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The Corporate Responsibility to Respect Human Rights: Operational Principles II, Human Rights Due Diligence (UNGP Principles ¶¶ 17-21)

14.1 Introduction

Although the UNGP are crafted as a tightly integrated set of principles that are structured around a set of "General Principles," which provides the overarching principles and objectives of the UNGP,[1] and the thirty one numbered substantive principles that follow, almost from the moment of its endorsement, a substantial amount of popular attention among key actors, and elites that drive opinion, has centered on the six principles that describe the structuring of "human rights due diligence" (HRDD).[2] Indeed, HRDD does serve as the operational center of the corporate responsibility to respect human rights.[3] John Ruggie, however, advanced a different, and more cautious view: "We should point out that it is not correct to say that due diligence is 'at the heart' of the Guiding Principles. The 'Protect, Respect and Remedy' framework is more complex."[4] That is the subject of this chapter.

It is tempting to read the UNGP, and its principles, through the lens of HRDD. Nonetheless, before one starts to work through the intricate details of HRDD and its structures, it is useful to always have in mind the larger context within which it is only possible to understand and apply HRDD within the range of its ends, at least as those ends are envisioned within the UNGP. It follows that States and other actors are always free to devise such regulatory or policy frameworks, in public or private law, as they please. Yet not all of them will fit nicely within the structures of the UNGP; and perhaps they are not meant to fit in rather than emerge from the UNGP.[5] One ought to be sensitive to the distinction, if only because it remains useful to preserve the integrity of the framework of the UNGP a s a source for analysis and development of business and human rights structures, even if one means to move beyond or against them.

The substantive principles are themselves divided into three co-equal categories that reflect the categorical divisions in the Protect-Respect-Remedy Framework introduced in the 2008 SRSG Report 8/5 (Protect, Respect, Remedy)[6] and the premises that they were elaborated.[7] That Three Pillar Framework, and the

[1] Discussed Chapter 6.1.
[2] See, e.g., Jonathan Bonnitcha and Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights," (2017) 28(3) *European Journal International Law* 899-919: UN-OHCHR, OHCHR Consultation on the Accountability and Remedy Project (ARP): The Relevance of Human Rights Due Diligence in Determining Corporate Liability (5-6 October 2017); available https://www.ohchr.org/sites/default/files/Documents/Issues/Business/HRDDConsultationConceptNote.pdf, last accessed 20 September 2025.
[3] Discussed in this way Chapter 13.2.2.
[4] John G. Ruggie and John F. Sherman III, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale," (2017) 28(3) *European Journal of International Law* 921-928.
[5] As the International Bar Association put it: "The UNGPs are a living document and were intended to trigger dynamic change through an iteration by States, Business and Civil Society. Their interpretation and application should reflect the evolution and articulation of international human rights standards over time." Updated IBA Guidance Note on Business and Human Rights: The role of lawyers in the changing landscape (April, 2023) ¶11, available https://www.ibanet.org/document?id=English-Updated-IBA-Guidance-Note-on-Business-and-Human-Rights-role-of-lawyers-apr-23, last accessed 10 August 2025.
[6] 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.
[7] Discussed Chapter 3.2.4.2.

SRSG's 2008 Report were the basis on which the SRSG's mandate was extended,[8] and the UNGP structure was organized. The "State Duty to Protect Human Rights" includes UNGP Principles 1-10;[9] the "Corporate Responsibility to Respect Human Rights" includes UNGP Principles 11-24;[10] and "Access to Remedy" includes UNGP Principles 25-31.[11]

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), and four sets of functionally differentiated operational principles. These include "General State Regulatory and Policy Functions," (UNGP Principle 3);[12] "The State-Business Nexus;" (UNGP Principles 4-6);[13] "Supporting Respect for Human Rights in Conflict-Affected Areas," (UNGP Principle 7);[14] and "Ensuring Policy Coherence," (UNGP Principles 8-10).[15] Its conceptual genesis was developed in two of the SRSG's 2007 Reports.[16]

The UNGP Corporate Responsibility principles (Principles 11-24) are divided into a set of "Foundational Principles (UNGP Principles 11-15) and four sets of functionally differentiated "Operational Principles" (UNGP Principles 16-24). These Operational Principles include "Policy Commitment" (UNGP Principle 16); "Human Rights Due Diligence" (UNGP Principles 17-21); "Remediation (UNGP Principle 22); and "Issues of Context" (UNGP Principles 23-24).

Lastly the 3rd Pillar, Right to Remedy, focuses on the institutional and procedural principles that are meant to serve as the minimum set of expectations (for corporate responsibility) and obligation (for States at east with respect to their legally binding obligations under international law) to match rights with remedy. Like the other Pillars it is divided into "Foundational Principles" (UNGP Principle 25), and a set of Operational Principles (UNGP Principles 26-31) that are themselves divided between the duties of States (UNGP Principles 26-27; "State Based Judicial Mechanisms" and "State-Based Non-Judicial Grievance Mechanisms"), the expectations for corporations (UNGP Principles 28-30; "Non-State Based Grievance Mechanisms"), and general effectiveness criteria for process rights (UNGP Principle 31).

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[8] 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.
[9] Discussed Chapters 7-11.
[10] Discussed Chapters 12-16.
[11] Discussed Chapters 17-21.
[12] Discussed in Chapter 8.
[13] Discussed in Chapter 9.
[14] Discussed Chapter 10.
[15] Discussed Chapter 11.
[16] 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.

HRDD system and process structuring, then, are well situated within, and shaped by, both the overarching premises on which the UNGP are grounded, as well as the effects and constraints that follow from their application to the State Duty to Protect and the corporate responsibility to respect human rights as these are also manifested through remedial mechanisms. They are meant to be understood and framed by the Foundational Principles of the Corporate responsibility to respect Human Rights[17] which develop the core objectives and approaches to be undertaken, and the principal triggering events around which, HRDD is to be developed and undertaken. HRDD is then situated within a textual and regulatory context in the enterprise—its essence arising within private law and the internal structuring of corporate governance of economic activities that cross the legal regimes that are the subject of the State Duty to Protect Human Rights.[18] That is the backdrop which necessarily shapes any approach to the more technical operational principles that are HRDD. These are elaborated first within a set of operational objectives (UNGP Principle 17) derived from and connected to the entity's policy commitment (UNGP Principle 16). The core components of HRDD are then elaborated: (1) identification and assessment of adverse human rights impacts (UNGP Principle 18); (2) integration of findings and the undertaking of appropriate action (UNGP Principle 19); (3) verification processes (UNGP Principle 20); and (4) accountability structures (UNGP Principle 21). These, in turn, are then undertaken as a function of other operational principles. The first connects the 2nd Pillar's responsibility to respect to the UNGP's Third Pillar remediation principles (UNGP Principle 22).[19] The second touches on two distinct issues of context: compliance hierarchies (UNGP Principle 23); and prioritization of addressing adverse impacts (UNGP Principle 24).[20]

One point is worth underscoring before considering the more detailed principles that together provide the UNGP's guidance on HRDD. The foundational principles of the corporate responsibility to respect make it quite clear that this responsibility to respect exists quite autonomously of States and State power. The UNGP 2nd Pillar crafts a set of expectations around the normative framework of that responsibility and respecting those processes that fulfill normative expectations in the 2nd Pillar principles (UNGP Principles 11-24). Nonetheless, the 1st Pillar State duty to protect human rights principles also provide guidance respecting State policy, guidance, and mandatory measures respecting State political choices about what form and to what extent the expectations of enterprise responsibility will be managed, guided, or controlled by the state through its political authority, however manifested (UNGP Principle 3),[21] with particular emphasis in the context of State direct or indirect economic relations with enterprises, including their ownership and control, and in the context of conflict affected areas where enterprises subject to State control may operate (UNGP Principles 4-7).[22] However, it is to be remembered that States have a significantly more limited scope of duty to protect Under UNGP Principle 1,[23] than enterprises have under UNGP Principles 11-12.[24] The State duty extends only to those "legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[25] Enterprises have a responsivity to respect all "internationally recognized human rights," even UNGP Principle 12 specifies the core internationally recognized human rights.[26] Enterprises have an obligation to conform to relevant law in the

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[17] Discussed Chapter 12.
[18] Discussed Chapter 13.
[19] Discussed Chapter 15.
[20] Discussed Chapter 16.
[21] Discussed Chapter 8.
[22] Discussed Chapters 9-10.
[23] Discussed Chapter 7.
[24] Discussed Chapter 13.
[25] UNGP General Principles, discussed Chapter 6.
[26] Discussed Chapter 12.

territories in which it operates or from which it derives its authority or powers (UNGP Principle 23).[27] Yet they also have an expectation to continue to engage in 2nd Pillar HRDD even where a State has exercised its authority to create guidance and mandatory measures that may either limit the application or scope, or choose one specific way of engaging with and manifesting HRDD, where this state guidance or requirement may conflict with the undertaking of HRDD processes fully[28].

14.2 UNGP Principle 17

14.2.1. UNGP Principle 17: Text

> In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
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> (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
> (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
> (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

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14.2.2.UNGP Principle 17: Commentary on Text

At its core, UNGP Principle 17 is meant to serve as the Chapeau for HRDD. In that regard its text gathers together the principles elements of HRDD and sets out the expectations and approaches that will guide interpretation and application of the more specific principles that follow (UNGP Principles 18-21). The principal purpose of UNGP Principle 17 can be traced back to the foundational obligation set forth in UNGP Principle 15(b)-(c) that enterprises have in place HRDD and remediation processes,[29] which are then to be expressed through an enterprise policy commitment under UNGP Principle 16.[30]

UNGP Principle 17 starts with the exposition of the purpose of HRDD and the means toward the realization of that purpose. UNGP Principle 17 identifies the purpose of HRDD: "to identify, prevent, mitigate and account for how [enterprises] address their adverse human rights impacts." The language is substantially the

[27] Discussed Chapter 16.
[28] Discussed Chapter 16 (UNGP Principle 23(b) ("Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements").
[29] Discussed Chapter 12.
[30] Discussed Chapter 13.

same as in UNGP Principle 15(b). These are the objectives to which UNGP Principles 18-21, but also the provisions of UNGP Principles 22-24, are directed. UNGP identifies the means in the form of an expectation: the expectation that "business enterprises should carry out human rights due diligence." Neither part of this initial sentence adds much to the understanding of enterprise expectations that had not already been elaborated in UNGP Principles 11-16. The references to objective and means, however, does point to the connection between the more abstract and normative provisions of those principles and the much more utilitarian task of actually realizing an HRDD structure for operation within an enterprise. What the first sentence of UNGP Principle 17 accomplishes, then, is to serve as a bridge between the conceptual framework toward which HRDD is to be directed, through its formulation as enterprise policy within the strictures of the enterprise policy commitment, and the actual mechanics of transposing these objectives and norms into operational form.

What follows is a general description of this components for this process of operationalization of the principles and objectives already identified and fleshed out. UNGP Principle 17 identifies the *structure* of HRDD as a *process*. It is a process that "should include [1] assessing actual and potential human rights impacts, [2] integrating and acting upon the findings, [3] tracking responses, and [4]communicating how impacts are addressed." Each of these four process elements is taken up seriatim in UNGP Principles 18-21.

UNGP Principle 17 then continues with a reference back to the foundational principles of the 2nd Pillar. First UNGP 17(a) references back to UNGP Principle 13: UNGP Principle 17(b) references back to UNGP Principle 14.UNGP Principle 17(a) and UNGP Principle 13 develop dual standards for addressing adverse human rights impacts—one applying to adverse impacts caused or contributed to by the enterprise, the other covering the class of adverse impacts that are directly linked to the enterprise's "operations, products or services by their business relationships."[31] UNGP Principle 17(b) and UNGP Principle 14 both speak to variation in the "means through which enterprises meet that responsibility (UNGP Principle 14), by reference to both the complexity and size of the business and the severity of the human rights impact.[32]

UNGP Principle 17(c), on the other hand, has no direct analogue in the Foundational Principles of the corporate responsibility to respect human rights. It provides that in crafting its HRDD processes, an enterprise must keep in mind that conditions and therefore obligations change. As a consequence HRDD systems must not be static; they should be "ongoing, recognizing that human rights risks may change over time" as would the nature and function of enterprise activities. The only other references to ongoing obligations to adjust compliance to changing circumstances both in terms of human rights risks and the nature of enterprise operations appeared to be directed not to enterprises but to the State. UNGP Principle 3 might be understood as treating the State's obligations to adjust its legal and policies structures with respect to their duty to protect human rights in the same or at least in a similar way to the expectation that enterprises do the same with respect to their HRDD rules, commitments and processes developed.[33] Nonetheless, the connection is tenuous at best; it merely suggests a parallelism between the State duty and the corporate responsibility with respect to the way in which both are expected to utilize their regulatory or managerial authority.

Read in its entirety, the text of UNGP Principle 17 *creates a husk*, in the ancient sense of that term denoting an outer shall protecting the core within—a housing. What it contributes both to the corporate responsibility to respect human rights and more specifically to HRDD is precisely that: the structural container within which the normative elements of the corporate responsibility can be housed, and so housed, utilized toward

[31] The identical language taken from UNGP Principles 13(a) and 17(a).
[32] Discussed Chapter 12.
[33] UNGP Principle 3(a), discussed chapter 8.

the production of a set of specified ends. The elaboration follows in the UNGP Principles that follow, utilizing the materials provided in the foundational principles as the brick and mortar that defines the characteristics of the house. Yet this house, this outer shell, can take a variety of forms and appear quite differently in different contexts. As long as the husk conforms to the values, purposes and premises from out of which it is built, then the husk conforms to the expectations at the heart of the 2nd Pillar. There is no one true way to build an HRDD system; there is no one true path for realizing something like a "perfect" structure. The very contextuality and temporality of HRDD built into the foundational Principles (UNGP Principles 13-15), and the temporality of HRDD itself, understood as constantly changing to align with the times and conditions in which it is utilized, all suggest contextually and temporally mutable systems built around and within a set of basic structures against which the appropriateness of context and application in time are judged.

UNGP Principle 17, then, specifies the materials, and material conditions, for creating the structures within which any variation in the forms of an HRDD system may be manifested. This include the purpose against which the effectiveness of any variation in HRDD systems is to be measured ("identify, prevent, mitigate and account for how they address their adverse human rights impacts"). It also includes the form that these HRDD systems must take—a process. And it also specifies the manner in which process can realize purpose: by "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."

UNGP Principle 17 then ends by specifying the limitations of variation that are either permitted or expected. The first (UNGP Principle 17(a)) touches on attribution, or in the language of the UNGP, "coverage"("abarcar" or encompass in the Spanish language version and "viser" or focus on in the French version). Coverage is relational in the sense developed in foundational UNGP Principle 13. The second (UNGP Principle 17(b) touches on context and severity as factors that determine the scope and form and function of the process that is HRDD. These are also relational but in the sense developed in UNGP Principle 14. The third introduced the principle of temporality. It elaborated an expectation grounded in the presumption that HRDD *process* could not function effectively if it were to take on the rigidity of rule based systems. Process was meant as a framework within which application would be contextual and relational, one that would be different for every enterprise and in every unit of time and place. These fundamentals of the HRDD husk was then elaborated, and in a sense, conformed, by the text of the UNGP Principle 17 Commentary.

14.2.3 UNGP Principle 11: Official Commentary

The Official Commentary adds a little bit of nuance to a reading of the text, and offers guidance about preferences for reading and applying UNGP Principle 17 within the broader context of the 2nd Pillar. Much of the Commentary restates the text of the Principle. Nonetheless, the Commentary adds some important guidance in the restating.

First UNGP Principle 17 Commentary describes the text of the Principle as "defining the parameters" of HRDD; while UNGP Principles 18-21 "elaborate its essential components."[34] The principal parameter described within UNGP Principle 17, specifically, and HRDD generally, is *risk*. Risk is the animating trigger around which HRDD structures are to be built. Risk is the ordering principle around which the concepts of prevention and mitigation are built. Risk that has been realized are beyond the scope of HRDD—they have already occurred—and

[34] UNGP Principle 17 Commentary.

as such belong to the realm of remediation.[35] This language is then repeated in the Commentary to UNGP Principle 19.[36] It is to risks that have not yet been realized—potential risk—that HRDD systems are meant to be directed. The Commentary explains: "Human rights risks are understood to be the business enterprise's potential adverse human rights impacts." It follows, according to the logic of the Commentary, that "Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders."

Second, since HRDD is primarily directed toward the prevention and mitigation of risk rather than remediation (the object of the 3rd Pillar of the UNGP), it follows that the effectiveness of HRDD systems sketched out in general form in the text of UNGP Principle 17 are a function of the timing of intervention. As the Commentary to UNGP Principle 17 explains: HRDD "should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions."

Third, if effectiveness is a function of risk prevention and mitigation, and if risk mitigation and prevention is itself a further function of the timeliness of HRDD intervention, then the Commentary suggests, HRDD systems must be constructed (drawing on UNGP Principle 17(b)) to organize timing effectiveness (prioritization) by reference to a "significance" principle.[37] And yet, prioritization is also treated in more detail in UNGP Principles 14, and 24. There the test is not of "significance, but rather in "severity."[38] It is that notion that is also carried forward to UNGP Principle 19 (Commentary).[39] It is possible to conflate the meaning of "significance" (UNGP Principle 17 Commentary) and "severity" (UNGP Principle 24 and UNGP Principle 19 Commentary). Yet that does not survive a careful parsing of the difference in meaning between significant and severity; the former suggests an object or action that is important enough to be worthy of notice or action, the later suggests intensity. The two may be related but they are not the same. Yet both are meant to apply to rules of prioritization.

One solution is simple and straightforward—the text of UNGP Principle 17(b) speaks to HRDD as a function, in part of "the risk of severe human rights impacts." It then makes sense to read the prioritization discussion in UNGP Principle 17 Commentary as speaking to severity when it uses the term significant. That is, significance acquires its value as a function of severity. Another is also simple: the text of UNGP Principle 24 takes precedence over that of the text in the Commentary of UNGP Principle 17—effectively overlaying the word "significant" in UNGP Principle 17 Commentary with the notion of intensity at the heart of the concept of "severity." That is suggested by the functional definition of severity in UNGP Principle 14.[40] Another solution may be found in comparing the way in which the Spanish and French versions of the UNGP Principle 17 Commentary text with that of the English version. In the Spanish version, the English text—" identify general areas where the risk of adverse human rights impacts is most significant"—is rendered as "identificar las áreas generales que presenten mayor riesgo de consecuencias negativas sobre los derechos humano" [identify the general areas that present the greatest risk of negative consequences on human rights]. In the French version, the

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[35] UNGP Principle 17 Commentary ("Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation (Principle 22).")
[36] Discussed Chapter 14.4.
[37] Ibid. ("business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.").
[38] Discussed Chapters 12 (UNGP Principle 14), and 16 (UNGP Principle 24).
[39] Discussed Chapter 14.4.
[40] Discussed Chapter 12 (UNGP Principle 14 Commentary "Severity of impacts will be judged by their scale, scope and irremediable character.").

text appears as "*recenser les domaines généraux où le risque d'incidences négatives sur les droits de l'homme est le plus important*" [to identify the general areas of the greatest risk of negative impacts on human rights]. In both the Spanish and French versions, the critical word (*importance* in the French version and *mayor riesgo* in the Spanish version) can be read as incorporating the concept of *severity*.

Fourth, UNGP 17 Commentary elaborates consideration of notions of complicity in the context of HRDD and the risk related assessment of potential adverse human rights impacts of economic activity. The Commentary describes complicity as arising in situations where an economic enterprise "contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties." Complicity, then, is understood as a critical element of UNGP Principle 17(a) for purposes of HRDD structures. Interesting, though, complicity is absent from the discussion of the "cause or contribute" standard set out first in its normative element in UNGP Principle 13,[41] one which cross references UNGP Principle 19 in its Commentary but not UNGP Principle 17. Complicity is described in two senses. As a non-legal concept complicity is a function of perception, "for example, they are seen to benefit from an abuse committed by that party." In its legal sense, the Commentary suggests, one might look to national legal orders for a definition grounded in criminal law, though it also draws attention to the possibility of civil liability for alleged contribution to *harm in tort* but not in human rights breaches.[42] The Commentary also suggested a connection to aiding and abetting principles in international law.[43]

Fifth, the Commentary suggests that HRDD, if properly conducted "should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse." That is a supposition that is rooted in the early empirical work of the SRSG.[44] Yet it has, in the UNGP, no force of law. And it certainly holds no promise as a waiver of liability in law or in markets, even where HRDD is vigorously pursued.[45]

14.2.4 UNGP Principle 17: Other Authoritative Interpretation/Commentary

14.2.4.1 The 2010 Draft. The draft version of UNGP Principle 17, circulated from the end of 2010 as Daft Principle 15,[46] did not diverge from the final text in important respects. Draft Principle 15 Commentary also did not diverge in substantial respect from what became the final version in UNGP Principle 17 Commentary. A few points of difference, however, merit brief comment. First, Draft Principle 15 Commentary identified individuals and communities as the focus of the objectives of HRDD. That this reference did not survive to the final version of the Commentary might suggest that that aim of human rights due diligence is to be broadly interpreted

[41] Discussed Chapter 12.
[42] UNGP Principle 17 Commentary.
[43] Ibid. ("the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime").
[44] Discussed Chapter 3.
[45] UNGP Principle 17 Commentary ("business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."). See also discussion Chapter 5.
[46] 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.

without regard to a particular object. That is, that adverse human rights impacts might arise form or be connected with actions and events that are not directed toward individuals and communities but which have an adverse impact nonetheless. That better aligns UNGP 17 as endorsed with the broad reach of UNGP 12.[47] Second, the final version, to a much greater extent than the Draft Principles emphasized the centrality of risk in the development of HRDD processes. The focus on risk prevention and mitigation, and the distinction between prevention/mitigation on the one hand, toward which HRDD was to be focused (UNGP Principle 13, 15), and remediation for risk realized in adverse impact (UNGP Principle 22), brings the final version of UNGP Principle 17's process framework in better alignment with the core characteristic of the corporate responsibility to respect human rights elaborated as UNGP Principle 11 ("Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation." UNGP Principle 11 Commentary).

14.2.4.2 The Travaux Préparatoires and Pre-Mandate Text. UNGP Principle 17 represents the articulation of the operational framework for the management of human rights in economic activity through markets and private law, written against and in the shadow of nearly a generation of efforts to manage international economic activity through legal measures targeting some form or another of economic actors.[48] To those ends it is the product of the work of the SSRG during the course of the second mandate after 2008, a key operational element of which was to distinguish the process/framework approach of the UNGP from its failed predecessor, the *Norms*.[49] But it also represented the essence of principled pragmatism at the heart of the UNGP.[50]

The Travaux Préparatoire are particularly relevant for HRDD in general and perhaps UNGP Principle 17 in particular.[51] The concept of due diligence was introduced early in the first mandate of the SSRG. It was crystalized in the discussion of the Three Pillar Framework in the SSRG's 2008 Reports. And it was the centerpiece of the operationalization reports of the SSRG in 2009 and 2010. The early reports built on principled pragmatism to suggest the state of then-current practice and its alignment with the concept of due diligence. It was only a simple conceptual step to take due diligence from its then current state and extend it into the context of human rights. The later reports then first conceptualized due diligence within a human rights framework. Once that was undertaken, the later reports then sought to develop the framework within which what would become the foundational principles of the corporate responsibility to respect human rights could be used to articulate a *process* of HRDD. That process, in turn, required not just elaboration, but alignment with the cultures and expectations of economic activity in ways that would then permit the practices to grow and change with changes in business practices and market expectations. And all of this, of course, was to be undertaken within a framework in which the State duty would also develop its own meta-frameworks for both the management of market expectation and the characteristics in law of HRDD processes.

Discussion of commentary on the UNGP HRDD principles that were prepared in consultation with the SRSG and which draw on the travaux Préparatoire follow in the next section.

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[47] Discussed Chapter 12.
[48] Chapter 4.
[49] Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) See, David Weissbrodt and Maria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' *American Journal of International Law* 97 (2003) 901-922; available <https://scholarship.law.umn.edu/faculty_articles/243> accessed 15 February 2022. Discussed Chapter 4.
[50] Discussed Chapter 3,1.
[51] Discussed Chapters 2 and 3

14.2.5 Other Glosses

In interpreting other UNGP Principles, one must 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 do 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. This is not to fault such efforts—they represent the manifestation of the sort of engagement that moves both principle and pragmatism forward, shaping the UNGP as groups engage in debates and shape their practice in desired ways that hep (re)shape the expectations at the foundation of the UNGP, especially but not entirely focused on the 2nd Pillar responsibility to respect. While that seems to be an important element in post UNGP endorsement work, these efforts are not included in this Commentary.[52] Beyond that some glosses have been produced that may prove useful for approaching the meaning of the UNGP.

The OHCHR *Interpretive Guide*[53] includes guidance on the corporate responsibility to respect human rights that adds a layer of interpretive context because it was prepared shortly after the endorsement of the UNGP and was undertaken with the involvement of SRSG Ruggie. "The Guide's content was the subject of numerous consultations during the six years of Professor Ruggie's mandate and was reflected in his many public reports and speeches, but has not previously been brought together."[54] In its preface, SRSG Ruggie explained that the Interpretive Guide was intended to provide "further explanation" of the UNGP as they relate to the corporate responsibility to respect human rights.[55] To those ends, the *Interpretive Guide* was structured in question and answer format. It was intended to complement the guidance provided in the UNGP Text and its official commentary. "The questions and answers provided here go beyond that commentary to provide additional detail and assistance in understanding the Guiding Principles. As such, they complement the commentary but do not replace or supersede it."[56] The Interpretive Guide was meant to be forward looking—to help guide decisions about the appropriate construction and application of UNGP principles as States and enterprises attempt to transpose Principles and guidance into contextually relevant and temporally dynamic processes and structures, framed within the "original meaning and intent" of the UNGP. [57]

The *Interpretive Guide*'s commentary on UNGP Principle 17[58] starts with a discussion of UNGP Principle 17 within the constellation of HRDD, and more broadly, of the corporate responsibility to respect human rights, and then at its broadest of the place of the responsibility to respect within the UNGP itself.[59] The focus is on the nature and meaning of human rights risks, which the Interpretive Guide defines as the risk of producing an adverse human rights impact. The object is to refocus the analysis from impacts on the enterprise to

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[52] Discussed Chapter 1.
[53] OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (Geneva & NY, 2012).
[54] Ibid., p. 3.
[55] John Ruggie, 'Preface to *Interpretive Guide*,' in OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, p. iv.
[56] *Interpretive Guide*, p. 4
[57] John Ruggie, 'Preface to *Interpretive Guide*,' p. iv ("As work continues to elaborate the implications of this responsibility for different sectors, issues and situations, I hope that this Guide will help ground those efforts soundly and squarely on the original meaning and intent of the Guiding Principles themselves.").
[58] *Interpretive Guide,* pp. 31-35.
[59] Ibid., pp. 31-32.

impacts caused by the enterprise's activities on its own internal stakeholders and external stakeholders.[60] The purpose is to avoid recasting HRDD as a mechanism for enhancing corporate financial performance and instead redirecting the analysis to the costs of such performance which is not necessarily accounted for in financial or other reporting mechanisms and with respect to which the scope of balancing against the benefits of adversely impacting human rights in the service of other aggregately larger "good" is rejected in favor of a human rights centered approach of identification, prevention, and mitigation, along with an expanded scope of remediation. In that respect, the Interpretive Guide explains the reason that the "knowing and showing" elements of HRDD must be ongoing (an "ongoing and iterative process").[61] It also explains the relationship between stakeholder engagement and a properly functioning HRDD system. [62] To those ends it suggests a connection between notions of human dignity and human rights—that s that HRDD is a means toward the protection of human dignity as a human right, reflecting not the text of the UNGP but its travaux Préparatoire.[63]

Additionally the *Interpretive Guide* emphasizes the contextual structuring of HRDD systems rejecting the idea that UNGP implies or mandates the construction of a system based on a "single prescriptive formula."[64] Variation is based on the now common factors of enterprise capacity or operational context and severity of impact.[65] The *Interpretive Guide*, emphasizing what is expressed conceptually in UNGP 14, is that flexibility in means (system construction and operation) does not affect the expectation of system objective s, nor a waiver of the expectation that all HRDD systems include the four core elements described in UNGP Principle 17.[66] In that respect the *Interpretive Guide* follows the text of the UNGP precisely as to issues of scope and responsibility triggers (causation, contribution, direct linkage as a result of business relations, drawing in UNGO Principle 13) and underscores that the essential element of HRDD is also its first two steps—the identification /assessment and addressing adverse impact.[67]

The concept of capacity, like that of HRDD systems itself, is not amenable to a fixed answer. However it is a function of what the Interpretive Guide distils from the UNGP—that "[r]espect for human rights relates to an enterprise's core operations."[68] That is the interpretive lens that the *Interpretive Guide* suggests as the basis for approaching issues of capacity in the context of designing and operating an HRDD system. That construction of the role of HRDD within enterprise operations is certainly a plausible one; but it might be worth mentioning that it is not the only one. And from the perspective of pragmatic principles, it may not reflect the views of State actors, some of whom might approach HRDD and human rights as an important but not decisive or paramount element in their operations. [69] The *Interpretive Guide* divides the concept of capacity into two distinct categories. The first touches on the allocation of necessary resources, appropriate to the scope and severity of the enterprise's human

[60] Ibid.
[61] Ibid., 33.
[62] Ibid. ("key to human rights due diligence is the need to understand the perspective of potentially affected individuals and group.").
[63] Ibid. This is a connection that is then picked up and explored in the *Interpretive Guide's* consideration of UNGP Principle 20.
[64] Ibid. p. 32.
[65] Ibid., pp. 32-33.
[66] Ibid.
[67] Ibid.
[68] Ibid., p. 35.
[69] See Larry Catá Backer, 'Chinese state-owned companies and investment in Latin America and Europe,' in Judith Schönsteiner and Markus Krajewski (eds) *Human Rights and Environmental Sustainability in State-Owned Enterprises* (Routledge, 2024), pp. 147-191.

rights risk profile. Failure in this respect augments the quality and scope of adverse human rights risk.[70] It is also a function of capacity, one in which the size and operations of the enterprise within its operating environment also plays a role. Both, it is suggested play a critical role in the preparation of an enterprise's initial risk profile, a necessary step in developing the enterprise's policy commitment under UNGP 16 and a predicate for framing HRDD in the enterprise within the UNGP Principle 17 structure.[71]

The *Interpretive Guide* offers guidance with respect to two other aspects of UNGP Principle 17. The first touches on the relationship between HRDD systems and remediation.[72] It describes the two processes as separate but inter-related and offers examples. These include the relationship between grievance processes designed to provide remedy and the collection of data necessary to make effective assessments of potential or ongoing adverse human rights risks. The tracking function of UNGP Principle 20 is another nexus point. The second point for which guidance is offered touches on the use of external experts in carrying out some portions of HRDD activities.[73] The Interpretive Guide does not dispute that HRDD systems might be wholly or partially outsourced. Nonetheless, it describes some cautions. First, outsourcing weakens the process of embedding human rights within the enterprise, potentially affecting the effectiveness of addressing strategies. Second, it may undermine the capacity of the enterprise to understand and there're to help build responsive, approaches to economic engagement with stakeholders otherwise adversely impacted.[74]

Robert McCorquodale and Cristina Blanco-Vizarreta provide a gloss on UNGP Principle 17[75] that suggests both the politics and the interpretive avenues from among which actors may choose strategically in molding their own optimal versions of what they understand HRDD to be. This is a commentary that suggests a best way forward, and for that reason alone is worth considering as an example of values infused strategic readings of the UNGP that are at once an important element in the naturalization of the language and principles of the UNGP as the basis for discussion of business and human rights generally, and a glimpse into the ways in which the UNGP invite actors to make strategic choices that are a part of the UNGP but that do not represent all of its possibilities. Where this is undertaken by a variety of actors adopting distinctive strategic interpretations of the possibilities built into the UNGP, one engages in the sort of conversations at the heart of the SRSG's vision for principled pragmatism.[76]

The authors start by situating HRDD within the UNGP. Their opening premise is the HRDD is a key component of the UNGP; this is underscored because the UNGP devotes five paragraphs to HRDD, and it is referenced elsewhere.[77] It is certainly true that as the authors suggest, HRDD "is a vital provision and cross cutting element" of the UNGPs.[78] From there it might follow that one could be tempted to view the entirety of the UNGP through an HRDD lens. That is fair, but hardly the only way of approaching either HRDD or the UNGPs. It is as plausible to understand as prominence of HRDD as a *consequential rather than a driving force of the UNGP*. In this sense one can also understand HRDD as vital, certainly, but vital as the operational expression, the process

[70] *Interpretive Guide*, pp. 33-34.
[71] Ibid., p. 34.
[72] Ibid.
[73] Ibid., p. 35.
[74] Ibid. (also hinders trust building).
[75] Robert McCorquodale and Cristina Blanco-Vizarreta , 'Guiding Principle 17: Human Rights Due Diligence,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 126-136.
[76] Discussed Chapter 3.1.
[77] Ibid., pp. 126-127.
[78] Ibid., p. 127.

manifestation of the normative framework built around the fundamental task of preventing and mitigating, and otherwise remedying adverse human rights impacts of economic activities. In that sense, HRDD as structured processes for the realization of foundational normative objectives process are in their variation the pragmatic manifestation of the principles that together constitute the UNGP as a while.

Taking the authors' perspective as a starting point, they first consider the terminology of HRDD.[79] The terminological use of HRDD was considered "clever" because it carried over a term familiar to the business and regulatory communities into new territory. But cleverness could not hide the problem that the term might mean different things to different people, for which earlier critical work on the UNGP was cited.[80] Arguing that the UNGP does not fully define HRDD, the authors turn to the work of the Office of the High Commissioner for Human Rights that appears to define HRDD an "an ongoing management process",[81] yet that appears to be precisely the approach of the UNGP. The author's proposed approach to a (re)definition of HRDD is said to be aligned with the SRSG's Travaux Préparatoire and what they interpret as the SRSG's approach to polycentric governance.[82]

The authors then seek to reframe the notion of adverse human rights impact on the basis of what "most writers consider."[83] They suggest that the term adverse human rights impact "is the same as a human rights violation or abuse, as under international law," but also notes other who argue for a broader interpretation.[84] That interpretation is certainly plausible but hardly exclusive or perhaps even the "best" of the various possibilities permitted under the UNGP.[85] In any case such a determination is a political/policy interpretive choice in approaching how one might best understand the UNGP as such. IN that context it might be useful to contrast the focus on "human rights abuse" in UNGP Principle 1,[86] and "adverse human rights impacts" in UNGP Principle 11.[87]

The authors consider the application of the foundational UNGP Principle 13 to HRDD.[88]They focus on the special problems of SMEs and the value of human rights impacts assessments as one manifestation of a HRDD process system.[89] With respect to severity, the authors argue that its impact ought to be measures on risks to rights holders rather than to the enterprise.[90] The UNGP define severity as a function of adverse human rights impacts (UNGP Principle 14 Commentary).[91] That, in turn, may suggest a blended approach or permit a focus on

[79] Ibid., pp. 127-128.
[80] Ibid., p. 127, n.6.
[81] UN Office of the High Commissioner for Human Rights, The Corporate Responsibility to Respect Human Rights—An Interpretive Guide (2012), UN Doc HR/PUB/12/02, § 6, cited in McCorquodale and Blanco-Vizarreta , 'Guiding Principle 17,'p. 128.
[82] Discussed Chapters 3, 5.
[83] McCorquodale and Blanco-Vizarreta , 'Guiding Principle 17,'p. 129.
[84] Ibid.
[85] See discussion of UNGP Principle 11 at Chapter 12; UNGP Principle 3 at Chapter 8.
[86] Discussed Chapter 7.
[87] Discussed Chapter 12.
[88] McCorquodale and Blanco-Vizarreta , 'Guiding Principle 17,'pp. 129-131.
[89] Nordic Trust Fund and World Bank Group, Human rights impact assessments : a review of the literature, differences with other forms of assessments and relevance for development (February 2013); Danish Institute for Human Rights, Introduction to Human Rights Impacts Assessment, available https://www.humanrights.dk/tools/human-rights-impact-assessment-guidance-toolbox/introduction-human-rights-impact-assessment, last accessed 10 August 2025.
[90] McCorquodale and Blanco-Vizarreta , 'Guiding Principle 17,'p. 131.
[91] Discussed Chapter 12.

one of the other stakeholder—as long as the ultimate focus is directed to the character, scale, scope and irremediable character of the impacts.

The authors consider the appropriate way HRDD systems ought to manifest HRDD as a function of the nature and context of their operations, as well as HRDD as an ongoing process, and its application throughout value chains.[92] With respect to the first, the authors note the need for augmented process in conflict affected areas (UNGP Principle 7).[93] With respect to the second, the authors emphasize the difference between HRDD and traditional transactionally based business due diligence. With respect to the third, the authors make a case for a very broad definition of the chain of production with respect to which an HRDD process is triggered. To that end it cites the policy work of the UN Working Group.[94]

The authors then consider complicity and legal liability—items that were referenced in the UNGP Principle 17 Commentary but not its black letter text.[95] With respect to the former, the authors emphasize the relationship between HRDD and the adverse impacts caused by or through indirect involvement. With respect to the later, the authors note that legal liability remains a creature of national legal orders.[96] Within those systems, proof of the establishment and appropriate use of HRDD processes might serve to mitigate legal liability for adverse impacts where such legal liability exists. The authors, like the SRSG, emphasized the power of reputational risk rather than the legal risk as an appropriate motivator of corporate conduct.

14.3 UNGP Principle 18

14.3.1. UNGP Principle 18: Text

> In order to gauge human rights risks, business enterprises should 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. This process should:
>
> (a) Draw on internal and/or independent external human rights expertise;
>
> (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

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14.3.2.UNGP Principle 18: Commentary on Text

At its core, UNGP Principle 17 is meant to serve as the Chapeau for HRDD. It is the husk within which the details of effective process, process that aligns with and advances the principles and aims of the foundational principles of

[92] McCorquodale and Blanco-Vizarreta , 'Guiding Principle 17,'pp. 131-132.
[93] Discussed Chapter 10.
[94] McCorquodale and Blanco-Vizarreta , 'Guiding Principle 17,'pp. 132-133.
[95] Ibid., 133-135.
[96] The authors also note the post 2011 adoption of HRDD in national and international soft and hard law systems. Ibid., p. 135.

the corporate responsibility to respect human rights may be realized. That husk of HRDD, the authority and shape of which is specified, differently for each enterprise, in the regulatory and policy framework of the enterprise's policy commitment (UNGP Principle 16),[97] "defines the parameters for human rights due diligence, while Principles 18 through 21 elaborate its essential components."[98] Those essential components are also identified in UNGP Principle 17: "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." UNGP Principle 18 elaborates the process mechanics for gauging human rights risks (in the language of UNGP Principle 17, of "assessing actual and potential human rights impacts").

UNGP Principle 18 is fairly straightforward in its essential guidance for the construction of an effective and authoritative range of approaches to gauging human rights risks within an HRDD process. It is worth underscoring and emphasizing here the curious textual leaping from UNGP Principle 17's characterization of this element of the HRDD process ("assessing. . . risk") with the characterization of the task at the textual start of UNGP Principle 18 ("gauge human rights risks"). The two are bridged by the textual explanation in the Commentary to UNGP 17 that instruct readers to understand human rights risks "to be the business enterprise's potential adverse human rights impacts." Four related points are worth further emphasis. Both were highlighted in UNGP 17 and now elaborated in UNGP Principle 18. The first is that the emphasis of HRDD processes touch on actual or potential human rights impacts. The second is that inherent in a focus on potential impact is the centrality of the notions, constructions and principles of risk. Risk becomes the mediating element between identifying risk, signifying them (in terms of risk) and then ultimately assessing their impact (severity) as a *function of risk*. The third is that risk of actual impacts are temporally constructed; that is that risk of actual adverse impacts is focused on future effects of actual impact. The fourth is that where risk is actually realized–where the impacts have occurred, one moves beyond HRDD processes to the (related) processes of remediation, to UNGP Principle 22 and the 3rd Pillar obligations of States and expectations of enterprises.[99] It is with these principles and considerations in mind that it is possible to approach an interpretation, and eventually an application, of the guidance set out in UNGP Principle 18.

The text of UNGP Principle 18 makes clear that the essence of the task of gauging human rights risks is to "identify and assess any actual or potential adverse human rights impacts with which [an enterprise] may be involved." Note that the identification and assessment tasks are different. *Identification* suggests a process of determining the significance of a thing, event or action in relation to something else–that "something else" is sometimes an abstract set of characteristics or essence that gives the object/task/event/etc. a perception of signification that invests a thing/process etc. with meaning. In this context one identifies actions, things, events, conditions etc. that may infringe on the human rights of others as that is understood in UNGP Principle 11,[100] but also as a function of the nature of the action of condition that would trigger identification as descried in UNGP Principles 13-14,[101] and then as formally described in enterprise policy and rule systems (UNGP Principles 15-16).[102]

Assessment, on the other hand, suggests a valuation of the object/event/action identified in accordance with a system of valuation that moves from signification of the thing/action etc. to value, and then from value to

[97] Discussed Chapter 13.
[98] UNGP Principle 17 Commentary.
[99] See discussion Chapter 14.2 and Chapters 15, 19-20.
[100] Discussed Chapter 12; see also discussion in Chapter 5.
[101] Ibid., Chapters 5-12.
[102] Discussed Chapters 12-13.

consequence within a broader set of values with consequences. One identifies, then, in relation to a set of common characteristics or consequences that draw attention to the thing/action identified. One assesses that thing that has been signified as relevant by reference to the values and objectives that form part of its character, effects, or condition. That is, one assesses in relation to something outside the thing/action identified. In this context one is expected to assess in relation to the values and rules identified in UNGP Principle 12.[103] Where one deals with potential and actual risk identification and assessment, then, one engages into related but quite different tasks. The first is to signify some element of the economic activity of the enterprise as actually or potentially creating a risk if adverse impact as that is understood from the UNGP's 2nd Pillar foundational principles. The second is to assess, or judge, the risk of that potential or actuality. That is all that is require dunder UNGP Principle 18—the rest—how one responds , or in the language of the UNGP, how one addresses identified and assessed risk of adverse impact, is then elaborated in UNGP Principle 19.

Note as well that the tasks of identification and assessment include *actual and potential impacts*. The differences between actual and potential impacts are also important as a function of the basic premises underlying UNGP Principle 18. First potential impacts are understood and assessed solely as a function of the foundational obligation to prevent and mitigate their *adverse* impacts. This derives from the fundamental object of the corporate responsibility to respect itself built into the black letter of UNGP Principle 11—to "avoid infringing on the human rights of others" and where that is not possible to "address adverse human rights impacts."[104] Second, actual impacts are significant for what they may reveal about potential future impact with respect to which the enterprise has a responsibility to avoid, prevent, and if either is not entirely possible, to mitigate *going forward*. Past or realized risk is to be identified, to be sure, but with respect to that the only possible means of addressing them is through the application of principles of remediation under UNGP Principle 22 and more broadly, UNGP Principles 25-31. That differentiation and the division of responsibility and response, are the essence of the separation of function built into UNGP Principle 15 (on the operationalization of context specific policies and processes) that include rules based structures, HRDD, and processes for any necessary remediation.[105]

The task of identification and assessment of actual and potential risk of adverse impact is then further constrained. UNGP Principle 18 makes clear that every enterprise is expected only to identify and assess those actual and potential risks of adverse impacts "with which they may be involved." The universe of actions/things/ processes identified, then, will vary from enterprise to enterprise and over time (UNGP Principle s 13-14, 16-17). And UNGP Principle 18 then further elaborates: enterprises are understood to be involved only "through their own activities or as a result of their business relationships." That also relates back to the foundational principles of the 2nd Pillar, and specifically to UNGP Principles 11 and 13. But it also reflects the fundamental expectation built into the State duty to protect in UNGP Principles 2 and 3 (respecting the reach of expectations to the range of an enterprise' operations),[106] as well as the economic activities of States (UNGP Principles 4 and 8-10).[107] The way these are elaborated and applied as process are affected by context and the nature of the severity of the risk identified (UNGP Principle 14), as well as by the way that each enterprise develops the specifics of their HRDD and remedial processes (UNGP Principle 15), in accordance with their own private law/policy commitments (UNGP Principle 16).

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[103] Discussed Chapter 12.
[104] Discussed Chapter 12.2.
[105] Discussed Chapter 12; realized in UNGP Principle 16, discussed Chapter 13.
[106] Discussed Chapter 7 UNGP Principle 2) and 8 (UNGP Principle 3).
[107] Discussed Chapters 9 (UNGP Principle 4), and Chapter 11 (UNGP Principles 8-10).

The result, of course, is that UNGP Principle 18 creates the fundamental expectation that the development of an HRDD process will be unique to every enterprise. There is no "one size fits all" for identification and assessment functions of HRDD. That "bespoke" quality of identification and assessment is further reinforced by the two specific items of guidance provided in UNGP Principle 18's text. The first is that the development and operation of processes and structures of identification and assessment "Draw on internal and/or independent external human rights expertise" (UNGP Principle 18(a). The second is that the development and operation also "[i]nvolve meaningful consultation with potentially affected groups and other relevant stakeholders" (UNGP Principle 18(b). While the expectation to draw on internal and independent external experts is not qualified, the obligation to engage in meaningful consultation is qualified by the contextual factors already identified in UNGP Principles 14-15.[108] Lastly, the text of UNGP Principle 18 provides hat non-expert consultation must be "meaningful." The expectation of "meaningful consultation" appears nowhere else in the UNGP. It is not clear what the amplifier "meaningful" adds to consultation. Perhaps, at a minimum, it suggests an element of good faith in the performance of consultation (that one takes the consultation and its results seriously); perhaps it also suggests that the consultation be taken seriously (something unnecessary when one is seeking out, and paying for expertise, one might suppose); and perhaps it underscores the idea that these consultations be taken to be important or at least valuable for the elaboration of effective systems. The expectation, however, does not require that the enterprise apply the results of the consultation, though it does suggest the prudence of developing explanations of the reasons why consultation inputs were not adopted, or adopted in modified form.

And thus emerges the key elements of UNGP 18's amplification of UNGP 17's identification of identification and assessment functions as the first element of the HRDD process: First the object is to gauge human rights risks as the first step toward meeting the expectation of an HRDD system to identify, prevent, mitigate and account for adverse human rights impacts. Second, the means of gauging human rights risks is to identify and assess actual and potential human rights impacts. Identification and assessment operationalizes the foundational premises of the corporate responsibility to respect human rights. Third, that identification and assessment requiring sorting, in the first instance between adverse risks already realized (which are then the subject of remediation) and potential and actual adverse impacts risks (which could be prevented or mitigated). Fourth, the identification and assessment of potential and actual risks of adverse impacts is limited to those with which an enterprise is involved because they arise or relate to their own activities or as a result of their business relationships. Each of these processes of identification and assessment is to be tailored to the context and operations of an enterprise; each therefore is expected to be in some ways unique. Fifth, in crafting its own bespoke processes for gauging human rights risks, an enterprise is expected to draw on experts, both internal experts and independent external experts. Sixth, in addition to technical expertise, an enterprise is expected to craft its operationalized processes after "meaningful consultation" with potentially affected groups and other related stakeholders, the minimum expectation of which is that these consultations be tailored, in turn, to the size, nature, context and operations of the enterprise.

14.3.3 UNGP Principle 18: Official Commentary

The Official Commentary adds a little bit of nuance, and a substantial amount of detail, to a reading of the text, and offers guidance about preferences for reading and applying UNGP Principle 18. Much of the Commentary reinforces the interpretation of text suggested in Section 14.3.2 in the following ways.

First, with respect to identification and assessment, UNGP Principle 18 Commentary reinforces not just the purposes of those actions within the overall processes of HRDD, but also the importance of context in their

[108] UNGP Principle 18(b) ("appropriate to the size of the business enterprise and the nature and context of the operation.").

development. On that point the UNGP Principle 18 Commentary is quite specific: "The purpose is to understand the specific impacts on specific people, given a specific context of operations." The Commentary then offers specifics for tailoring identification and assessment processes to the conditions within which it is meant to operate effectively:

> Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.

Note that the phrasing permits a substantial amount of variation to suit context. What is offered applies to a hypothetically typical context. But it is up to the enterprise, and also for the State under UNGP Principle 3 where the State also seeks to assert their own duty in this context through law or policy, to make that determination from time to time. The Commentary does offer one context in which the typical expectations may not apply. Enterprises are to pay "special attention to any particular human rights impacts" when those impacts are borne by individuals, or groups or populations "at heightened risk of vulnerability" with sensitivity to gender (UNGP Principle 18 Commentary), though not to trans-gender issues.

Second, the UNGP Principle 18 Commentary then ties the operational characteristics of the identification and assessment processes to other risk related identification and assessment processes of the enterprise. In this way it amplifies, or better put refines, the guidance provided in UNGP Principle 17 Commentary suggesting that HRDD processes could be "included within broader enterprise risk-management systems." More specifically UNGP Principle 18 Commentary first notes that the sort of risk management systems to which UNGP Principle 17 Commentary had in mind included environmental and social risk impacts assessments and business risk assessment processes. The Commentary, incorporating the values framework of UNGP Principle 12,[109] then explains that even so incorporated, the HRDD identification and assessment processes "should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights."

Third, with respect to the issue of time and temporal changes in the situation of the enterprise and its operations, the UNGP 18 Commentary also offered a suggested template. The Commentary offered a baseline; such assessments ought to be made at regular intervals. The Commentary then offered a number of triggering events around which temporally sensitive assessments might be organized:

> prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

Fourth, the Commentary then ends with the offering up of two additional ideas. The first touched on identification/assessment accuracy. This, the Commentary suggested, is the essential point of the consultation described in UNGP Principle 18(b). The caution is that such consultation, to be useful, ought to take place directly and in the native language of those consulted and otherwise reduces other barriers (including it would seem trust barriers) to the effectiveness of the consultation. The second was meant to serve as a reminder of sorts

[109] Discussed Chapter 12.

that UNGP Principle 18 was only an initial step in the HRDD process. More importantly in that respect, that the "assessment of human rights impacts informs subsequent steps in the human rights due diligence process."

Fifth, UNGP Principle 18 Commentary also offered an alternative to consultation where direct consultation "is not possible." That alternative would have the enterprise rely on representatives and representative organizations to speak for the people and communities that are the real objects of consultation. These include "credible, independent expert resources, including human rights defenders and others from civil society." Human rights defenders are also mentioned in the UNGP in UNGP Principle 26 Commentary where the object is to ensure that State based judicial mechanisms should ensure that the "the legitimate and peaceful activities of human rights defenders are not obstructed."[110]

Sixth, UNGP Principle 18's expectation that the identification and assessment process is informed by experts is aligned with that of UNGP Principle 16,[111] which describes that expectation that the corporate policy commitment be informed by "relevant internal and/or external expertise." There the UNGP Principle 16 Commentary notes: "The level of expertise required to ensure that the policy statement is adequately informed will vary according to the complexity of the business enterprise's operations. Expertise can be drawn from various sources, ranging from credible online or written resources to consultation with recognized experts.", with respect to the elaboration of a corporate policy commitment." UNGP Principle 18 adds the additional condition that such expertise be "independent" where the experts are external.[112] UNGP Principle 18 also speaks to "drawing on" such expertise; UNGP Principle 16 includes the more ambiguous direction to be "informed by" such expertise, which the UNGP Principle 16 Commentary then modifies by adding the expectation that the policy statement should be "adequately informed" by experts.

Seventh, it may be useful to note here that the UNGP describe indirect consultation involving civil society in only one other context. UNGP Principle 23 Commentary (issues of context in realizing the normative expectations of the UNGP in cases of regulatory conflict) also notes the importance of external consultation. In this case, however, UNGP Principle 23 Commentary speaks to consultation "with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives."[113] The difference in the suggested breadth of consultation is likely a function of the nature of the consultation. In UNGP Principle 18, that consultation touches on identification and assessments of impacts in a highly specific context. In UNGP Principle 23, the consultation focuses on a point of intersection between the State duty to protect and the corporate responsibility to respect, the mediation between which will affect all aspects of a specific HRDD process/structure. That is not to say that UNGP Principle 18 limits the range of expert consultation—instead UNGP Principle 18 may be understood as setting a minimum standard that an enterprise may expand. It also says noting that the State, in meeting its own duty to protect human rights, might under UNGP Principle 3 Commentary's development of a "smart mix of measures" guidance, also either directly provide systems of discretionary or mandatory consultation or review, or otherwise develop rules or policies, including capacity building rules and policies, that touch on the identification and assessment process.[114] As such, effective consultation of experts and stakeholders must be understood to state a minimum requirement, and ought to be

[110] Discussed
[111] Discussed Chapter 8.
[112] Discussed Chapter 14.3.2.
[113] Discussed Chapter 16.
[114] Discussed Chapter 8.

read together with State action under UNGP Principle 3 (as they seek to elaborate the expectations set out for States in UNGP Principle 2.[115]

14.3.4 UNGP Principle 18: Other Authoritative Interpretation/Commentary

14.3.4.1 The 2010 Draft. The draft version of UNGP Principle 18, circulated from the end of 2010 as Draft Principle 16,[116] diverged from the final text in important 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, Draft Principle 16 spoke to awareness of human rights risks "generated through their activities and relationships" as the operative goal of identification and assessment. The final version abandoned the concept of awareness for the more structuring language of the first clause of the final version of provision in UNGP Principle 18. In addition, the language of the Draft provision was augmented by more specific references to the factors that frame the identification and assessment process.

Second, UNGO Principles 18(a) and (b) were carried over substantially unchanged from their draft form. It is worth noting, however, that UNGP Principle 18(a) was altered by the addition of the word "independent" with reference to external experts. The idea, drawn from the travaux Préparatoire, was to emphasize that expertise should not be used as a means of corrupting the process, but that it add meaningfully to it (and thus drawing a parallel to the language of meaningful consultation in UNGP Principle 18(b)).[117] Expert autonomy, in this sense, provides the value of a gatekeeper function.[118]

Third, the Commentary to Draft Principle 16 was also carried over with no critical substantive changes into the final version of UNGP Principle 18. This Commentary underscored the role of identification and assessment as the initial step and not the end of the process of HRDD. However, it did include the context oriented language of the final version and was revised to more accurately point to the distinctions that affect the construction of the means by which a specific enterprise realizes its HRDD expectations.

1432.4.2 The Travaux Préparatoires and Pre-Mandate Text. UNGP Principles 18 were written against and in the shadow of nearly a generation of efforts to manage international economic activity,[119] but was principally directed as a key element that distinguished the approach of the UNGP from its failed predecessor, the

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115 Discussed Chapter 7.
116 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.
117 See Finnur Dellsén, 'The Epistemic Value of Expert Autonomy,' (2020) 100(2) *Philosophy and Phenomenological Research* 344-361.
118 Consider Shunsuke Matsuno, "The Gatekeeping Expert's Dilemma,' *Theoretical Economics* (4 November 2025), https://arxiv.org/pdf/2511.00031.
119 Chapter 4.

Norms.[120] The Travaux Préparatoire are relevant for better situating the identification-assessment function within HRDD processes.[121] Of particular relevance are the SRSG's 2007 Reports.[122] The General Report and the four Adde4nda considered a number of key issues around human rights impacts assessments. These provided the pragmatic baseline against which the identification and assessment criteria were eventually refined in the final version of the UNGP.

14.3.5 Other Glosses

The OHCHR *Interpretive Guide*[123] includes guidance on the corporate responsibility to respect human rights that adds a layer of interpretive context because it was prepared shortly after the endorsement of the UNGP and was undertaken with the involvement of SRSG Ruggie.[124] "The Guide's content was the subject of numerous consultations during the six years of Professor Ruggie's mandate and was reflected in his many public reports and speeches, but has not previously been brought together."[125] SRSG Ruggie expressed the wish in his Preface to the Interpretive Guide, that it "will help ground those efforts soundly and squarely on the original meaning and intent of the Guiding Principles themselves."[126] It is in that spirit that one ought to approach the Interpretive Guide with respect to the UNGPs, wherever that guidance might then lead those who seek to use it and however far it takes them from the UNGP's original meaning and intent.

The *Interpretive* Guide's commentary on UNGP Principle 18 [127] starts by underscoring the critical role of UNGP Principle 18 within any HRDD structure and process. It is both the starting point of HRDD and also the point at which all elements of HRDD are transposed from principle and concept to reality and application within changeable human rights risks contexts. It is, as the Interpretive Guide reinforces, the essential first step in the HRDD process.[128] The focus of this first step are human rights risks. Actual impact is no longer an issue of HRDD but f remediation invoking UNGP Principle 22 and the remedial 3rde Pillar. The *Interpretive Guide* distinguishes between the *risks that an enterprises operations pose to human rights* from the risks that *involvement in human rights impacts pose to the enterprise*.[129] The Interpretive Guide then offers examples of individuals and groups that may be the object of adverse impact—other than the enterprise itself. The *Interpretive Guide* suggests a very broad scope of potentially affected individuals, but does not suggest a standard or principle of causation or linkage, and its limits. Again, context may be the preferred driving force of analysis, at least for the *Interpretive Guide*.[130]

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[120] Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) See, David Weissbrodt and Maria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' *American Journal of International Law* 97 (2003) 901-922; available <https://scholarship.law.umn.edu/faculty_articles/243> accessed 15 February 2022.
[121] Discussed Chapters 2 and 3
[122] Discussed Chapter 3.
[123] OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (Geneva & NY, 2012).
[124] Further discussion of the *Interpretive Guide* at Chapter 14.2.5.
[125] Ibid., p. 3.
[126] John G. Ruggie, Preface, *Interpretative Guide*, p. iv.
[127] *Interpretive Guide*, pp. 36-45.
[128] Ibid., p. 36.
[129] Ibid., p. 37. This was an issue also taken up in the commentary of UNGP Principle 17. See *Interpretive Guide* pp. 31-36 and Chapter 14.2.5.
[130] Ibid.

The *Interpretive Guide* suggests the importance of the temporal element in human rights assessments–that is on identification and assessment functions.[131] Drawing on the text of UNGP Principle 18, the *Interpretive Guide* speaks in terms of "repeat assessments."[132] Nonetheless these repeat assessments are not necessarily routinized but triggered by events, examples of which the *Interpretive Guide* offers as guidance. For each of these, timing is critical and the *Interpretive Guide*, following UNGP Commentary, offers as guidance that impact assessment not be delayed but ought to start as early as possible in the life of the activity or relationship.[133] That may mean that the assessment start at the planning stages of an activity or relationship. The *Interpretive Guide* also notes that HRDD ought to apply in all contexts in which the enterprise engages in non-HRDD diligence–mergers and acquisitions, contract, project assessment, and the like. A special set of guidance is provided for optimally framed responsible contracts.[134]

With respect to assessment, the *Interpretive Guide* considers the relationship between the probability of adverse impact and the severity of that impact.[135] It is suggested that one does not offset the other, and severity "is paramount" in the assessment analysis.[136] The *Interpretive Guide* notes that UNGP Principle 18 self-assessments can be integrated into other assessments, for example ESG assessments, though stand-alone assessments are recommended where the activities or operating context ` se a heightened human rights risk.[137] The Interpretive Guide also notes the value of grievance mechanisms, "news or experts on particular operating contexts" and NGO campaigns might also be sources of information identifying areas of potential impact for assessment.[138] "In sum, the processes for assessing human rights impact should be systematic so that the various elements add up to a coherent overview of actual and potential human rights impact . . . and can accurately inform the subsequent steps in the due diligence process."[139]

The *Interpretive Guide* then offers guidance on assessment. Noting the categorical distinctions for assessment (causing, contributing, or direct link), it offers examples of each.[140] Particular attention is paid to examples of assessments grounded in business relationships. These include actions like the provision of security forces by a State, and tracking actions in complex value chains. In the latter context the Interpretive Guide refers back to the principle of prioritization of UNGP Principle 17 Commentary grounded in risk and severity.[141]

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[131] Ibid., pp. 37-38
[132] Ibid., p. 37.
[133] Ibid., 37-38.
[134] Ibid., p. 38-39, Box 4.
[135] Ibid., pp. 39-40.
[136] Ibid., p. 40.
[137] Ibid.
[138] Ibid.
[139] Ibid., p. 41.
[140] Ibid., pp. 41-42.
[141] Ibid., p. 41 (examples provided for guidance).

The guidance offered for UNGP Principle 18 by the Interpretive Guide ends with a consideration of expert and stakeholder consultation.[142] It suggests the need to consider consulting outside experts, even where an enterprise has internal expertise to get a more precise view of the state of the field and the practices and developing general expectations, information that internal experts may not have. That is a particularly strong suggestion where enterprises may lack capacity—especially small and medium size enterprises.[143] It is also valuable where direct consultation with relevant stakeholders is not feasible. [144] Lastly, the role of stakeholder consultation is explored. Its justification is elaborated—to identify different perspectives by stakeholder groups, or the way in which such stakeholders understand the nature and character of impacts. That may include significant information on cultural, indigenous, and other localized approaches to practices, actions, and ideas that may not otherwise be available to enterprises. Sources of consultation with stakeholders and alternatives and resources are offered .[145]

Claire Bright and Céline da Graca Pires have provided a gloss on UNGP Principle 18.[146] They start their commentary by reaffirming the role of the identification and assessment tasks of UNGP Principle 18 as both the starting point of an HRDD process and the transposition of the directives of the enterprise policy commitment (UNGP Principle 16) into an operational context.[147] They consider identification and assessment within the general context of the preparation and use of human rights impacts assessments (what they call HRIA).[148] It may bear noting that HRIAs are necessarily synonymous with the components of HRDD systems. They may represent one way of approaching the operationalization of HRDD "work product" but they do not define, to the exclusion of other means, context specific approaches to HRDD system construction and operation.

The authors then focus on the process of completing HRDD impacts assessments.[149] The authors draw on the OHCHR's Interpretive Guide and the Work of the UN Working Group for Business and Human Rights to augment the primary sources. The former appeared useful in helping understand one way of understanding the prioritization issues for complicated operations in ways that reflect the normative and operational premises of UNGP Principle 24.[150] The latter appeared relevant to issues of HRDD in conflict affected areas.[151] In all of the contexts in which identification and assessment means are utilized, HRIA appear to the authors to serve those ends well. [152]

The authors then consider application of UNGP Principle 18 in a variety of contexts. These are meant to explore the possibilities inherent in UNGP Principle 18 for the malleability of identification and assessment not just in specific context but over time as that context and human rights challenges change.[153] Similarly, the authors

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[142] Ibid., pp. 43-44.
[143] Ibid.
[144] Ibid.
[145] Ibid., pp. 44-45 and Box 5.
[146] Claire Bright and Céline da Graca Pires, 'Guiding Principle 18: Human Rights Impacts Assessments,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 136-146.
[147] Ibid, pp. 137-138.
[148] Consider Nordic Trust Fund and World Bank Group, Human rights impact assessments : a review of the literature, differences with other forms of assessments and relevance for development (February 2013) (HRIA "is an instrument for examining policies, legislation, programs and projects to identify and measure their effects on human rights." Ibid., p. v)
[149] Bright and Graca Pires, pp. 138-140.
[150] Discussed Chapter 16.
[151] Bright and Graca Pires, p. 139.
[152] Bright and Graca Pires, p. 142.
[153] Ibid., pp. 139-140.

suggest and expand on the rationale for non-expert consultation.[154] These are explored within the context of HRIA as a model for the realization of UNGP Principle 18's identification and assessment process. The authors emphasize the utility of consultation, within that lens, especially with respect to prioritization, with reference to UNGP Principle 17, though one might also consult the more specific guidance in UNGP Principle 24.[155] The value of engaging experts is also considered. Here the authors appear to transpose the broader scope of expected consultation set out in UNGP Principle 23 into UNGP Principle 18.[156] That is a fair reading of the interpretive flexibility of UNGP Principle 18 where the description appears, but it is worth recalling that UNGP Principle 18 does not require such breadth of expert consultation—only credible independent experts are required. As such it is useful to point out that UNGP Principle 18 sets out a minimum consultation requirement from which enterprises may deviate to include broader and deeper consultations with both experts and stakeholders. The authors end with a useful discussion of the transposition of UNGP Principle 18 in then recent legislative efforts.[157]

14.2 UNGP Principle 19

14.4.1. UNGP Principle 19: Text

> In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action:
> (a) Effective integration requires that:
> (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
> (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
> (b) Appropriate action will vary according to:
> (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
> (ii) The extent of its leverage in addressing the adverse impact.

[154] Ibid., pp. 140-141.
[155] Discussed Chapter
[156] Bright and Graca Pires, p. 142.
[157] Ibid., pp. 143-145. It ought to be noted that those legislative efforts have, since their enactment, been subject to substantial revision and discussion. That revision and discussion again underscore both the developing nature of HRDD systems as private and public law, but also highlight the broad range of plausible approaches to realizing HRDD systems within the umbrella of the UNGPs. While one might take this or that position on the basis of normative value choices, political or policy strategies or the like, the UNGPs do not, in themselves posit a single best approach. Indeed, given the emphasis on context in shaping HRDD systems in the UNGP, such best practices one size fits all approaches may not align with the core approach of the UNGP.

14.4.2.UNGP Principle 19: Commentary on Text

UNGP Principles 15 and 16 create the framework within which it is possible to elaborate the structures and means for creating and operating an effective HRDD system, or rather for deploying and intimately embedding in the business of enterprises, an HRDD process. UNGP Principle 15 sets out the foundational principles for transposing the values based premises of the corporate responsibility to respect human rights UNGP Principles 11-14) into a pragmatic system, one that distinguishes but aligns the means for preventing and mitigating risks of adverse impacts with the means to provide effective remedy for those adverse impacts that cannot be avoided.[158] UNGP Principle 16,[159] as the analogue to UNGP Principle 3,[160] then provides guidance for the transposition of principles and values into a private governance system within enterprises that extends to the ends of their jurisdiction—that is throughout their operations understood to be limited to its own activities and that of others directly linked to their operations.

UNGP Principles 17-24 serve as the pragmatic manifestation, the structural operationalization, of the vision of corporate responsibility to respect human rights as a normative system. At its core, UNGP Principle 17, the chapeau for HRDD, is the husk within which the details of effective process, process that aligns with and advances the principles and aims of the foundational principles of the corporate responsibility to respect human rights may be realized. That husk of HRDD, the authority and shape of which is specified, differently for each enterprise, in the regulatory and policy framework of the enterprise's policy commitment (UNGP Principle 16),[161] "defines the parameters for human rights due diligence, while Principles 18 through 21 elaborate its essential components."[162] Those essential components are also identified in UNGP Principle 17: "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." UNGP Principle 18 elaborates the process mechanics for gauging human rights risks (in the language of UNGP Principle 17, of "assessing actual and potential human rights impacts"). UNGP Principle, the subject of this Section 14.4.3, addresses the action that an enterprise is expected to take (prevention, mitigation, remediation) once it has identified and assessed the actual and potential adverse Humam rights impacts of its activities.

The focus of UNGP Principle 19 is the prevention and mitigation of adverse human rights impacts. Two things first. That focus is only possible after such adverse impacts (or their risk to be more precise) is determined by application of the identification and assessment process of UNGP Principle18. Second, following the normative categorization of UNGP Principle 15(a) and (b),[163] the focus carries forward the distinction between risks of adverse impacts that can be prevented and mitigated, on the one hand, and adverse impacts that have already occurred on the other. RDD process and structures are directed toward the former. Once an actual adverse impact is identified and assessed, then the principles around remediation, UNGP Principle 20 and the 3rd Pillar principles apply. UNGP Principle 19 undertakes this guidance for the "integration and action" component of an HRDD system by first describing the "how" of it—a pragmatic and highly contextual framework for institutional integration of identification and assessment. It then provides guidance with respect to the "action" element by creating a framework within which institutional action may be rationalized by reference to the normative criteria of

[158] Discussed Chapter 12.
[159] Discussed Chapter 13.
[160] Discussed Chapter 8.
[161] Discussed Chapter 13.
[162] UNGP Principle 17 Commentary.
[163] Discussed Chapter 12.

"causation" or "linkage" developed in UNGP Principles 13[164] and 16,[165] then incorporated into the system construction of HRDD in UNGP Principle 17,[166] and further elaborated in UNGP Principles 22 (remediation).[167]

UNGP Principle 19, then, provides that the prevention and mitigation of identified and assessed adverse human rights impacts requires two consequential actions by enterprises under their HRDD systems. The first is *integration;* "business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes." The second is *appropriate action*. Both are further elaborated in UNGP Principles 19(a) and (b).

UNGP Principle 19(a) speaks to "effective integration." One might have supposed that all expectations built into the UNGP would carry the further expectation of effectiveness. In that sense the term might appear to be redundant; but it is not. Effectiveness is a term used throughout the UNGP to dente different things.[168] In this case the object appears to be to suggest that the term that is modified (in this case "integration") is to be understood in functional terms. That is, that the expectation is to be measured not against text but against actual results, consequences or better put measurable consequences, rather than on a simpleminded application of text, irrespective of where its consequences lead.[169] Here, the UNGP Principle 19 text tells its readers, consequences matter more than text. Or more precisely text can only be understood and applied (whatever words are used to get there) as a function of its (preferred or directed) consequences, or more precisely that text must be interpreted in light of the preferred consequences and therefore preferred consequences, in effect, *is* text. Opposed to rule "effectiveness" are the several forms of formalism.[170]

UNGP Principle 19(a) describes the components of effective integration in two parts. The first, UNGP Principle 19(a)(i) speaks to appropriate assigning of institutional responsibility for addressing adverse impacts "appropriate level and function within the business enterprise." Note that this not does command or suggest what that level and function is within the institution. Again, context, capacity, location of the adverse impact and severity will all be factors in assessing effectiveness. That also means that the UNGP do not create an expectation of institutional rigidity in the assignment of responsibility, nor does the UNGP seek to impose a "one size fits all" guidance for the construction of an institutional hierarchy and order for such assignment. The only requisite is that responsibility ought to be recognized, and so recognized, assigned. That assignment falls within the meaning of UNGP Principle 19(a)(i) if it is at the appropriate level and function within the enterprise. Note as well that allocation of responsibility is a function of the relationship between the character and form of the adverse impact and the institutional department or person to whom the responsibility to address those impacts is assigned. It follows that the assignment of responsibility ought to be as fluid as the character and nature of the impact to be addressed. No doubt there is nothing in UNGP Principle 19(a)(i) that prevents the enterprise form creating a specialized department with comprehensive authority to address adverse impacts as they arise. That would require such a specialized department to be able to project authority throughout the enterprise and engage with those directly connected to the impacts and its prevention or mitigation. Nonetheless, the UNGP Principle 19(a)(i) framework does not preclude delegating responsibility on an ad hoc basis—that is responsibility would lie with the

[164] Discussed Chapter 12.
[165] Discussed Chapter 13.
[166] Discussed Chapter 14.2
[167] Discussed Chapter 15.
[168] Key terms and standards that repeat in the UNGP are described in Chapter 1.
[169] Functionalism and formalism in text is discussed Chapter 1.
[170] The concepts can be slippery in legal analysis. See, e.g., Richard H. Pildes, 'Forms of Formalism,' (1999) 66(3) *U. Chicago Law Review* 607-621.

unit best able to respond to the impact at a level and function within the enterprise. What makes any form of responsibility allocation possible is set out in UNGP Principle 19(a)(ii).

The second, UNGP Principle 19(a)(ii), focuses on the connection between allocating responsibility and supporting mechanisms that contribute to the effectiveness of integration. The guidance is built around the expectation that *effective* (consequence and objectives assessed) integration requires "[i]decision-making, budget allocations and oversight processes enable effective responses to such impacts." Again, the UNGP do not provide a one size fits all guidance on institutional measures. It suggests only the institutional elements that are critical for effective integration of a responsibility allocation based system. The particulars of any structure or institutional approach will necessarily depend on the context, the nature and capacity of the enterprise, and the character and severity of human rights risks (actual or potential).

UNGP Principle 19(b) speaks to "appropriate action." The term "appropriate action" is unique to UNGP Principle 19. It can be understood, again functionally, as the operationalization of the normative obligation to "address" adverse human rights impacts (UNGP Principles 11-15), in the way indicated for each enterprise under its policy commitment measures (UNGP Principle 16) that are part of the enterprise's HRDD processes (UNGP Principle 17) and that are more specifically "identified and assessed" under UNGP Principle 18. While the notion of "addressing" gaps in State duty and in the operation of remedial measures may be found in the UNGP, most of the focus of "addressing" emerges from the core element of the corporate responsibility to respect human rights (UNGP Principles 11, 13, 15, 17, 19-21, and 24). A key element in addressing adverse human rights impacts is to take action where adverse impacts are identified and assessed (UNGP Principle 17).[171]

One addresses these adverse impacts "appropriately." The term "appropriate" is used in a variety of context throughout the UNGP.[172] In UNGP Principle 19 it is used to evoke a sense of moral evaluation, that is of evaluation as a function of the values against which the term appropriate acquires meaning.[173] In this case the function of values against which appropriate is understood arises from the foundational principles of thew UNGP themselves. UNGP Principle 19(b) explains that "appropriate action will vary" according to two factors described in UNGP Principle 19(b)(i) and (ii). Like "effective integration" there is no one size fits all expectation , but rather the appropriateness of action will be contextual.

First, UNGP Principle 19(b)(i) explains that variation in the appropriateness of action is a function of causation., That is the nature of the expectation of addressing adverse impacts appropriately depends on whether the enterprise "causes or contributes to" or whether its connection to the adverse impact is solely a function a direct linkage to "its operations, products or services by a business relationship." That serves to transpose the fundamental distinction between the two as a normative matter developed in UNGP Principle 13 into an operational context within HRDD processes in UNGP Principle 19. Second, UNGP Principle 19(b)(ii) explains that the variation in addressing adverse impacts will be a function of the enterprise's "leverage in addressing the adverse impact." The term "leverage" appears only in UNGP Principle 19, though it was an object of substantial study by the SRSG in the travaux préparatoire.[174] Leverage, then, becomes an important element of enterprise action to fulfill its responsibility to respect human rights when, in any circumstance, the enterprise must address an actual or potential risk of adverse impact the effects of which can be prevented or mitigated. Leverage is a

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[171] Discussed Chapter 14.2.
[172] See Chapter 1 on recurring terms in text.
[173] Jacques Derrida, 'The Concept of the Appropriate,' in Nancy J. Holland (ed), The Madwoman's Reason: The Concept of the Appropriate in Ethical Thought (Pennsylvania State University Press, 1998), pp. 1-23
[174] Discussed Chapter 3.

natural consequence of putting two thing together. First that the legal constitution of business relationships constrain the power of a responsible enterprise form exercising that responsibility. And two, that such responsibility is triggered based on economic rather than legal relationships. To bridge that gap, the SRSG uses the mechanisms of leverage—that is of market and economic power in relationships. As such, leverage is quintessentially a markets reinforcing device and dependent, to some extent, on the ability of the parties both to exercise leverage and to be moved by it.

Putting it all together, UNGP Principle 19's text is both straightforward and integrated within the foundational principles of the UNGP 2nd Pillar (UNGP Principles 11-15). UNGP Principle 19 elaborates two key operational elements (1) integrating the findings from impacts assessments (UNGP Principle 18) across enterprise functions and processes, and (2) taking appropriate action to prevent and mitigate those identified human rights impacts. The remainder of UNGP Principle 19 elaborates guidance with respect to expectations of "effective integration" (UNGP Principle 19(a)) and "appropriate action" (UNGO Principle 19(b). Effective integration requires two distinctive actions, The first is the assignment of responsibility for addressing impact somewhere within the institutional structures of the enterprise. The guidance given is that this allocation of responsibility match institutional level and function to the form and character of the adverse impacts to be addressed. The second is that integration cannot be effective unless it is adequately supported. Support it is suggested, comes in the form of internal decision-making, budget allocations, and oversight processes—the bread and butter of effective intuitional operation now applied to response to adverse impacts. "Appropriate action" (UNGP Principle 19(b) also requires two distinct actions. The first focuses on the character f expected action where the enterprises causes or contributes to a negative impact or when it is involved solely because it is directly linked to the impact through its operations, products, or services through business relationships. The second considers the role of leverage in addressing adverse impact in either situation. Each of these circumstances will determine the form and application of the appropriate action to be taken to prevent or mitigate a negative impact. Where the impact has already occurred, UNGP Principle 19 serves as a sorting device—shifting the enterprise's focus from HRDD structures to those of remediation under UNGP Principle 22.

14.4.3 UNGP Principle 19: Official Commentary

The Official Commentary to UNGP Principle 19 adds detail and nuance to a reading of the text, and offers guidance about preferences for reading and applying UNGP Principle 19 in the general context of HRDD. Much of the Commentary restates the text of the Principle. Nonetheless, the Commentary adds some valuable guidance in the restating. The UNGP Principle 19 Commentary starts with a consideration of integration. The Commentary offers guidance on the effectiveness of assessing human rights impacts. The Commentary explains that horizontal integration across the enterprise of assessment specific findings is effective only when it is embedded "in all relevant business functions." What constitutes "relevance" is contextual, of course. More importantly, perhaps, the Commentary defines the objectives and characteristics of effective embedding: "to ensure that the assessment findings are properly understood, given due weight, and acted upon." Again, all of these terms are contextual and are measured against the fundamental objective to prevent, and if not prevent then mitigate, and if not mitigate, then remedy adverse human rights impacts with respect to which the enterprise's responsibility to respect attaches.

The Commentary then considers issues of assessments of impacts. Drawing in UNGP Principle 18, the Commentary to UNGO Principle 19 recalls that the enterprise assess both actual and potential adverse impacts. It also recalls that potential impacts are to be prevented or mitigated actual impacts are to be remedied. The Commentary then also recalls the varying nature of the addressing obligation of adverse impacts (UNGP Principle 13). The Commentary to UNGP Principle 19 distinguishes between (1) impacts that the enterprise causes, (2) those to which the enterprise contributes, and (3) those that arise through direct linkage. Impacts falling within the "cause" standard are to be prevented or mitigated (ceasing continuing to engage in practices through which the risk of adverse impact will be realized). Impacts falling within the "contribute or may contribute" standard create the expectation that the enterprise will act by taking "the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. The situation, according to the Commentary "is more complex" where the enterprise has neither caused nor contributed" to the adverse impact but is connected to it because the impact is directly linked to the enterprise's operations, products or services by reason of its business relationships with others. In this context the Commentary urges a multi-factor weighing and balancing analysis:

> Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences. (UNGP Principle 19 Commentary)

The Commentary suggests that at some point, where the complexity of the situation and its implications for human rights becomes significant enough, the enterprise might in those circumstances consider drawing on "independent expert advice in deciding how to respond." The advice is both curious and interesting. It is curious because the Commentary reads an expectation int the black letter of UNGP Principle 19(b) where the text is silent. It is interesting because the Commentary effectively transposes an expectation from UNGP Principle 18 (on the identification and assessment of adverse impact) into UNGP Principle 19's function of addressing those adverse impacts. Generally there is nothing in the UNGP's that forbid or limit the use by enterprises of internal or external experts. References to drawing on expert advice is set out in UNGP Principle 16,[175] UNGP Principle 18,[176] UNGP Principle 23 (legal compliance),[177] UNGP Principle 25,[178] UNGP Principle 26,[179] UNGP Principle 29,[180] and UNGP Principle 31.[181] These suggest the minimum areas and situations where there is a strong expectation of expert consultation. But that is only the baseline, not the maximum, and enterprises may be free to engage experts as they like beyond the minimum. It is worth noting that any focus in UNGP Principle 18, and the Commentaries of UNGP Principles 19 and 23 on the "independence" experts appears to go to presumptions about the value of the advice rather than the capacity to give it.

The Commentary also offers guidance on "leverage." First, as mentioned above, the UNGP Principle 19 Commentary suggests the use of leverage in a context in which the enterprise contributes or may contribute to adverse impacts. In those situations, the enterprise should "use its leverage to mitigate any remaining impact to the greatest extent possible." The reason is straightforward: in those contexts, and unlike situations where the enterprises causes negative impacts, the enterprise may not have sufficient control to directly address the impact. Second, the Commentary offers a premise regarding the circumstances in which leverage may exist: "where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm." Third, the extent of leverage is highly contextual—that is the implication certainly of the UNGP Principle 19's discussion of

[175] Discussed Chapter 13.
[176] Discussed this Chapter.
[177] Discussed Chapter 16 in the Commentary—again reflexing the same form of guidance—where things get complicated the enterprise ought to consider reaching out to experts.
[178] Discussed Chapter 17.
[179] Discussed Chapter 18.
[180] Discussed Chapter 20.
[181] Discussed Chapter 21.

the factor balancing to be undertaken by an enterprise in which negative impacts are directly linked to their operations even though the enterprise did not cause or contribute to those impacts. Fourth, if leverage exists, then the UNGP Principle 19 suggests that the expectation is that it must be "exercised." Fifth, UNGP Principle 19 Commentary also offers suggestions for increasing leverage where leverage is lacking in sufficient quantity to have effect: "Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors." Sixth, where insufficient leverage exists and cannot be increased to prevent or mitigate adverse impacts, then the expectation is that "the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so."

14.4.4 UNGP Principle 19: Other Authoritative Interpretation/Commentary

14.4.4.1 The 2010 Draft. The draft version of UNGP Principle 19, circulated from the end of 2010 as Draft Principle 17,[182] diverged from the final text in detail but not in important 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 principal difference between the draft and final versions was the introduction of the concept of leverage into the black letter of the text of the final version of UNGP Principle 19.

> Leverage is mentioned in the Draft Principle 17 only in its Commentary.
>
> Where a business enterprise identifies that it is associated with adverse human rights impact by a supplier solely because it procures the goods or services that are provided in abusive conditions, it should carefully assess what appropriate action to take going forward, based on a combination of what leverage it possesses to change the wrongful practices of the supplier, how crucial that supplier is to its business, and the implications for human rights of any course of action.[183]

This is the core concept that is then broadened significantly in the final form of UNGP Principle 19. First, the concept of leverage moves into the black letter of the principle itself. Se4cond, within the black letter leverage becomes an element of prevention and mitigation action on a par with any other forms of response irrespective of whether the enterprise caused or contributed to the adverse impact or whether it is involved solely because the adverse impact is directly linked to its operations. adverse impact.

14.4.4.2 The Travaux Préparatoires and Pre-Mandate Text. UNGP Principles 19 were written against and in the shadow of nearly a generation of efforts to manage international economic activity,[184] but was principally directed as a key element that distinguished the approach of the UNGP from its failed predecessor, the *Norms*.[185] UNGP Principle 19 embodies one important aspect of the work of the SRSG during the course of his

[182] 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.
[183] Draft UNGP Principle 17 (2010).
[184] Chapter 4.
[185] Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) See, David Weissbrodt and Maria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other

two mandates from the HRC. Almost from the beginning of his first mandate the SRSG noted the central role of leverage.[186] SRSG Ruggie noted in 2005 that "What is needed is a strategy for strengthening the corporate contribution to the protection and promotion of human rights that recognizes and leverages the dynamics at work in each of these spheres."[187] The concept of leverage was elaborated closer to its final form in the SRSG's 2008 Reports; and the SRSG's 2009 Reports transpose the normative principles developed in 2008 to an operational context.[188]

14.4.5 Other Glosses

The OHCHR *Interpretive Guide*[189] includes guidance on the corporate responsibility to respect human rights that adds a layer of interpretive context because it was prepared shortly after the endorsement of the UNGP and was undertaken with the involvement of SRSG Ruggie.[190] "The Guide's content was the subject of numerous consultations during the six years of Professor Ruggie's mandate and was reflected in his many public reports and speeches, but has not previously been brought together."[191] SRSG Ruggie expressed the wish in his Preface to the Interpretive Guide, that it "will help ground those efforts soundly and squarely on the original meaning and intent of the Guiding Principles themselves."[192] It is in that spirit that one ought to approach the Interpretive Guide with respect to the UNGPs, wherever that guidance might then lead those who seek to use it and however far it takes them from the UNGP's original meaning and intent.

The *Interpretive* Guide's commentary on UNGP Principle 19[193] starts with an explanation of the need for embedding the HRDD function through effective integration. The justification is functional and is derived from the earlier work of the SRSG.[194] It can be summarized this way: where those identifying and assessing impact (UNGP Principle 18) are not the same as those who are tasked with addressing impact, the effectiveness and speed of addressing adverse impacts may be substantially and negatively affected. "Effective integration", then, may be "decisive" for the effective response by an enterprise to its adverse impacts. That effectiveness can be achieved, and one of the objectives of UNGP Principle 19 (a) was, to promote this sort of effectiveness through "effective" integration. Effective integration, then, might be understood as most likely to succeed where the HRDD processes are "embedded." The Interpretive Guide distinguishes between "embedding"—a *macro-process* around HRDD, and "integration," a *micro-process* for specifically identifying and assigning responsibility for specific impacts. Embedding, as a macro process , is focused on ensuring that all personnel are aware of the enterprise's policy

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Business Enterprises with Regard to Human Rights' *American Journal of International Law* 97 (2003) 901-922; available <https://scholarship.law.umn.edu/faculty_articles/243> accessed 15 February 2022.

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

187 John G. Ruggie, Remark s delivered at the Business & Human Rights Seminar, Old Billingsgate, London (8 December 2005); available [https://www.business-humanrights.org/en/latest-news/doc-remarks-by-john-g-ruggie-business-human-rights-seminar-old-billingsgate-london-december-8-2005/], last accessed 29 February 2024

188 Discussed Chapter 3.

189 OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (Geneva & NY, 2012).

190 Further discussion of the *Interpretive Guide* at Chapter 14.2.5.

191 Ibid., p. 3.

192 John G. Ruggie, Preface, *Interpretative Guide*, p. iv.

193 *Interpretive Guide*, pp. 46-52.

194 Discussed Chapters 3 and 5.

commitment, understand the implications of that commitment for their own role in the enterprise, are made capable of integrating HRDD sensibilities and tasks in their own work (capacity building through training and incentives), and are acculturated to regard HRDD as a core value of the workplace. That is the essential role of UNGP Principle 16.[195] Integration, as a micro-process, is the focus of UNGP Principle 19. It is understood as an iterative process, made possible precisely because UNGP Principle 16 has embedded capacity throughout the enterprise, and that makes it possible to connect effectively the functions of identification and assessment, with that of addressing impact in specific cases.[196]

In considering the effect of context on the means of addressing adverse impact, the *Interpretive Guide* offers guidance that focuses on the size of the enterprise and the regularity or predictability of human rights issues.[197] Small enterprises, the Interpretive Guide, assumes, may more easily effectively integrate compliance respecting addressing impacts. Larger enterprises might require what the Interpretive Guide calls "a systematized approach."[198] Guidance with respect to this sort of systematization institutionally includes suggestions for structured collaborations, clarification of internal reporting requirements, well managed interactions with external experts, and efforts at collective actions with others in the economic sector or State officials.[199] The Interpretive Guide also considers approaches to effective integration along supply and production chains.[200] Here the Interpretive Guidelines suggests greater reliance on relevant provisions in formal private law arrangements, for example through contracts. These contracts can produce, the Interpretive Guide suggests, not just institutional clarity across enterprises in business relationships, but also the basis for exercising, and perhaps cultivating, leverage. To that end, effective integration might also extend to the enterprise's outside gatekeepers—lawyers, accountants, financial institutions and the like. The Interpretive Guide, however, warns against legalism—the formal preparation of documents unlikely to be met. Instead the Interpretive Guide urges an approach based on principles for responsible contracts.[201]

The Interpretive Guide then shifts attention from effective integration (UNGO Principle 19(a) to appropriate action (UNGO Principle 19(b).[202] After describing the general structures of appropriate action and its connection to UNGP Principle 22 (remedy for impacts already realized), the Interpretive Guide considers the "more complex situation" where the identified adverse impact is linked to the enterprise's operations , products or services and caused or contributed to by a party with which the enterprise has a business relationship. It is in this context that leverage becomes more central to the analysis of appropriate action and the Interpretive Guide provides a set of factors that might be used as a guideline for understanding and assessing the potency of leverage in a specific relationship.[203] It then references back to the UNGP Pr5inciple 19 Commentary for the description of the issues to be considered in responding appropriately but which then lend themselves to a leverage matrix which

[195] *Interpretive Guide*, pp. 46-47; UNGP Principle 16 is discussed Chapter 13.
[196] *Interpretive Guide*, p. 47.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Ibid., pp. 47-48.
[201] Ibid., p. 48, and Box 4 (pp. 38-40), discussed in connection with the *Interpretive Guide*'s suggestions respecting and commentary on UNGP Principle 18. See *Interpretive Guide*, pp. 36-45.
[202] Ibid., pp. 48-50.
[203] Ibid., p. 49 (Box 6).

is set out.[204] The leverage matrix guidance applies both to existing and to contemplated business relationships.[205] The *Interpretive Guide* then loops back to effective integration in the context of appropriate action "where complex challenges arise."[206]The principle is straightforward, the more challenging and important or significant the issue (including significance based on severity), the more important it is for more senior managers to become involved and the greater the value of enterprise wide and external consultation becomes. That includes stakeholder consultation, subject to the caveat that such efforts do not increase the risk of adverse impact.[207]

Björn Fasterling has provided a gloss on UNGP Principle 19[208] that is worth considering. He starts by noting the deep inter-penetration between effective integration and appropriate action.[209] Fasterling first suggests that the term integration in UNGP Principle 19 is given its general meaning in the management literature. It suggests the need to maximize effectiveness in organizations that are functionally differentiated. Reading the provision in light of UNGP Principle 16, Fasterling suggests that it ought to be adopted at an enterprise's senior strategic levels.[210] That is a plausible reading, the need for overall responsibility to be embedded within the upper reaches of a unified management. Yet the UNGP themselves emphasize context and provide a basis for developing other managerial structures to suit the characteristics of the business and its operations. Horizontally organized enterprises, and platform enterprises would likely require a different approach to the organization and deployment of responsibility to meet their own characteristics. With respect to the assignment of responsibility (UNGP Principle 19(a), Fasterling emphasizes that the process of responsibility assignment ought to focus more on the managerial rather than the legal structures of the enterprise. Functional differentiation, rather than legal categories appear to be most relevant. Context is in that respect a significant factor in decision making as is the objective—effective alignment of responsibility with capability to address adverse impact. Fasterling then considers the more effective characteristics of responsibility assignment— human rights expertise as well as substantive expertise in the area of adverse impact, for example.[211] Fasterling also considers the characteristics of networked integration , an approach noted in the UNGP Principle 19 Commentary.[212] Lastly, he considers the conditions for effectiveness specified in UNGP Principle 19(a)(ii). He notes that to make those enabling conditions effective the enterprise will require the development of corporate cultures that are supportive of human rights.[213] In that context Fasterling warns against decoupling practices that would detach HRDD processes from the business of the enterprise.[214]

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[204] Ibid., p. 50. The leverage matrix balances the importance of the business relationship (crucial versus non-crucial) against the extent of available leverage (have leverage versus lack leverage) producing a four box decision analysis that provides guidance for enterprise action on the basis of the combination of importance and leverage in a specific instance of adverse impact. Crucial relationship provide essential products or services to an enterprise, but severity also enters into the analysis. Ibid.,

[205] Ibid., p. 51.

[206] Ibid.

[207] Ibid.

[208] Björn Fasterling, 'Guiding Principle 19: Acting Upon Human Rights Impacts Assessments,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 147-156.

[209] Ibid., pp. 147-148.

[210] Ibid., p. 148 (noting judicial decisions in europe4 suggesting a broadening of traditional corporate notions of a fiduciary duty of are). ring .

[211] Ibid., p. 149.

[212] Ibid, pp. 149-150.

[213] Ibid., p. 150.

[214] Ibid.

Fasterling reads the expectations built into UNGP Principle 19(b) in conjunction with UNGP Principle 13.[215] Fasterling starts by differentiating among the categories within which appropriate action is organized—case, contribute, direct link. He notes that the UNGP do not precisely define the limits of each, noting that the SRSG resisted, after endorsement, efforts to build in definitive definitions.[216] Fasterling, instead, looks to the core purposes of the UNGP to suggest that each term ought to be as qualitative indicators describing stages of connection to adverse impact along a continuum, for which he draws for support, in part, on the work of the OHCHR, and text from John Ruggie after endorsement.[217] Fron this he concludes that the focus of contribute, cause, direct link is a function of impact rather than on relationship—that is on the economic activity rather than on the way it is organized. Following the UNGP Principle 19 Commentary, he notes the special challenges of that approach in the context of directly linked responsibility and points to the role of leverage as a factor in those cases.[218]

Fasterling then notes that appropriate action is substantially focused on either ceasing the action producing the impact or preventing the impact in a cause or contribute context, but that the scope of action for directly linked impacts will be different, foregrounding the role of leverage.[219] He notes that at the margins of ceasing or preventing are he responsibility for providing a remedy for impacts already realized, and on the other side, to deploy leverage to mitigate ongoing impact.[220] Fasterling then directly considers leverage.[221] Fasterling refers to post endorsement work of the OHCHR and especially their "Interpretive Guide", along with suggestions in other guidance documents produced by the OECD and civil society organs, for specific examples about how leverage might be used in a variety of contexts.[222] Fasterling then suggests the role of leverage in supply chains, and the role that leverage plays in financing transactions.[223] Lastly, Fasterling considers an important element of the UNGO Principle 19 Commentary—leverage where appropriate action suggests termination of a business relationship.[224] He reinforces the preference in the UNGP against "cut and run" tactics, recalling the Commentary's admonition to increase leverage rather than terminating relationships- He also notes that mitigation is an acceptable alternative to prevention which is coupled with termination.

14.5 UNGP Principle 20

14.5.1. UNGP Principle 20: Text

> In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:
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> (a) Be based on appropriate qualitative and quantitative indicators;

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[215] Ibid., pp. 151-155.
[216] Ibid., p. 151.
[217] Ibid., pp. 151-152.
[218] Ibid., pp. 152-153.
[219] Ibid., 153.
[220] Ibid. (offering suggestions on the manner in which this is to be undertaken).
[221] Ibid., pp. 153-155.
[222] Ibid., pp. 153-154, drawing on OHCHR The Corporate Responsibility to Respect Human Rights—An Interpretive Guide (2012) UN Doc HR/PUB/12/02, OECD, 'OECD Dur Diligence Guidance for Responsible Business Conduct' (2018), and Shift Project, 'Using Leverage in Business Relationships to Reduce Human Rights Risks,' (November 2013).
[223] Fasterling, pp. 154-155.
[224] Ibid., p. 155.

(b) Draw on feedback from both internal and external sources, including affected stakeholders

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14.5.2.UNGP Principle 20: Commentary on Text

UNGP Principles 20 and 21 round out the technical provisions that detail the expectations for the establishment of HRDD systems and their processes. They serve the critically important functions of assessment of action (UNGP Principle 20) and of communication of system performance, both internal and external (UNGP Principle 21). Each rounds out a system the apex predicate of which is the addressing of adverse human rights impacts by those entities with respect to which the UNGP elaborates the expectation of undertaking a responsibility to respect human rights. Neither effectiveness assessment nor communication is possible until all of the other pieces of the HRDD system-process has been established and is put into action. That is to say, that effectiveness assessment is dependent on the establishment and operation of processes of identifying and assessing actual and potential adverse human rights risks (UNGP Principle 18), of integrating and addressing identified and assessed adverse impacts that are capable of prevention or mitigation (UNGP Principle 19), or of directing remediation of adverse impacts already realized (UNGP Principle 22) by enterprises which have the responsibility to respect human rights because they caused or contributed to such adverse impacts or because the impacts are directly linked to their operations by reason of their business relationships. UNGP Principle 20 focuses on tracking the success of the process that led from identification to appropriate addressing of adverse impacts. This is the quality control aspects of the HRDD process. UNGP Principle 21 is styled accountability, and it is a means of accounting, in the sense of reporting to internal and external constituencies the results of the enterprises operations, expressed in their policy commitment (UNGP Principle 16), from which is established an enterprise's HRDD system (UNGP Principle 17) and realized through the process of identification and assessment, integration of findings and appropriate action, and effectiveness assessment (verification) of UNGP Principles 18-20).

In this context, then, UNGP Principle 20 elaborates the portion of HRDD that focuses on quality assessment. To that end, UNGP Principle 20 focuses on what it calls "tracking." Tracking is commonly defined as actions taken to "record the progress or development of something over time."[225] The Spanish language version of UNGP Principle 20 uses the term "seguimiento", which embodies both the meaning of "following" or "tracking" but also sense of "monitoring", which in English also carries the meaning of "watching or noticing particular things."[226] Monitoring suggests a watching rather than a following, though both may be intended. What appears most likely is that the term is meant to connote the action of amassing enough significant data on the HRDD process with respect to specific adverse impacts from the time they are identified and assessed, through the time that the responsible parties take appropriate action, including prevention, mitigation, or remediation, along with the methods (direct action or leverage) used. One is not merely following or looking—one is gathering and assessing, and in doing so also adjusting system performance. One gets this sense best from the French version of

[225] Cambridge Dictionary, available https://dictionary.cambridge.org/us/dictionary/english/tracking, last accessed 30 November 2025.
[226] Ibid., available https://dictionary.cambridge.org/us/dictionary/english/monitor.

UNGP Principle 20, which uses the term "contrôler" which suggests not just verification or inspection, but in finance the notion of auditing.[227]

One might suppose that a better word might have been chosen for the English version of the UNGP. Still, the choice was not thoughtless. It is possible to understand the choice as a means of foregrounding one particular aspect of the process of assessment—the primary obligation to ensure that the process from identification to appropriate auction in each specific instance conforms to both the particular HRDD process in which it is addressed as well as the overall principles and expectations of the UNGO 2nd Pillar. One is meant, here, to focus on individual strands rather than the whole, in the first instance. From these strands, then aggregated, one can then produce the general assessments and the consequential analysis of aggregate performance, that is embedded in the "tracking" function of UNGP Principle 20 and then realized through the communication expectations of UNGP Principle 21.

This approach to the meaning and application of "tracking" is consonant with the object of tracking set out in UNGP Principle 20. Enterprises are expected to "track the effectiveness of their response." To adverse human rights impacts being addressed. Effectiveness is a value measure. It is measured against the fundamental principles of the 2nd Pillar and UNGP Principe 11—to prevent or mitigate, and if neither is possible, to remedy, adverse human rights impacts with respect to which an enterprise is expected to exercise responsibility within the normative structures of UNGP Principles 11-15.[228] More specifically, the measures used to track effectiveness are expected to focus on the response of the enterprise to the identification and assessment of an adverse impact, and then to the response, in terms of the effectiveness of its integration of the adverse impacts assessments and the appropriateness of the action taken in response.

A better sense of this might be extracted by considering the more detailed elaboration of the "tracking" expectation set out in UNGP Principle 20(a) and b). Each adds a layer of meaning to the tracking function. UNGP Principle 20(a) provides that tracking is expected to be "based on appropriate qualitative and quantitative indicators." That suggests, in turn, an internal auditing mechanism in which the tracking—understood as the gathering of data which has significance for an assessment function of the arc of activity with respect to a specific adverse impact from identification through action. It also suggests that the tracking assessment ought to be broadly grounded, not just on quantitative data, the stuff of financial auditing, but qualitative measures as well. UNGP Principle 20(b) appears to flesh out this last point by providing that the tracking function ought to "draw on, feedback from internal and external sources, including stakeholders. The provision recalls the mechanics and expectations of the identification and assessment function of UNGP Principle 18 ("Draw on internal and/or independent external human rights expertise" and "Involve meaningful consultation with potentially affected groups and other relevant stakeholders"),[229] but also on the mechanics for the elaboration of the enterprise policy commitment in UNGP Principle 16 ("informed by relevant internal and/or external expertise"). This, in turn, suggests the expectation that the metrics and focus of assessment is to be developed in a way that aligns with the enterprise's rules and objectives in its policy commitment, and with the processes built into its HRDD system.[230]

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[227] Larousse Modern French-English Dictionary (NY: McGraw-Hill, 1960), p. 162.
[228] Discussed Chapter 12.
[229] Discussed Chapter 14.3.
[230] It is worth recalling here the language in UNGP Principle 16: "Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships." Discussed Chapter 13.

That alignment then reinforces the notion of policy and action coherence that is built into not just the UNGP 2nd Pillar but also in the State duty to protect provisions of UNGP Principles 8-10.[231]

14.5.3 UNGP Principle 20: Official Commentary

The Official Commentary adds a little bit of nuance to a reading of the text, and offers guidance about preferences for reading and applying UNGP Principle 20. The Commentary focuses on three aspects of UNGP 20's text: the first justifies the tracking aspect of HRDD, the second speaks to targeting tracking functions, and the third to the integration of tracking into quality control and system improvement.

First the UNGP Principle 20 Commentary justifies tracking functions within HRDD systems for three reasons, each of which helps better approach the notion of tracking in the black letter of UNGP Principle 20. "Tracking is necessary [1] in order for a business enterprise to know if its human rights policies are being implemented optimally, [2] whether it has responded effectively to the identified human rights impacts, and [3] to drive continuous improvement." The first describes a system quality control and auditing function for tracking within and of HRDD systems. System quality control measures are inherent in the formulation of HRDD systems and response parameters set out in UNGP Principles 15 and 16.[232] The second focuses on micro-effectiveness. It is, as suggested above, the foundation of tracking systems, even as auditing measures when understood against the core normative objectives of HRDD systems under UNGP Principles 11 and 15.[233] A better reading if the Commentary, in light of the normative framework fi the 2nd Pillar foundational principles might have put this second basis for tracking first. The third rationale focuses on systemic integrity and improvement. It is meant to take the assessment of the first rationale and then apply it to the improvement of the system to the ends that it better delivers on micro-effectiveness—that is to effective action addressing adverse human rights impacts on the ground and with respect to individual adversely affected rights holders to which the enterprise bears a responsibility.

It is to those ends, of course, that one understands the value and utility of qualitative and quantitative indicators in UNGP Principle 20(a). It is important to note that the UNGP do not specify a single or best approach to realizing any of these three justifications. Nor does the UNGP specify any particular or structurally mandatory means for developing and applying tracking measures, other than "verify" that human rights impacts are being effectively addressed. The word verify is used to similar effect in the English, Spanish and French versions of the UNGP. It could be understood in its most narrow and limited way—a passive checking off a compliance list that something has been done to some minimum level of competence. Yet that would not align with either the rest of the text of the UNGP Principle 20 nor its Commentary, both of which suggest a broader understanding of that term, to include investigating, examining, ascertaining, inspecting, testing and confirming. What is verified, then, are implementation, effective response, and areas for systemic or performance improvement.

Second, the UNGP Principle 20 Commentary generally underscores the prominence of the responsibility to track response effectiveness. That tracking is expected to focus on, and be measured against, individuals. The Commentary specifically noted the heightened expectation respecting "responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization." The caution aligns the focus on the tracking function of UNGP Principle 20 with several other UNGP Principles. For HRDD systems, the principle alignment for tracking would be found in UNGP Principle 18 Commentary's

[231] Discussed Chapter 11
[232] Discussed Chapters 12 and 13.
[233] Discussed Chapter 12.

caution to pay special attention in the identification and assessment process of adverse impacts for "groups and populations that may be at a heightened risk of vulnerability or marginalization." More generally this heightened attention aligns with the provision in the UNGP's General Principles that all of the UNGP principles be implemented "with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized" which also include "due regard" to risk differences on account of gender and sex.[234] UNGP Principle 20's tracking obligation would also have to take into account the heightened risk of abuse as a factor in conflict affected areas within UNGP Principle 7.[235]

Lastly, the UNGP Principle 20 Commentary suggests that the tracking function ought to be "integrated into relevant internal reporting processes." The suggestion is that tools and processes common to other reporting and monitoring processes might be extended or integrated with the HRDD tracking function. "This could include performance contracts and reviews as well as surveys and audits, using gender-disaggregated data where relevant." The UNGP Principle 20 Commentary also suggests drawing on the operational level grievance mechanisms (UNGP Principle 29) in which the enterprise participates as a source for data ("feedback" in the language of the Commentary) relevant to tracking. The interrelationship between UNGP Principle 29 and HRDD, especially UNGP Principle 18 and 20, is foregrounded in the UNGP Principle 29 Commentary.[236]

14.5.4 UNGP Principle 20: Other Authoritative Interpretation/Commentary

14.5.4.1 The 2010 Draft. The draft version of UNGP Principle 20, circulated from the end of 2010 as Draft Principle 18,[237] diverged in one material respect from the final text in important respects. The difference might be understood as a change of emphasis rather than of content.

Draft Principle 18 included three items of guidance for the tracking function. In addition to the two that became UNGO Principles 20(a) and (b), Draft Principle 18 included the guidance that tracking "inform and support continuous improvement processes." In the final version of UNGP Principle 20, that objective does not disappear but is found in the Commentary (discussed in Chapter 14.5.3). A reasonable interpretation is that what had been Draft Principle 18(c) differs in character from subsections (a) and (b) which survived into the final version of UNGP 20. Where subsections (a) and (b) focus on tracking processes and methodologies, Draft Principle 18(c) focused on objective. In the final version of UNGP Principle 20 Commentary, the objectives of tracking were set out in expanded form, including the objective that tracking be used to drive improvement of an enterprise's HRDD processes.

14.5.4.2 The Travaux Préparatoires and Pre-Mandate Text. UNGP Principles 20 were written against and in the shadow of nearly a generation of efforts to manage international economic activity,[238] but was

[234] Discussed Chapter 6.
[235] Discussed Chapter 10.
[236] Discussed Chapter 20 (these mechanisms "support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence" UNGP Principle 29 Commentary).
[237] 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.
[238] Chapter 4.

principally directed as a key element that distinguished the approach of the UNGP from its failed predecessor, the *Norms*.[239] Of particular note are the SRSG's 2011 Report 17/31 Addendum 2,[240] and the consultation Reports appended to the SRSG's 2008 Reports.[241] Also useful might be John Ruggie's recommendations to FIFA for embedding human rights across its global operations.[242] These suggest the way that principled pragmatism and the contextualism at the heart of the HRDD process are used to shape more specific application to a particular enterprise undertaking a specific set of economic activities in contextually relevant places.

14.5.5 Other Glosses

The OHCHR *Interpretive Guide*[243] includes guidance on the corporate responsibility to respect human rights that adds a layer of interpretive context because it was prepared shortly after the endorsement of the UNGP and was undertaken with the involvement of SRSG Ruggie.[244] "The Guide's content was the subject of numerous consultations during the six years of Professor Ruggie's mandate and was reflected in his many public reports and speeches, but has not previously been brought together."[245] SRSG Ruggie expressed the wish in his Preface to the Interpretive Guide, that it "will help ground those efforts soundly and squarely on the original meaning and intent of the Guiding Principles themselves."[246] It is in that spirit that one ought to approach the Interpretive Guide with respect to the UNGPs, wherever that guidance might then lead those who seek to use it and however far it takes them from the UNGP's original meaning and intent.

The *Interpretive Guide*'s commentary on UNGP Principle 20 starts with an explanation of its sense that UNGP Principle 20 was built around the "what gets measured gets managed" principle.[247] The interpretive Guide then frames its commentary around five questions: (1) how should effectiveness be tracked?; (2) how far should the tracking system go?; (3) what indicators ought to be used to track?; (4) what is the appropriate role of feedback?; and (5) how can an enterprise demonstrate the credibility of tracking systems?

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

[240] Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Addendum 2: Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative A/HRC/17/31/add.2 (23 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 2024

[241] 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 Addendum 1 A/HRC/8/5/Add.1 (23 April 2008); available [https://undocs.org/en/A/HRC/8/5/Add.1]; last accessed 25 February 2024.

[242] John G. Ruggie, "For the Game," FIFA & Human Rights (Corporate Responsibility Initiative Report No. 68. Cambridge, MA: Harvard Kennedy School., 2016), p. 35

[243] OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (Geneva & NY, 2012).

[244] Further discussion of the *Interpretive Guide* at Chapter 14.2.5.

[245] Ibid., p. 3.

[246] John G. Ruggie, Preface, *Interpretative Guide*, p. iv.

[247] Ibid., p. 53

With respect to the question of the tracking of effectiveness, the *Interpretive Guide* , mirroring the UNGP Principle 20 Commentary, emphasizes that there is no single answer.[248] The approach embraced is contextual, both within the cultures of enterprises, and the context in which the adverse impacts arise. Also following the UNGP Principle 20 Commentary, integration with existing auditing and monitoring structures within an enterprise is encouraged. Consideration of international and national standards "offer ready metrics" that might be used, with sensitivity to trust issues among affected stakeholders.[249] The *Interpretive Guide* also reinforces the text of UNGP 20 and its Commentary that a tracking system could be quite simple, though more elaborate tracking processes and systems might be worth considering.[250] Similarly, with respect to appropriate indicators, the Interpretive Guide notes the importance of context, both operational and related to the impact. Some examples of approaches in context are provided.[251] The *Interpretive Guide* does move beyond guidance to commentary when it suggests a frame of interpretation for qualitative measures—that "respect for human rights is about the dignity of people."[252] It is certainly plausible to consider dignity as an element, and it has been part of the constitutional orders of States for several generations. At the same time, human dignity as a singular referent is not the only or perhaps superior lens for reading the nature and scope of the corporate responsibility under UNGP Principles 11-12. The *Interpretive Guide* offered guidance on the nece4ssity and value of engagement as a part of the tracking methodology.[253] The *Interpretive Guide* does connect the role of operational level grievance procedures as a space for developing and utilizing data—qualitative and quantitative in the tracking process. That reflects the discussion in the UNGP Principle 20 Commentary. Lastly, the *Interpretive Guide* echoes the need for such systems be credible and robust. Credibility and robustness, the *Interpretive Guide* notes, is a function of the clarity and comprehensiveness of data harvesting and expert consultation.

Andreas Rühmkorf has provided a gloss on UNGP Principle 20.[254] He starts by noting the connection between UNGP Principles 20 and 21, both understood as the steps necessary to "collect and report information" about the way that enterprises addressed the adverse impacts for which they are responsible.[255] Rühmkorf notes that the tracking requirements of the HRDD process had to the date of his commentary drawn little attention by States in their national Action plans.[256] Rühmkorf suggests that the reason for this might be that UNGP Principle 20's objectives "lend themselves to internal, rather than public, processes.[257] After a description of the requisites

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[248] Ibid.
[249] Ibid., p. 54.
[250] Ibid, p. 55 (also noting the value of what they term "root cause " analysis going to how and why an impact occurred).
[251] Ibid., p. 55-56.
[252] Ibid., p. 56. This is a connection first expressed in the *Interpretive Guide* in their guidance respecting UNGP Principle 17, p. 33.
[253] Ibid., pp. 56-57.
[254] Andreas Rühmkorf, 'Guiding Principle 20: Tracking Business Human Rights Responses,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 157-163.
[255] Ibid., p. 157.
[256] Ibid., p. 158. The UN Working Group for Business and Human Rights 2014 Report to the UN General Assembly spoke to the utilization of a national action plan device as a way of focusing State implementation of their duty to protect human rights under their guidance. See, UN Working Group, "Substantive Elements to be Included in Guidance on National Action Plans to Implement the Guiding Principles on Business and Human Rights (Notice of Open Public Consultation, 2014), available https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/NAPconsultation.pdf. See generally UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights (ver. 1.0, December 2014), available https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG__NAPGuidance.pdf.
[257] Rühmkorf, p. 158.

for compliance with UNGP Principle 20's guidance, Rühmkorf notes the value of the tracking function for "learning and improving,"[258] and with that an emphasis on what had been Draft Principle 18(c), and the UNGP Principle 20 Commentary. He notes as well the understanding of the word tracking to include monitoring, noting that OECD commentary treats the terms as related concept.[259]

Rühmkorf then considers the range of tracking functions that have already been developed and to some extent utilized. He notes in that respect that these are for the most part instruments of private law and build on practices developed in the evolution of CSR/Sustainability reporting.[260] Discussed as well are contemporary efforts by international organizations, like the Global Reporting Initiative (GRI), the Danish Institute for Human Rights, and the UN Guiding Principles Reporting Framework , SEDEX, and the Corporate Human Rights Benchmark, as influential examples.[261] He also reports on the current state of empirical research on tracking. [262] Lasty, Rühmkorf considers the rise and fall of the audit system in global supply chains.[263] Rühmkorf notes that such auditing systems were a key feature of private supply chain governance and an important part of monitoring compliance in supply chains. Ironically, the increasing relevance of mandatory human rights and human rights compliance and due diligence measures has affected the design and use of these instruments. Audits have been criticized by public actors and civil society elements as well for an apparent failure of effectiveness grounded in some forms of criticism on the extent to which enterprises can control the scope and content of audits. The issue of auditor liability is also discussed.[264]

An indirect commentary on tracking, as part of human rights due diligence, might be found in the UN Working Group on Business and Human Rights Report to the UN General Assembly in 2018.[265] The Report highlights what they believe are emerging good practices and offer guidance on developing them further. The Report is notable for the explanation of the Working Group position on what may be the best or better approaches to the interpretation and application of the UNGP in general and tracking in particular.

14.6 UNGP Principle 21

14.6.1. UNGP Principle 21: Text

> In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:
>
> (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;

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[258] Ibid., p. 158.
[259] Ibid.
[260] Ibid.
[261] Rühmkorf, pp. 159-160.
[262] Ibid., pp. 160-161.
[263] Ibid., pp. 161-162.
[264] Ibid., pp. 161-162.
[265] UN Working Group on Business and Human Rights, Report to the UN General Assembly, A/73/163 (16 July 2018), ¶¶42-60.

(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

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14.6.2.UNGP Principle 21: Commentary on Text

UNGP Principles 20 and 21 are two of a pair. Their connection to each other is aligned with the objectives of ensuring that the process and objectives of HRDD, as specified in more detail in UNGP Principles 18 and 19 are effectively undertaken and meaningfully communicated.[266] UNGP Principle 20 focused on the effectiveness function—quality assurance and monitoring for system and specific application effectiveness through a "verification" based "tracking" function. UNGP Principle 21 focuses on communication, and with it on transparency, and as a consequence on engagement from out of transparency infused communication.

The function of communication is described in the text of UNGP Principle 21 as a species of "accounting." Accounting and accountability is a nuanced concept in business and human rights.[267] Accounting in the context of the UNGP necessarily focuses on three key elements in no particular order of importance—to whom is one accounting, in what form is the accounting to be rendered, and with respect to what is that accounting undertaken. Accounting, in the context of UNGP Principle 21 is to be undertaken through external communication. It is to be directed to the internal and external stakeholders, and at its broadest, the general public. The object of the accounting is to focus on how enterprises "address their human rights impacts."

A potentially significant point requires highlighting here. While UNGP Principle 20 speaks to tracking "adverse impacts," UNGP Principle 21 speaks to "human rights impacts." One starts with the language of UNGP Principle 11, which defines the responsibility to respect human rights as avoiding infringing human rights and addressing "adverse human rights impacts" that they cannot avoid.[268] The phrase "adverse human rights" is picked up again in UNGP Principle 13, which defines the responsibility of enterprises as a function of their relationship to "adverse human rights impacts."[269] Likewise UNGP Principle 14 speaks to severity as a function of "adverse human rights impacts."[270] Yet, UNGP Principle 15 (b)speaks to the constitution of a HRDD system "to identify, prevent, mitigate, and account for how they address their *impacts on human rights*," while UNGP Principle 15(c) speaks to the remediation of "*adverse human rights impacts*."[271] Nonetheless, in UNGP Principle 17, deviating from UNGO Principle 15(b), the provision identifies the object of HRDD systems goals as " to

[266] More detail at Chapter 14.5.2.
[267] Discussed in Larry Catá Backer, 'Unpacking Accountability in Business and Human Rights: The Multinational Enterprise, the State, and the International Community,' in Liesbeth Enneking, et al., (eds.), *Accountability and International Business Organizations: Providing Justice for Corporate Violations of Human Rights, Labor, and Environmental Standards* (Routledge, 2020), pp. 60-85.
[268] Discussed Chapter 12.
[269] Ibid.
[270] Ibid.
[271] Ibid.

identify, prevent, mitigate and account for how they address their *adverse* human rights impacts."[272] The reference is to *adverse* human rights impact in UNGP Principles18-20. One returns to the potentially broader language of UNGP Principle 15 only in the communication expectation in UNGP Principle 21. Likewise in the 1st Pillar State duty principles, the language references human rights abuses (UNGP Principle 1-2, 4, 7; though the UNGP Principle 4 Commentary speaks of adverse impacts).

There are several ways of approaching these textual variations. Perhaps the simplest way is the least positive one. One can, for example, approach these textual variations can take all of these deviations—the use of abuse, adverse impacts and impacts-- as sloppy and inconsistent drafting that is the result of multiple iterations of drafting. As a consequence, one might argue that all use variations point to the same thing—every sort of human rights impact that may either trigger the State duty to protect or the expectations of the corporate responsibility to respect. Another approach is to take these variations in textual references to and qualifiers of human rights impacts mean something—that they were deliberate. More specifically they relate to the way that human rights impacts are understood and addressed by States, on the one hand, through the 1st Pillar architecture, and enterprises address their responsibility to respect human rights within the 2nd Pillar and its HRDD structures. Note in this respect that UNGP Principle 1, setting out the State duty, speaks in terms of protecting against "human rights abuse."[273] UNGP Principle 11, setting out the corporate responsibility, speaks in terms of "addressing adverse human rights impacts."[274] State duty extends at a minimum, to all international law obligations that a State may have undertaken or be subject to under international law with regard to human rights." (UNGP General Principles).[275] Corporate responsibility applies to "the entire spectrum of internationally recognized human rights . . .with respect to which the "authoritative list of the core internationally recognized human rights" is specified ((UNGP Principle 12 Commentary).[276] These include rights understood as binding international law and normative principles, some of which, it has been argued, have acquired some sort of characteristic as international customary law.[277] But there is no consensus on this notion. As such, one might reasonably take the position that the UNGP acknowledges that the extent and character of the State duty and the responsibility of enterprises are both distinct and perhaps at some points inconsistent, the latter, where a State has rejected an international norm or treaty (directly or through reservation) that remains part of the normative "responsibility compliance basket" of enterprises under the 2nd Pillar and thus a component of HRDD systems. To speak of human rights *abuse*, then, is to consider the adverse effects of (a) violating law or policy grounded in law that itself derives from State legal orders and international human rights law to which the State is bound, or (b) a breach of law or policy which States have not fully transposed or enforced. These are all bound up in legal duty centered on the state, and to notions of misuse or misapplication of law or duty.[278] To speak to human rights *adverse impacts*, on the other hand, is to consider the measurable consequences of action, which give rise to an expectation that the adverse effects, if potential, will be prevented or mitigated, or that if the effects have been realized, that remedy that seeks to make the affected party whole will be provided. These are transactional measures and expectations rather than formal measures grounded in the first instance, in law or legal frameworks. It follows that in a system that is grounded in private law realized through markets, one grounded in a set of expectations that will differ from and in many cases

[272] Ibid.
[273] Discussed Chapter 7.
[274] Discussed Chapter 12.
[275] Discussed Chapter 6.
[276] Discussed Chapter 12.
[277] Consider William A. Schabas, *The Customary International Law of Human Rights* (OUP, 2021).
[278] From the Vulgare Latin (*abusare*) and Latin (*abusus*); Etymology Online Abuse, available https://www.etymonline.com/word/abuse, last accessed 20 November 2025. The sense is carried over more directly in the Spanish and French versions of the UNGP.

be broader than the obligation to comply with law (and related policy measures) , that the enterprise may also be expected to be prepared to communicate not just about how they addressed adverse impacts (UNGP Principles 17-20), but also how they address the full scope of their human rights impacts (UNGP Principle 11) within systems of non-State compliance structures with its own normative expectations (UNGP Principle 12) within which some but not all impacts will be adverse. For that reason, as well, even when States exercise their duty to protect against human rights *abuse* by legislating mandatory HRDD systems, an enterprise's autonomous responsibility to identify, assess, appropriately address, remedy, and track their adverse human rights effects is not ever eliminated, or superseded .Instead, in the face of State mandatory measures, the enterprise will have to balance both in accordance with the guidance provided in UNGP Principle 23.[279]

Within this context, and to these ends, UNGP Principle 21 creates the expectation that an enterprise "should be prepared" to communicate how they address their human right impacts. That expectation of preparation—not that they must but that they ought to be prepared to communicate—is directed to external communication. Enterprises need not communicate, but must be prepared to communicate where the circumstances warrant communication. Communication, in the first instance then, means preparation for communication. And preparation for communication means doing all things and amassing all information necessary to communicate. UNGP Principle 21 provides that the communication speak to the enterprise's HRDD efforts, including, and based on, enterprise verification respecting the way that enterprises addressed their adverse human rights impacts through UNGP Principle 20's framework and purpose.

The expectation of preparedness is heightened for enterprises "whose operations or operating contexts pose risks of severe human rights impacts." In those circumstances, the enterprise "should report formally on how they address them." Those conditions of severity that may trigger an expectation of formal reporting are likely to align UNGP Principles 21 and 7 (operation in conflict affected areas), but is not limited to those areas that are the focus of UNGP Principle 7, though in that context the two principles might well be read together.[280] It should be noted that risk of severe human rights impacts are not limited to conflict affected areas which are the subject of UNGP Principle 7. They might arise in any operational context and require a metrics for determining the risk and characteristics of severity. Guidance on severity, in turn, is provided in UNGP Principles 14,[281] 19, and 24.[282] In that context expectation of preparedness gives way to an expectation of formal communication respecting the way in which the enterprise addressed their human rights impacts.

UNGP Principle 21 then provides more specific guidance for communication. First UNGP Principle 21(a) focuses on the "form and frequency of communication. It suggests two elements of form and frequency of communication: first that that form and frequency "reflect an enterprise's human rights impacts"; second that both the form of communication and its frequency are "accessible to" their "intended audience." UNGP Principle 21(a) is usefully read against the overall "be prepared to communicate" standard of UNGP Principle 21. Reading the two together suggests that the general "be prepared" standard implied at least some communication in the form and frequency described in UNGP Principle 21(a). Nonetheless nothing in either would imply the preparation of formal reporting. Communication need do no more than account for addressing an enterprise's human rights impacts in a form and frequency that reflects human rights impacts and is accessible. The exception, of course, is also specified in UNGP Principle 21—where the business or operating context poses risks of severe human rights

[279] Discussed Chapter 16.
[280] Discussed Chapter 10. It should be noted that the conditions described in UNGP Principle 7 will affect the contextual analysis of all aspects of HRDD under UNGP Principles 17-19 as well.
[281] Discussed Chapter 12.
[282] Discussed Chapter 16.

impacts. One circumstance is clear in the UNGP—where the enterprise operated in and through conflict affected areas (UNGP Principle 7).[283] But any context can give rise to a particular instance of severe impact, depending in a combination of factors to be "judged by their scale, scope and irremediable character" (UNGP Principle 14).[284] Neither the form nor specific expectations around accessibility are specified, leaving it to the enterprise to determine what constitutes both in their own specific context and will vary as a function of the factors already described in UNGP Principle 14.[285]

UNGP Principle 21(b) then focuses on the sort of information an enterprise ought to be prepared to communicate. The enterprise is expected to provide "information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved. That suggests several premises implied in the text of UNGP Principle 21(b). First, there is a necessary alignment between UNGP Principle 20 and 21 with respect to data. It would appear that the data (processed as information with attached analytics and a values based assessment driven by UNGP Principles 11-15) that us used for tracking and assessment in UNGP Principle 20 ought to be available, in appropriate form, for communication under UNGP Principle 21. Not all information, of course would have to be communicated; it is enough for information communicated to be "sufficient to evaluate" the adequacy of enterprise response. Second, the scope and particularity of information may vary significantly as a function of severity, and therefore of the expectation that an enterprise formally report on how those are addressed. Severity, then, serves as an important factor in evaluating not just the form and frequency of reporting, but also its content. In these, like other aspects of communication, context matters significantly; and drawing on UNGP Principle14 that context includes the circumstances of the enterprise and the severity of impact. Third, adequacy of response in this sense will be primarily focused on adverse impacts—the object of UNGP and the basis on which information is gathered and processed for the tracking that is the basis for analysis of response to "particular impacts involved." Fourth, and on the other hand, because UNGP Principle 20 Commentary also notes that the purpose, in part, of tracking and assessment is for the improvement of the HRDD system, information may also be available for broader addressing of human rights impacts, including positive impacts and systemic effects of impact assessment systems that satisfied UNGP Principle 21(a)'s focus on impacts, not just "particular human rights impacts", which in the context of HRDD is likely to presume a negative impact. Nonetheless, it bears recalling that there is nothing in the 2nd Pillar to prevent an enterprise from meticulously mapping and assessing positive human rights impacts. UNGP Principle 21 includes those in the communication expectation.

Lastly, UNGP Principle 21(c) speaks to confidentiality based limiting principles. These are focused on effects on "affected shareholders" and also respecting "legitimate requirements of commercial confidentiality." The extent of limitation are grounded in principles of risk. The risk is a function of harm of exposing information. There is also, unstated, an element of legal compliance—there are all sorts of information that may be subject to disclosure constraints. These differ, in sometimes substantial ways, from on State's domestic legal order to another, In addition, international law and norm constraints will apply differently to different States, depending on Three types of risk are described. Two are directed toward the people (stakeholders and personnel) and one toward commercial (trade and know-how) secretes. UNGP Principle 21(c) does not indicate the level of risk necessary to justify withholding information. Certainly the requisites of legal compliance is one significant element. The rest likely consist of contextually relevant indicators of risk to life, liberty and property. It is also not clear whether than risk assessment is confined to the affected individual or to the community that may suffer indirect effects. It would be plausible to assume that the risk analysis set out in UNGP Principle might be relevant for risk assessment.

[283] Discussed Chapter 10.
[284] Discussed Chapter 12.
[285] Ibid.

14.6.3 UNGP Principle 21: Official Commentary

The Official Commentary adds nuance to a reading of the text, and offers guidance about preferences for reading and applying UNGP Principle 21. Much of the Commentary restates the text of the Principle. Nonetheless, the Commentary adds some important guidance in the restating.

The UNGP Principle 21 Commentary begins with a justification for the principle as well as the connection of that principle to HRDD and more generally to the normative framework of the 2nd Pillar responsibility to respect. The Commentary suggests that communication requires policies and procedures, drawing indirectly the guidance in UNGP Principle 21 with the normative (UNGP Principle 15) and the operational (UNGP Principles 16-17) respecting the manifestation of private law structures for HRDD systems, including communication systems. The Commentary suggests that the object are to "know and show" that the enterprises respect human rights. The "showing" function, the Commentary then suggests, "involves communication", the engagement with which serves the additional objectives of "transparency and accountability to individuals or groups that may be impacted and other relevant groups, including investors." The extent of relevance for inclusion of communication is a matter of context and of the nature and history of the impacts reported. Communication, serves as a species of consultation and engagement that then connects it more specifically to the consultation and engagement expectations set out in UNGP Principles 16 (policy commitment available and communicated broadly); 18 (meaningful consultation respecting identification and assessment process), and 20 (verification and tracking to draw on feedback from internal and external sources including stakeholders) .

It should be noted that having policies and procedures in place to meet their "know and show" obligations does not mean that the enterprise must communicate fully and routinely to any group of people or generally. It does mean, at a minimum, that the enterprise is prepared to communicate; it does not mean that it is expected to communicate as a positive obligation. At a minimum, the enterprise can meet the expectations of UNGP Principle 21 by meeting the "prepared to communicate standard" of UNGP Principle 21's black letter . To that end, for example, the enterprise may have a policy and procedures in place that permits interested stakeholders, or anyone with an interest, the ability to seek information from the enterprise about the manner and extent to which the enterprise addressed their human rights impacts.

The UNGP Principle 21 Commentary also underscore that the UNGP do not set a rigid form or content for communication. The Commentary suggests a very broad set of examples of communication that aligns with the UNGP Principle 21 communication expectations: "including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports." The emphasis is pragmatic and grounded in the reality that forms of acceptable communications are changing as technology makes available different forms of communication and social expectations about communication change. The Commentary applies this evolutionary pragmatic perspective to the form of formal reporting where operations pose risks of severe impacts.[286]

Lastly the Commentary to UNGP Principle 21 focuses on formal reporting. It is framed around a more detailed reporting of all of the elements of HRDD that were undertaken in the context of risk of severe impact due to the nature of the business or its operations. The Commentary provides this guidance: "The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights."

[286] UNGP Principle 21 Commentary ("Formal reporting is itself evolving, from traditional annual reports and corporate responsibility/sustainability reports, to include online updates and integrated financial and non-financial reports").

The Commentary also suggests the value of independent verification—a step that would not be forbidden under UNGP Principle 20 (tracking and verification) but is beyond its minimum requirements, which requires on that tracking should draw on "feedback from both internal and external sources." UNGP Principle 21 Commentary justifies this suggestion by explaining that "Independent verification of human rights reporting can strengthen its content and credibility." The UNGP Principle 21 Commentary ends with a further suggestion that sector specific indicators might provide a report with "helpful additional detail."

14.6.4 UNGP Principle 21: Other Authoritative Interpretation/Commentary

14.6.4.1 The 2010 Draft. The draft version of UNGP Principle 21, circulated from the end of 2010 as Draft Principle 19,[287] diverged from the final text 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.

Most of what became UNGP Principle 21 can be extracted from Draft Principle 19. But its ordering and emphasis are to some extent quite different. The first sentence of Draft Principle 19 includes the "should be prepared to communicate" principle. But it then deviates from the final draft by using the word "publicly," a term that was changed to "externally" in the final version. It is at this point that the deviation is greatest. While Draft Principle 19 appears to tie the obligation to communicate publicly "when faced with concerns of relevant stakeholders", the final version avoids any suggestion that public communication is a function of specific outreach . Instead UNGP Principle 21 is rewritten to suggest that concerns raised by stakeholders may be one but not the only basis for external communication, suggesting a broader scope of the expectation of communication. While that aspect of communication appears to be broadened, the 2nd sentence of Draft Principle 19 is substantially narrowed. Where the Draft Principle 19 crafted an expectation of reporting "regularly on their performance" for enterprises "with significant human rights risks," the final version UNGP Principle 21 limited formal reporting to enterprises whose "operations or operating contexts pose risks of severe " impacts. In Draft Principle 19, the form and function guidance served as the focus of Draft Principle 19(a) and (b), corresponding to NGP 21 (b) and (c), at least roughly. The guidance with respect to form and frequency was moved to UNGP Principle 21(a) as the first of three elements of guidance for all communications. The "respond with adequate information" guidance in Draft Principle 19(a) became the "Provide information that is sufficient to evaluate the adequacy of an enterprise's response" of UNGP Principle 21(b). The change from and "adequate" to a "sufficient" information standard does not appear to be much of a change, but it bears recalling that adequate suggests an acceptable amount of information, in this case acceptable amount of information with respect to the explanation of the enterprise's addressing of impact. A "sufficient" amount of information with respect to a thing or object is a quantity of information that is at least enough but can be more than enough to meet a specific need. The former tends toward a subjective standard; the latter tends toward an objective standard—that is the former is a function of the belief of those for whom information is provided while the latter is a judgment made in reference to the object for which information is provided. But both definitions include the notion of "enough" either for the purpose or in

[287] 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.

the minds of those for whom it is offered.[288] Lastly, Draft Principle 19(b) spoke to communications being subject to risks of such communication to stakeholders and for commercial secrets. That language was changed to provide that the communication "not pose risks" to stakeholders or for commercial secrets, affording a greater level of protection, and a broader scope of responsibility for the communicating enterprise.

14.6.4.2 The Travaux Préparatoires and Pre-Mandate Text. UNGP Principles 20 were written against and in the shadow of nearly a generation of efforts to manage international economic activity,[289] but was principally directed as a key element that distinguished the approach of the UNGP from its failed predecessor, the *Norms*.[290]

14.6.5 Other Glosses

The OHCHR *Interpretive Guide*[291] includes guidance on the corporate responsibility to respect human rights that adds a layer of interpretive context because it was prepared shortly after the endorsement of the UNGP and was undertaken with the involvement of SRSG Ruggie.[292] "The Guide's content was the subject of numerous consultations during the six years of Professor Ruggie's mandate and was reflected in his many public reports and speeches, but has not previously been brought together."[293] SRSG Ruggie expressed the wish in his Preface to the Interpretive Guide, that it "will help ground those efforts soundly and squarely on the original meaning and intent of the Guiding Principles themselves."[294] It is in that spirit that one ought to approach the Interpretive Guide with respect to the UNGPs, wherever that guidance might then lead those who seek to use it and however far it takes them from the UNGP's original meaning and intent.

The *Interpretive* Guide's commentary on UNGP Principle 21 starts by differentiating accountability between internal and external accountability. While UNGP Principle 20 has much to say about internal accountability, UNGP Principle 21 focuses on external accountability. "That means, at a minimum, having internal information-gathering and accountability systems and being able to account externally for their actions if faced with allegations of human rights abuse."[295] The *Interpretive Guide* underscores the relationship between effective communication and marshalling enough information to put the enterprise in a position to effectively communicate. Issues of the quantum of information necessary for that purpose are distinguished from decisions about the timing, recipients and forms of communication.[296] The *Interpretive Guide* also interprets UNGP Principle 21's communication expectation as centering around the communication, externally, of "general approaches" but might speak to more specific information in particular cases; there is no expectation that the enterprise reveal all issues identified in its HRDD process nor all steps taken to mitigate or prevent in every

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[288] Compare definition of sufficient and adequate in the Cambridge dictionary.
[289] Chapter 4.
[290] Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) See, David Weissbrodt and Maria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' *American Journal of International Law* 97 (2003) 901-922; available <https://scholarship.law.umn.edu/faculty_articles/243> accessed 15 February 2022.
[291] OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (Geneva & NY, 2012).
[292] Further discussion of the *Interpretive Guide* at Chapter 14.2.5.
[293] Ibid., p. 3.
[294] John G. Ruggie, Preface, *Interpretatative Guide*, p. iv.
[295] Interpretive Guide, p. 57.
[296] Ibid., pp. 57-58.

instance.[297] The exception, as set out in the text of UNGP 21, is in the context of significant human rights risks. The Interpretive Guide justifies the expectation of more formal, more regular, and perhaps more detailed communication because of the higher public interest in those instances.[298]

The Interpretive Guide reinforces the idea that the HRDD process itself is expected to serve as the source of information needed by an enterprise as a basis for communication.[299] The *Interpretive Guide* than provides more specific guidance on the sort of information that might be communicated externally both in the context of an enterprise's general approaches, and where the communication focuses on an individual impact and how it is to be addressed. With respect to the former, sector specific context might serve as a framework for communication. Wirth respect to the latter the focus is expected to be in the facts around which negative impacts result and the way in which the enterprise has or intends to address them.[300]

The Interpretive Guide reinforces the expectation that communication ought to fit its purpose.[301] It then elaborates by providing guidance with respect to common points of purpose. [302]Where accounting to shareholders and interested parties (likely primarily affected communities), communication can be limited to that group, taking into account effective communication factors—language, literacy, culture, and the means of communication. Meeting in lieu of written communication where appropriate can meet the expectations of UNGP Principle 21 as well. Where accounting is to shareholders and other interested parties (civil society is included in this part of the guidance), then more traditional and technologically current means of communication may be utilized—presentations at annual meetings of shareholder, electronic communications, web pages and the like. The most conventionally formal presentations (and the form and content of these may change with the times) are reserved for enterprise operations or operating contexts pose a risk of severe human rights impact, with a cross reference to UNGP Principle 14.[303] The Interpretive Guide also suggests the reasons why an enterprise might wish to consider more regular formal reporting even in the absence of an expectation to communicate in that form and with that frequency in terms of its benefit for institutional capacity building and transparency.[304] The Interpretive Guide also suggests, in line with the flexibility built into the communication expectation in UNGP Principle 21, that formalized reporting may be undertaken in a variety of ways and may be integrated with other reporting.[305] The objective is effectiveness and appropriateness, form follows objective.

The *Interpretive Guide* emphasizes that external communication is not limited to reporting. It also includes adverse risk related warnings to affected communities and individuals , in cases of which the enterprise ought not wait to be asked for information.[306] It also provides guidance where communication is related to challenges by external parties related to the way an enterprise addresses adverse impacts. It sketches out a rough spectrum of factors that help an enterprise determine whether or how to respond to such a challenge. Within that framework of potential responses, the Interpretive Guide then considers the question of "sufficiency" of communications.[307] Informaiton is sufficient, the Interpretive Guide offers, when it conveys all facts necessary to

[297] Ibid.
[298] Ibid., p. 58.
[299] Ibid.
[300] Ibid.
[301] Ibid., p, 59.
[302] Ibid., pp. 59-60.
[303] Discussed Chapter 12; see also Interpretive Guide, pp. 18-22.
[304] *Interpretive Guide*, p. 59.
[305] Ibid., p. 60.
[306] Ibid.
[307] Ibid., p. 61.

make informed decisions by those to whom facts are directed and in ways that permit them to make decisions that advance their interests.[308] The Interpretive Guide then seeks to make the case for greater transparency and disclosure.[309] It also provides guidance for the limits of disclosure and transparency—where disclosure would pose risk to stakeholders or personnel (internal or external individual risks) or cause risk to the operation of the enterprise (business operational secrets).[310] Included is a suggested standard for determining when a business operational secret is important enough to protect, grounded in the local law of business confidentiality, and extending to actions, like negotiations of significant transactions that might be imperiled by early disclosure. Lastly, the Interpretive Guide underscores the relationship between communication and shareholder engagement thought-out the HRDD process.[311]

Andreas Rühmkorf has provided a gloss on UNGP Principle 21.[312] He starts by noting the intimate connection between UNGP Principles 20 and 21. He also notes that issues of disclosure are increasingly the province of State based mandatory measures, though these are quite sector and objective specific. Nonetheless, enterprises will have to navigate among the mandatory disclosure and reporting measures on the one hand, and the communication expectations of UNGO Principle 21.[313] As suggested earlier,[314] the UNGP expectations that do not disappear in the face of mandatory measures. Rühmkorf usefully notes that mandatory and UNGP based communication can often overlap especially for enterprises that have a history of producing CSR (corporate social responsibility) or ESG (Environmental, Social, and Governance) reports.[315] Rühmkorf identifies the focus of UNGP Principle 21 on reactive communication—that is when concerns have been raised by stakeholders.[316] The remedy, he urges, is for more mandatory measures aligning the expectations of UNGP Principle 21 with the use of State political and legislative power under UNGP Principle 3.[317]

In that light, Rühmkorf discusses voluntary human rights reporting. He notes that their weakness lies in the absence of detailed information which increases the chance that an inaccurate picture of the enterprise's human rights record might emerge.[318] In that context, he suggests that the reliance on narrative, qualitative, reporting, without quantitative elements, is a critical element of voluntary reporting. He also considers UNGP Principle in the context of what he describes as the rise and fall of mandatory reporting on human rights impacts in Europe.[319] He offers criticism of these mandatory non-financial reporting mandatory measures,[320] and then considers reporting in light of emerging sector or impact specific measures or in the case of France, Germany and the E.U., more comprehensive reporting measures.[321] Non-financial reporting is criticized for the absence of

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308 Ibid.
309 Ibid.
310 Ibid. (providing examples and explanation).
311 Ibid., p. 62.
312 Andreas Rühmkorf, 'Guiding Principle 21: Communication of Human Rights Impacts,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 164-170.
313 Ibid., pp. 164-165.
314 Discussed Chapter 14.1.
315 Rühmkorf, 'Guiding Principle 21, p. 165.
316Ibid.
317 Ibid., UNGP Principle 3 is discussed at Chapter 8.
318 Rühmkorf, 'Guiding Principle 21, p. 166.
319 Ibid., pp. 166-167.
320 Ibid., p. 168
321 Ibid., pp. 169-170.

quantitative data, and because enterprises can avoid reporting entirely under voluntary programs.[322] Mandatory measures are criticized for not going far enough, especially with respect to the publication of more specific information respecting enterprise addressing of adverse impacts.[323]

14.7 Conclusion

Since the fundamental objective of the UNGP, whether as State duty or corporate responsibility is to prevent or mitigate, or if neither is possible to remedy adverse human rights impacts (2nd Pillar) or abuse (1st Pillar), a critical element of fulfilling that objective revolves around what is elaborated in the 2nd Pillar as a process that starts with identification and assessment, moves to effective integration of that assessment within the enterprise to permit appropriate addressing of such impacts, which are then tracked and analyzed for internal quality assessment and improvement against an ideal (no adverse impact), and ultimately communicated externally to ensure that perspectives and values produce as pragmatically accurate a set of values based metrics as context permits. Those values apply to both State duty and corporate responsibility. Nonetheless, the context within which they are applied and the different nature of public and private organs—one vested with sovereign political authority, the other invested with functionally differentiated economic purpose organized through mechanics of private law and social expectation—require distinctive means of fulfilling the respective duty and responsibility of States and enterprises.

For States that means is focused on the appropriate use of public authority internally and externally to guide and compel those individuals and entities subject to its authority to legal compliance and to guide them respecting preferred expectations of conduct through policy measures and compliance systems.[324] These are limited, in turn, at least as they serve as constraints on the way in which States are expected to exercise their political powers, by the scope of "any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.[325]

For enterprises that means is focused on the development of private law systems and processes that are crafted to permit effective and appropriate engagement with the corporate responsibility. Those processes and systems are framed, in turn, within a set of compliance expectations built around a set of normative expectations derived from international public law and social expectations that help determine the values that are critical in assessing system integrity, function, and results. They are constrained, and supplemented by the obligation of legal compliance with the domestic legal orders of the States in which they operate or which may assert power over them or some or all of their operations and relationships. The are expressed operationally as HRDD systems in UNGP Principles 17-21—the object of consideration in this Chapter.

This model, then, effectively posits the creation (existence) of two related but also self-referencing systems—systems that are structurally coupled, in the sense that each communicates with and interacts with the other affecting their own internal operations by reference to their relationships with each other[326]—but that operate autonomously of each other. That separation represents an acknowledgement of principled

[322] Ibid., p. 168.
[323] Ibid., p. 170.
[324] Discussed Chapters 7-11.
[325] Discussed Chapter 6.
[326] On structural coupling on self-referencing systems see, e.g., Claudio Baraldi, 'Structural Coupling: Simultaneity and Difference Between Communication and Thought,' (1993) 3(2) *Communication Theory* 112-129.

pragmatism,[327] in the sense that, drawing from the UNGP General Principles,[328] it reflects the framing of the political-economic ordering within which human societies now operate. That separation also appears to survive even efforts to "legalize" the corporate responsibility to respect through the adoption of domestic or international law norms and structures. These mandatory efforts—the layering of State duty onto corporate responsibility produces compliance, harmonization, and prioritization issues that are both recognized in the UNGP are elaborated in UNGP Principles 23-24.[329] Yet their elaboration as UNGP principles within the 2nd Pillar also underscores the fundamental principle that corporate responsibility continues to serve as an expectation irrespective of the extent or forms of mandatory measures imposed by States or international law.

Because of the fundamental importance of the foundational normative principles of the corporate responsibility to its operationalization as HRDD in UNGP Principles 17-21, it bears briefly recalling in those foundational principles. UNGP Principle 11 sets put the "global standard of expected conduct for all business enterprises wherever they operate."[330] The global standard is simple and straightforward: "Business enterprises should respect human rights"[331] Everything that follows in UNGP Principles 12-15 is an elaboration of that ordering premise.[332] Several sub-premises apply to the entirety of the Pillar 2 foundational principles. The first is that these principles *provide expectations rather than mandatory obligations*. The State may produce mandatory obligations through its political-institutional public authority—at least to the ends of its jurisdiction. The enterprise operates in markets both within and beyond the State. The foundation of those foundation concepts in expectation represents the deep embedding of the normative framework of principled pragmatism in the heart of the UNGP Pillar 2 structures. Principled pragmatism starts with current practice, adds to it the nudging effects of the UNGP normative framework the practice of which produces a dialectic over repeated application that is meant to move expectation closer to realization by internalizing norms through iterative practice. The model is not for the impatient.

The expectation of the core premise of the corporate responsibility to respect human rights is given a meaning: the expectation that enterprises ought to avoid infringing of the human rights of others, and should address adverse human rights impacts with respect to which the UNGP assigns them responsibility. Nonetheless the core of the principle is unwavering—the enterprise may have a responsibility, but its character is that of expectation, and expectations are social collective norms that may be quite severe in their effects but lie beyond the reach of the legal structures that define the relationship between States and their subjects. States, of course may, to the extent of their political will and for so long as that will is deemed worthy of manifestation, transform social expectation into mandatory legal duty. Yet that duty can extend no farther than the reach of their jurisdiction and may be checked by the habits, will and legal authority of other States, all subject to sometimes superior claims of authority in international law.

The meaning of this sense of the corporate responsibility to respect human rights is then elaborated as a conceptual matter in UNGP Principles 12-15. UNGP Principle 12 identifies the international law and norms with respect to which the corporate responsibility arises. At its broadest to is limited to "internationally recognized human rights—a term that is itself elastic and subject to a variety of interpretations. UNGP Principle 12 also provides a minimum, the International Bill of Human Rights and the principles concerning human rights of the

[327] Discussed Chapter 3.1.
[328] Discussed Chapter 6.
[329] Discussed Chapter 16.
[330] UNGP Principle 11 Commentary.
[331] UNGP Principle 11.
[332] Discussed Chapter 7.

ILO's Declaration on Fundamental Principles and the Right to Work. The Principle also emphasized detachment—a detachment from the legal or normative architecture of the responsibility to respect and the boundaries of a State's duty to protect human rights. These two may overlap but neither controls the other with respect to scope or interpretation.

UNGP Principle 13 attaches the active principle of respect to the normative elaboration of UNGP Principle 12. UNGP Principle 13 divides the corporate responsibility into two parts. The first applies a "causing or contributing" standard to adverse human rights impacts. These ought to be avoided, and if avoidance is not possible, then addressed. Critical here is the way in which principles of principled pragmatism applies to the key terms—"causing and contributing", "adverse impact" "through their own activities", "avoid" and "address." The focus first is on prevention; and if prevention is not possible then mitigation and then remediation. The second applies to adverse impacts "directly linked to their operations, products or services" by their "business relationships." With respect to these, the expectation is to "seek to prevent or mitigate" any consequential adverse impacts, without regard to whether or not the enterprise contributed to those impacts. Within a production chain enterprises are responsible for the conduct of all others without regard to their contribution to the adverse impacts that must be addressed.

UNGP Principle 14 adds two critical elements to the conceptual framework of the corporate responsibility. The first introduces the notion that factors of scale and complexity may shape the "means through which enterprises meet" their Pillar 2 responsibilities. That introduces the notion of variability in the operationalization of Pillar 2 human rights due diligence—though not of the expectation of the responsibility to respect itself. Objectives remain constant; means vary from enterprise to enterprise. That produces a distinctive element in enterprise compliance that moves away from the one size fits all rigidity of law but is more suitable to the sensibilities and practices of the market (again principled pragmatism in system design). Specific factors that enter into the analysis are also identified: size, sector, operational context, and ownership and structure. Each of these is left undefined and thus amenable to development. The second introduces the concept of severity as a factor that shapes and limits the flexibility of adopting context specific means toward the realization of the responsibility to respect expectation. Severity, in turn "will be judged by their scale, scope and irremediable character." Putting the two together produces the analytical matrix within which an enterprise can develop institutional structures for realizing the means of fulfilling their responsibility to respect, while severity adds temporal and transaction oriented limitation. Thus structures must be flexible enough to meet both the character of the enterprise and to respond to changing levels of severity of impact form transaction to transaction and over time.

Lastly UNGP Principle 15 serves as a bridge between the conceptual construction of the UNGP Pillar 2 responsibility to respect and the more precisely drawn operational principles built around human rights due diligence. The bridging is undertaken through the development of a conceptual basis for operationalization. That basis includes three elements. The first is based on the production of a useable enterprise policy commitment in a form that furthers the task of fulfillment. This will be elaborated in UNGP Principle 16. The second focuses on the essential role of human rights due diligence as the primary mechanism for realizing the Pillar 2 foundational principles in context. These will be elaborated in UNGP Principles 17-21. And the third focuses on the elaboration of a suitable remediation framework. These will be elaborated in UNGP Principles 22-24. Holding these together and emphasizing the important of the analytics framework of factor balancing in UNGP Principle 14 is the overarching referent against which these policies and processes are to be elaborated: an "appropriate to size and circumstances" standard. The foundational principles thus appear to make clear enough that while the UNGP describes a unitary normative standard, it "activates" that normative standard (e.g. addressing adverse human rights impacts measured against internationally recognized human rights), as well as a single framework for its fulfillment (human rights due diligence), it also provides substantial flexibility, which can differ from enterprise to enterprise, with respect to the means adopted to fulfill these expectations, and that even those means may be required to vary depending on the severity of individual cases of adverse impact.

UNGP 16[333] occupies a space between the conceptual framework of UNGP Principles 11-15, and the operational framework of that conceptual framing in UNGP Principles 17-21. UNGP Principle 16 focuses on the structural elements for the making of corporate rules and policies that parallel the framing of the conceptual duty of States in UNGP Principles 1-2[334] for the expectations of the exercise of State power elaborated in UNGP Principles 4-10 [335]is elaborated in UNGP Principle 3[336] transposes the fundamental normative principles of UNGP Principles 11-15 into operational private law structures and systems through which an enterprise embeds these normative expectations into its operational systems. It is only at this point, and with those principles deeply internalized into the cultures of an enterprise, that one can begin to conceptualize the framework of the systems that are required to confront the fundamental task of the corporate responsibility to respect human rights—the avoidance of adverse human rights impacts, its mitigation where such impacts cannot be entirely avoided, and its remediation where such impacts have caused harm to human rights holders.

For the corporate responsibility to respect human rights, that operational framework is embedded in the structures and processes of HRDD. The UNGP Principles 17-21 set out the overall framework for elaborating operational structures that embed the conceptual structures and normative expectations of a corporate responsibility to respect human rights beyond the legalities and political preferences of the State and deeply embedded in markets. The Foundational Principles of the 2nd Pillar (summarized above) serve as the critical element of the autonomous structures of a corporate responsibility to respect. They are set out logically to create a deeply self-referencing normative structuring of corporate responsibility within markets, the contents of which, of course, may be affected by States, singly, in groups, or through international instruments, as they projected public regulatory power onto the private law arrangements beyond their institutions. UNGP Principles 17-21, then, transpose that conceptual framework into operational level structures in the form of HRDD. What is left after that, for purposes of elaborating and protecting both the conceptual and structural elements of the corporate4 responsibility is the setting out of principles for mediating between the corporate responsibility and the State duty to protect, on the one hand, and the structures for providing remedy (UNGP Principles 25-31) on the other. The focus is not just on impacts but more specifically on the *risk of adverse impact*, toward which the HRDD system fundamentally deployed. In this sense, the emphasis of the HRDD system is on a precise but critical sub-set of the universe of human rights (and sustainability) related impacts that may arise form or be related to economic activity undertaken by either States or other persons or collectives. It is further narrowed by a focus on economic enterprises, though one might also posit that all collectives ought to be the subject of HRDD, including civil society organs, religious and secular institutions, and other forms of collective organization when they engage in economic activity of the type that creates the risk of adverse impact.

UNGP Principle 17 provides the framework for the HRDD system: (1) identification and assessment of actual and potential adverse impact, (2) integrating ad addressing the findings, (3) tracking (monitoring and assessing) responses, and (4) communicating externally on how impacts are addressed. The objectives toward which these four core elements of HRDD systems are directed are also straightforward—to identify, prevent, mitigate and account for adverse impacts. The four core elements described in UNGP Principle 17 are then

[333] Discussed Chapter 13.
[334] Discussed Chapter 7.
[335] Discussed Chapter 9-11.
[336] Discussed Chapter 8.

elaborated in more detailed guidance in UNGP Principles 18-21. In the process UNGP Principle 17 serves as the nexus point between the foundational principles and their expression in operational systems. What is stressed in UNGP Principle 17 in the context of HRDD system construction are the extent of the scope of the HRDD exercise, the flexibility of system forms as a function of (1) enterprise capacity and the nature of operations and (2) the severity of the risk of impact, and the flexibility of system forms over tome and the context in which impacts may arise or be manifested.

UNGP Principle 18 provides further guidance on the identification and assessment function of HRDD. It distinguishes between the identification of adverse impacts that have already been realized—for which remediation rather than HRDD process are triggered—and the risk of adverse impact, both actual and potential, with respect to which the HRDD system is meant to respond in order to fulfill system objectives described in UNGP Principle 17. To those ends UNGP Principle 18 elaborates guidance on the use of internal and external expertise and also on the role and importance of non-expert consultation, especially consultation with affected groups and other relevant stakeholders. All of this is framed by the implementation flexibility constraints of enterprise context (capacity and the nature of operations) and the severity if impacts.

UNGP Principle 19 provides further guidance on the contextually more complicated issues of effective integration of identification and assessment of impacts and the appropriate action that ought to be taken on the basis of that assessment. Both present issues of contextual constraints, and both are grounded in the premise that a wide scope of variation is to be expected. That variation affects the means by which effective integration and appropriate action is undertaken, but it does not change the ultimate object in the service of which flexibility is grounded—the addressing of adverse impacts premised on a hierarchy of result starting with prevention, and then moving to mitigation. Within these structural elements, UNGP Principle 19 introduces the concept of leverage as a force for nudging behaviors especially those that are tied to business relations.

UNGP Principle 20 focuses on tracking. Tracking is better understood broadly as the function of quality control, auditing, and assessment of the HRDD system with respect to its core objectives—to identify, prevent, mitigate and account for the way in which an enterprise addresses its adverse impacts. Guidance is provided with respect to the sort of indicators that might be developed and utilized. Additionally, the role of feedback from stakeholders and other relevant internal and external sources is also elaborated. Ultimately the function of all of this guidance is to provide a structural basis for effec6ive elaboration of systems that help an enterprise assess how its human rights policies (UNGP Principle 16) are being implemented, whether specific responses have been effective, and how deficiencies in either might point to system improvement (generally) and remedial quality specifically.

Lastly, UNGP Principle 21 provides guidance for external communication of the operation of HRDD systems. The expectation of external communication is grounded in a very broad flexibility. UNGP Principle 21 avoids the imposition of a positive obligation to communicate, but does create a standard of preparedness to communicate when concerns are raised or more generally when affected stakeholders or their representatives request communication respecting general operationalization of specific instances of addressing impacts. The exception is grounded in severity. Where there are risks of severe impact arising from enterprise operations or operating context, more formal and proactive reporting is expected. The form of such eternal communication is guided by accessibility principles. Finally transparency is constrained by law (especially respecting business secrets or negotiations) and human rights impacts of disclosure for affected stakeholders and others.

And there it is. Together they elaborate the framework of an HRDD. Nonetheless it is important to underscore that what is elaborated is a framework and not a detailed and rigid set of instructions for the making of a one size fits all institutional apparatus for compliance with the objectives elaborated in UNGP Principles 11-15. Enterprise context (capacity and nature of operations) as well as the context of the impacts that are caused by or which an enterprise contributes to, or which may arise from out of an enterprise's relationships (severity) shape the form and means of fulfilling the objectives of HRDD and of shaping its form and approaches . These also change over time and from impact to impact. That makes for both a very slippery and very flexible structuring, but one that is conceived as producing, in the aggregate, the most effective way of addressing human rights impacts in context. Nonetheless, it is a flexibility that must then be connected with both the imperatives and expectations built around th3 State duty to protect, and the duty to ensure effective remedy. That mediation is built into the 2nd Pillar and radiates out from the 2nd Pillar through its HRDD operationalization to both the 1st and 3rd Pillars. The router is built into UNGP Principles 22-24, which are considered in the following chapters,