal compliance and the avoidance of complicity. That, in itself, was consonant with the UNGP General Principles that described the business enterprise as BOTH required to comply with law AND respect human rights.[38]

The final version also added the specific focus on issues of gender based and sexual violence to the text of UNGP Principle 7(b). The language of UNGP Principle 7(c) was made more emphatic. As originally drafted it provided that "As appropriate, reducing or withdrawing access to public support and services." It included both an "as appropriate" standard" and a limitation on the form of discipline to "reducing or withdrawing" services and support. The final version eliminated booth, providing much more generally that access to services and support could be denied. That provides States with a potentially greater scope of action and more flexibility to respond in context. Lastly UNGP Principe 7(d) was broadened from the 2010 draft version by adding "legislation" to the regulatory measures subject to its "ensuring effectiveness" standard. More importantly, the final version eliminated the proviso that effectiveness in addressing risk was limited to those "which could amount to the commission of international crimes." The intent was clear—to substantially broaden the ambit of State guidance where a home State is displaced within a conflict-affected area.

10.5.2 The Travaux Préparatoires and the Pre-Mandate Text

At the time of the presentation of the UNGP in final form to the UN Human Rights Council, the SRSG also presented a report on business and human rights in conflict-affected areas. That was undertaken in fulfillment of his mandate, but included in more elaborate form, significant portions of the core premises and sights that produced UNGP Principle 7 in its final form.[39] Perhaps it may be worth emphasizing that the SRSG did not define the term conflict-affected area" except as a function of heightened risk of gross human rights abuse. Conversely, the implication is that a heightened risk of gross human rights abuse is defined by reference to conflict-affected areas. "Human rights abuses frequently spark or heighten conflict, and conflict in turn often leads to further human rights abuses."[40]

Yet the self-referencing definition is grounded in and derives from the application of a fundamental set of premises on which the entire architecture of the UNGP are built: the fundamental premise that States are fully present. Where States are not present, where they may be wholly or partially absent, the system collapses, unless another State can be substituted, that is unless another Sate to States may fill the gaps. That gap filling may be permanent or until the absent State returns. For purposes of UNGP Principle7 one such manifestation of absence is the subject of State expectations—where the absence is manifested as a conflict-affected area. "In conflict-affected areas, the "host" State may be unable to protect human rights adequately owing to a lack of effective

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[38] Discussed Chapter 6.3.
[39] Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Business and human rights in conflict-affected regions: challenges and options towards State responses A/HRC/17/32 (27 May 2011); available [https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other]; last accessed 25 February 2025 (2011 SRSG Report 17/32 Conflict Regions). Discussed Chapter 2.3.3.
[40] Ibid., ¶ 5.

control." For other forms and manifestations of conflict that results in State absence from a regulatory territory, the SRSG notes there are other systems of regulatory norms available at the international level.[41]

The open question, then, is how to rationalize a process for determining which State is to lend its presence in a conflict-affected area when the host State disappears. The answer that the SRSG suggested was based on trajectories of control built into UNGP Principle 2. Every business enterprise is domiciled somewhere and operates principally in a territory somewhere. The State in whose territory an enterprise is domiciled already is already understood to be obliged to set out respect expectations for its domiciled enterprises "throughout their operations." (UNGP Principle 2). It might then follow that this Home State is in the best position to fill the gap in conflict affected areas where the host State is absent. The gap is filled, and the enterprise remains subject to an oversight it already enjoys. "Where transnational corporations are involved, their "home" States therefore have a role to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighbouring States can provide important additional support."[42] The implication is that the home State has primacy of guidance for their own enterprises operating in conflict-affected areas. The assumption appears to be that all "home" States will produce roughly similar guidance; no provision is made where that is not the case. The only possibility lies in the application of UNGP Principle 10 and the development of some sort of multilateral approach. But States are not obligated to do so. That was the suggestion of the SRSG: "States are more inclined to adopt policies that set standards that do not put their own businesses at an unfair disadvantage, indicating that multilateral standard-setting on this issue may be a necessary part of ensuring that States move forward in the fulfilment of the State duty to protect human rights."[43]

10.5.3 Other Glosses

Olga Martin-Ortega and Fatimazahra Dehbi have produced a quite useful gloss on UNGP Principle 7.[44] The quite usefully reframe the analysis away from the State to the enterprise perspective. They note in that connection that UNGP Principle 7 might be understood as a means of preventing, mitigating, and remedying gross human rights abuses where, in conflict-affected areas, enterprises might positively or negatively contribute to "the economic dimension of armed conflict."[45] The underlying premise is grounded , in turn, in application of the prevent-mitigate-remedy principle in a context in which the vey operation of business enterprises may heighten the risk of gross human rights abuse—catalyzing conflict spirals.[46]

Martin-Ortega and Dehbi argue for a broad reading of the term "conflict-affected area" because the SRSG did not use the more traditional term "armed conflict." The consequence, they suggest, is to pull the term out of international humanitarian law and its focus on armed conflict.[47] That is a strong argument, though one that does not appear in the UNGP Principle 7 Commentary. On the other hand, avoidance of traditional terms of art with

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[41] Ibid., ¶ 7.
[42] Ibid., ¶ 6.
[43] Ibid., ¶ 21.
[44] Olga Martin-Ortega and Fatimazahra Dehbi, Guiding Principle 7: Supporting Business Respect for Human Rights in Conflict Affected Areas, in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 56-62.
[45] Ibid., p. 57.
[46] Ibid., p. 58, and citing Andreas Graf and Andrea Iff, 'Respecting Human Rights in Conflict Regions: How to Avoid the "Conflict Spiral",' (2017) 2(1) Business and Human Rights Journal 109. 113-114.
[47] Olga Martin-Ortega and Fatimazahra Dehbi, Guiding Principle 7, , p. 58.

definition limiting effect would invite a broader reading of the term. It also detaches the term from the legal construction, approaches, and perspectives of the regulatory systems from which the term would have otherwise emerged. "Conflict-affected area" is indeed different form "armed conflict" and that reinforces the more fundamental principle that the UNGP are not extensions of International Humanitarian Law. They provide quite useful examples of those situations in which the expectations of UNGP Principle 7 may be triggered.[48]

However, the broadening of the definition or scope of the term may not extent very far. As suggested above,[49] the focus remains centered on conflict, rather than on the absence of the State. The reasons are unstated but may well rest on the assumption that while it might be useful to broaden the scope of UNGP Principle 7 from IHL, it might not be useful to broaden it enough to raise issues of limitation on home State projection into "conflicts" in home States based on principles of State absence. Thus, for example, at its broadest, a definition of ·conflict-affected area" that is based on State absence and measured against the heightened risk of gross human rights abuses could bring within its ambit a number of what, from the perspective of the State system, might be problematic, at least politically. Some examples give a sense of the problem: (1) extending the definition of conflict affected areas to those territories where, for example, narco-trafficking cartels effectively control territory and thus in which the host State may not be able to fully assert its authority;[50] (2) virtually all of the territory of a State where the host State lacks capacity to undertake its State duty (at least to a level satisfactory to home States);[51] and (3) host States in which the home State judicial apparatus determines that local law is either sufficiently developed or not capable of effective local adjudication because of local conditions on "substantial justice" grounds, for example.[52] It is likely that a strong embrace of a definition of conflict affected area that is rounded in a heightened risk based on effective State absence standard would require coordination with notions of extraterritoriality embedded in UNGP Principle 2,[53] or a stronger coordination with the principle of multilateralism in UNGP Principle 10.[54]

Martin-Ortega and Dehbi also provide some guidance in interpreting the hierarchies of intervention among States in conflict-affected areas. These area arranged in an ordered hierarchy starting with the host State, then the home State, and lastly 'neighboring' States. They pick up the point implied in the Official Commentary to UNGP Principle 7 that at its broadest virtually any State may be a neighboring or home State under contextually relevant situations—for example the outsourcing of security functions by a host State to a business enterprise domiciled elsewhere which then materially intervenes in ways that heighten the risk of gross human rights abuses by other business enterprises.[55] It is for good reason, then, that UNGP Principle 7 is triggered by a risk analysis—

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[48] Ibid., pp. 58-59.
[49] Discussed Chapter 10.2
[50] Cf., Michael Farbiarz, Extraterritorial Criminal Jurisdiction,' (216) 114 Michigan Law Review 507-557; David Hughes, Differentiating the Corporation: Accountability and International Humanitarian Law, (2020) 42 Michigan Journal of International Law 47-104 (2020).
[51] Described in Larry Catá Backer, 'Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse.' (2016) 1(1) UC Irvine Journal of International, Transnational & Comparative Law 11-65, 52-53.
[52] Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents), [2019] UKSC 20 ¶¶88 -102.
[53] Discussed Chapter 7.2.
[54] Discussed Chapter 11. See discussion Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas,' A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights (June 2010) Working Paper No. 59.
[55] Martin-Ortega and Dehbi, pp. 59-60.

the heightened risk of gross human rights abuses within whatever may be understood as a conflict affected area. In that sense, certainly, UNGP Principle 7 may not stray too far from IHL.

Lasty, Martin-Ortega and Dehbi suggest the range of undertakings built into the expectations of States in UNGO Principle 7(a)-(d). [56] Especially useful is the discussion of the consequences for failure to provide guidance and impose sanctions by home and neighboring States where a host State disappears in a conflicts affected area. The fundamental difficulty, left uncommented, though, is that, at its core, the expectations under UNGP Principle 7, however thoughtfully elaborated, provide a set of expectations which are discretionary rather than mandatory. At a minimum, States are bound only by their internal legal obligations—these may include IHL, for example. If that is the case, then, at least as a set of mandatory measures UNGP Principle 7 merged into IHL regimes. Oo the other hand, the SRSG was clear that though the UNGP started with the baseline—the minimums, the hope was that the community of nations would use those baselines as a foundation for building stronger and more effective structures of conduct that might—either through legal or markets regimes, assume a more mandatory character. It bears mentioning as well, that much of what is possible under UNGP Principle 7 may also be a function of capacity. Certainly the most developed States when considering the undertaking of the expectations in that Principle may be capable of the broadest application; but other States, especially less developed States may not. That is especially the case for States which may border conflict-affected areas. The worst possible scenario, however, is where one of more neighboring States actually and intentionally are complicit in or seek to enhance the instability in a conflict affected area. In the later context, and especially for home States, the consequences present complex interwoven issues of gross human rights risks in which business enterprises may be involved but also a duty to protect human rights as a against the actions of other States and the instrumentalities under their control. In that context, the principles and insights of UNGP Principles 10, and 20-24 may also have a role to play.

Rachel Davis also offered a useful perspective on UNGP Principle 7.[57] Drawing on the last paragraph of the Official Commentary to UNGP Principle 7, Davis emphasized that, like the "additional steps" standard of UNGP Principle 4 where the State inserts itself into markets as an owner/controller or facilitator of business enterprises, where State may exercise regulatory authority over an enterprise (within the ambit of UNGP Principle 2), UNGP Principle 7 creates an expectation that the State will take measures "in addition to" its legal obligations under international law. Thus the expectations in the context of conflict affected areas are also "in addition" to those ordinarily expected of a State under the State duty to protect human rights.[58]

Davis noted the way in which what became UNGP Principle 7 was an expression or product of the SRSG's principled pragmatism, in this case produced form out of the workshops undertaken to learn more about the then contemporary state of expectation and practice and reported out at the time of the presentation of the final form of the UNGP to the UN Human Rights Council in 2011.[59] Davis explained: "The workshops confirmed the importance of all states – home, host and neighboring – seeking to address issues early before conditions on the ground deteriorate."[60] There was emphasis, as well, drawn from these consultations, about the then current taste for "*proactive engagement by states* with business."[61] Most usefully drawn from the SRSG consultations, and the

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[56] Ibid., pp. 60-62.
[57] Rachel Davis, 'The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and Business responsibilities,' (2012) 94 International Review of the Red Cross 961-979.
[58] Ibid., p. 965.
[59] Ibid., pp. 965-966, citing 2011 SRSG Report 17/32 Conflict Regions). Discussed Chapter 2.3.3.
[60] Davis, 'The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and Business responsibilities,' p. 966.
[61] Ibid.

resulting framework that found its way into UNGP Principle 7 was the fundamental importance, for the SRSG, of distinguishing the palette of measures to be made available to help cooperating business enterprises form those disciplinary measures to be imposed on uncooperative enterprises.[62] These well summarize the insights in the SRSG's 2011 Report.[63]

10.6 Conclusion

The UNGP are founded on the core premises of a smoothly operating set of institutions in the public and the private spheres. In the public sphere order is manifested by the thick institutionalization of the State (as concept, norm and action). These are tasked with the duty of maintaining order within normative guardrails within their territories and jurisdictions, and to arrange their affairs with other like constituted States for the efficient functioning of all States. For every territory there is a State, and every State sis expected to operate in broadly similar ways—at least with respect to the good order of the spaces over which they are entitled to exercise authority. In the private sector, business enterprises are meant to operate along similar lines. Each is expected to maintain the good order of their internal operations consistent with the normative rules under which they are expected to ac They comply with law, of course, but also develop thick systems of expectations that order their operations and relations with other stakeholders (labor, consumer, and the like) in ways that make it possible to retain the good order of constant iterations of single transactions that in the aggregate constitute markets and that rationalize the development and deployment of a State's productive forces (however that is understood).

Within these premises it is possible to develop the UNGP. The core expectation around which they are built—and which is built into the UNGP General Principles—is that Sates will undertake certain duties and business certain responsibilities. Together, duty and responsibility of appropriately functioning States and enterprises will flesh out the entirety of the space within which it is possible to order the relationships of economic production and human rights, and divide those duties and responsibilities among States and enterprises. Where the fundamental assumption of well-functioning States is removed—where States disappear, in whole or in part—from the territories over which they exercise authority, then the UNGP system is itself threatened. The disappearance of States—their absence from the places in which they undertake a critical role, then, becomes a fundamental threat to the good order of the UNGP.

UNGP Principle 7 seeks to plug the hole in the system when the State disappears. However, it is a task only partially undertaken. The Principle does not confront the issue of the disappearance of the State except in the context of conflict affected areas—a term that is both highly ambiguous and narrow, The Principle does not consider the broad range of human rights abuse but only the heightened risk of gross huma rights abuse. The principle of severity thus brought to bear does not so much order the timing of responses as much as it creates a cut off of sorts—in conflict affected areas heightened risks of gross human rights violations trigger substantial additional expectations from States that may have some connection with conflicts affected areas or with the activities undertaken in them. For everything else—nothing additional. The Principle does not impose mandatory measures, but only expectations, irrespective of the international human rights legal obligations that may be implicated. Many of the terms and conditions, and most of the more specifically detailed expectations contain

[62] Ibid., pp. 967-968.
[63] 2011 SRSG Report 17/32 Conflict Regions, ¶¶ 12-18 (measures for cooperative enterprises ibid., 16; for uncooperative enterprises ¶¶ 17-18). Discussed Chapter 2.3.3.

substantial points of ambiguity. And the connection between positive and negative measures, in a Principle that is at best discretionary, leaves questions unanswered.

Nonetheless, as a statement of a minimum baseline set of expectations imposed on hoe and neighboring States, as well as on host States to the extent they have not entirely disappeared from conflicts affected areas, marks a substantial effort to protect the integrity of the UNGP system as a whole. And it serves as a well-constructed foundation on which States may order their own interventions in situations, in accordance with their own values and capacity, subject of course to their international legal obligations, and build on them together to develop the insights and expectations set out in the Principle. UNGP Principle 7 represents an able application of the SRSG's principled pragmatism approach,[64] and5one that was meticulously detailed in the 2011 Report on Conflict Regions that was distributed at the time of the endorsement of the UNGP.[65] UNGP Principle 7, then, reflects the underlying challenge for the self-management of the State system itself on the good operation of which the UNGP itself relies. In the absence of that there is only pragmatism in the service of principle: as the SRSG noted in that 2011 Report on Conflict Regions, "Participating States were not expected to reach a consensus or endorse any position, but to contribute to a policy discussion that the Special Representative could draw upon in making his own recommendations contained in the present report."[66]

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[64] Discussed Chapter 3.1.
[65] 2011 SRSG Report 17/32 Conflict Regions. Discussed Chapter 2.3.3.
[66] Ibid., ¶ 4.