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The State Duty to Protect Human Rights: Foundational Principles (UNGP Principles ¶¶ 1-2)

7.1 Introduction

After the unnumbered introductory section entitled "General Principles" which serves as a chapeau to the framing and structural principles that follow,[1] the thirty one substantive principles follow. These are divided along the lines of the Protect-Respect-Remedy Framework introduced in the 2008 SRSG Report 8/5 (Protect, Respect, Remedy)[2] and the premises on which they were elaborated.[3] The Three Pillar Framework was welcomed by the UNHRC and on the elaboration of which the SRSG's mandate was extended.[4] The "State Duty to Protect Human Rights" includes UNGP Principles 1-10; the "Corporate Responsibility to Respect Human Rights" includes INGP Principles 11-24; and "Access to Remedy" includes UNGP Principles 25-31.

[1] Discussed Chapter 6.1.
[2] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 (7 April 2008); available [https://undocs.org/en/A/HRC/8/5]; last accessed 25 February 2024.
[3] Discussed Chapter 3.2.4.2.
[4] Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/Res/8/7 (18 June 2008) [https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf] (hereafter the UNHRC 2008 Resolution). Discussed Chapter 3.3.2.

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);[5] "The State-Business Nexus;" (UNGP Principles 4-6);[6] "Supporting Respect for Human Rights in Conflict-Affected Areas," (UNGP Principle 7);[7] and "Ensuring Policy Coherence," (UNGP Principles 8-10).[8] Its conceptual genesis was developed in two of the SRSG's 2007 Reports.[9] This Chapter considers the foundational principles to the UNGP's State duty to protect human rights.

7.2 UNGP Principle 1

7.2.1. UNGP Principle 1: Text

> States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

7.2.2.UNGP Principle 1: Textual Commentary

The simplicity of the text of UNGP Principle 1 belies its complexity. That complexity, in turn, serves both as a gateway to the State based duties that follow, and produces ambiguity, or at least spaces where substantially different but plausible readings may be supported. UNGP Principle 1 consists of two sentences. The first describes the State duty; the second describes the way in which that duty is to be undertaken.

The description of the State duty consists of several key terms. The (1) State (2) must protect (3) within their territory and/or jurisdiction (4) against human rights abuse (5) by third parties including business enterprises.

UNGP Principle 1 is addressed to States. It is not addressed to any entity other than States, nor to their subordinate units, autonomous regions, special ones, indigenous reservations and the like. At the margins, at least, that raises a number of interesting issues respecting what may be considered a State and what may not be, at

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[5] Discussed in Chapter 8.
[6] Discussed in Chapter 9.
[7] Discussed Chapter 10.
[8] Discussed Chapter 11.
[9] 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.

least for purposes of the UNGP.[10] It also raises the question of what sort of entities may engage in the act of recognition of statehood.[11] Except at the margins, of course, the issue is of greatest interest to international jurisprudence. And yet it is at the margins that the greatest potential risk of adverse human rights impacts might be experienced—that is especially the case in conflict zones, a topic also addressed elsewhere in the UNGP, including around the issues of self-determination and unilateral declarations of independence.[12] The UNGP has little to say about which entities constitute States—the General Principles suggest that those who use the UNGP are free to assert any credible position under international law, and that the range of plausible credulity is as substantial as the jurisprudence of State existence/recognition.

UNGP Principle 1 directs States to protect. The obligation to protect is mandatory; States *must* protect. This is also a positive as well as a mandatory obligation with respect to its object. Positive obligations have now arisen in a number of areas and they represent an evolution from traditional negative duties[13] of States,[14] especially as developed by regional human rights courts and around issues touching on human rights and sustainability.[15] Yet that tells the reader very little other than that the State duty creates mandatory obligations. The character of those obligations may be administrative, or statutory. Their character may sound in tort[16] and focus on an individual claimant, or may assume an administrative or constitutional element grounded in administrative abuse or failure to act whether derived from internalized international law or directly from national constitutional principles.[17] The UNGP do not directly seek to frame the nature of the duty, other than it is to be undertaken through all of the usual means by which a State acts—especially law and policy measures which are the subject of other INGP Principles. Again, the range of plausible compliance can be quite broad—as well as the sources for its definitive pronouncement within a national public institutional apparatus—courts, agencies. legislatures, elected officials and the like.

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[10] The baseline text remains the Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

[11] See, e.g., José E. Alvarez, International Organizations as Law Makers (OUP, 2005), 148-154;

[12] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 404 (July 22); see generally, Sascha Dov Bachmann and Martinas Prazauskas, 'The Status of Unrecognized Quasi-States and Their Responsibilities Under the Montevideo Convention,' (2019) 52(3) *The International Lawyer* 393-438.

[13] Johan Vorland Wibye, 'Beyond Acts and Omissions – Distinguishing Positive and Negative Duties at the European Court of Human Rights, (2022) 23 *Human Rights Review* 479-502.

[14] This was an important element in the development of the State Duty as it evolved during the first mandate of the SRSG. See discussion Chapter 3.2.3

[15] See, e.g., Case of Pavlov and Others v Russia Application No. 31612/09 (11 January 2023) (whether the authorities failed to take protective measures to minimise or eliminate the effects of industrial air pollution in the city of Lipetsk, in violation of the applicants' right to respect for their private life under Article 8 of the Convention). See, generally, Vladislava Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights,' (2020) 33 *Leiden Journal of International Law* 601-620; Tsubasa Shinohara, 'Which states parties should be held responsible for the implementation of positive obligations under the ECHR in sports-related disputes?,' (2022) 22 *The International Sports Law Journal* 323-342.

[16] See, e.g., Vladislava Stoyanova, 'Common law tort of negligence as a tool for deconstructing positive obligations under the European convention on human rights,' (2019) 24(5) The International Journal of Human Rights

[17] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (ECHR 087 (2024) 09.04.2024); Habitantes de la Oroya v Peú (27 November 2023) Corte Interamericana de Derechos Humanos; available [https://www.corteidh.or.cr/docs/casos/articulos/seriec_511_esp.pdf], last accessed 10 May 2024. See also Jie Ouyang, 'Unleashing the Green Principle in the Chinese Civil Code: Embedding Private Law into the Green Transition,' (2023) 12(5) *Journal of European Consumer and Market Law* 203 – 208.

The UNGP describes the expectation, but its operationalization, and its normative content, are subjects of law, including international law. And the nature of the obligation is meant to be understood within the basic structures of the General Principles. That is to say, while States *are invited* to embrace the broadest framework within which to identify the boundaries of its duty to fulfill human rights most broadly understood, the UNGP recognize that States may only be required to undertake and fulfill those precise legal obligations States have undertaken or to which they may be subject, along with obligations arising from its own domestic legal ordering. One cannot read more into this term than that—though through this term one can also justify the broadest expansion of obligation it is willing to undertake.

Human Rights abuses are the object of UNGP Principle 1's positive obligation on States to protect. That objective has two parts. The first touches on human rights. The second touches on abuse. Human rights is undefined in UNGP Principle 1. However, the UNGP General Principles remind us that, unless States undertake broader scopes of obligation, States are bound only by the international legal obligations to which they have adopted or to which they are subject.[18] The General Principles do limit its application to human rights. But it is not clear where one draws the line—at its broadest virtually every instrument of international law will have direct or indirect impact on or connection with human rights. But there is a core of international instruments that are self-consciously centered on human rights. These are identified neither in the General Principles or in the State duty Pillar (UNGP Principles ¶¶ 1-10). Instead they are identified only in the provisions which directly elaborate the corporate responsibility to respect human rights (UNGP Principle ¶ 12). In addition, human rights alone do not trigger the application of UNGP Principle 1—abuse of human rights serves as the trigger. The abuse, of course, must be suffered by a rights holder, and it must occur "within the territory and/or jurisdiction." Left ambiguous, or at least subject to plausible alternative interpretations, are at what point that abuse triggers the duty.

The mandatory obligation to protect against human rights abuse is restricted to an area described as "their territory and/or jurisdiction." The term territory and/or jurisdiction is a broad one. Again, it permits an equally broad scope of interpretation consistent with its text; or a narrow interpretation. At its heart is the old and quite contentious issue of the connection between State territorial control and the projection of state power beyond its territorial borders. One could, for example, plausibly choose to read this term as a function of international law (however one chooses to define it among its own various possibilities).[19] Alternatively one could interpret the provision as a function of the authority of national organs to apply international law or norms (whether or not transposed onto a domestic legal order) under, for example, their effects.[20] It is also plausible to interpret the provision as a function of the reach of national administrative regimes.[21] The issues remain contentious, [22] though one in which international bodies appear more willing than some States to expand.[23]

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[18] Discussed Chapter 6.
[19] See, e.g., Lucia Leontiev, 'Conceptualising Extraterritoriality. Public International Law and Private International Law Considerations,' (2024) 24 *Global Jurist* https://doi-org.ezaccess.libraries.psu.edu/10.1515/gj-2023-0128
[20] Marek Martyniszyn, 'Japanese Approaches to Extraterritoriality in Competition Law,' (2017) 66 ICLQ 747-762.
[21] Sarah C+ Kaczmarek and Abraham L. Newman, 'The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation,' (2011) 65 *International Organizations* 745-770.
[22] See, e.g., Daniel Ricardo Quiroga-Villamarín, 'Vicarius Christi: Extraterritoriality, pastoral power, and the critique of secular international law,' (2021) 34(3) *Leiden Journal of International Law* 629-652; William S. Dodge, 'The New Presumption Against Extraterritoriality,' (2020) 133(5) *Harvard Law Review* 1582-1654.
[23] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?,' (2013) 117(3) *Journal of Business Ethics* 493-511.

The mandatory obligation to protect under *UNGP Principle 1 arises only when such human rights abuse is undertaken by "by third parties, including business enterprises."* It is not clear who or what these third parties are, except that they include business enterprises. Put differently, enterprises are the only named category of third parties specified in the text if UNGP Principle1—but they are not the only category of UNGP Principle 1 "third parties" that may be subject to this State duty. Any third part (other than the State, it seems) may be brought within this positive obligation "protect against human rights abuse within their territory and/or jurisdiction." Included among them would be non-governmental organizations, religious institutions, social or mass organizations, and individuals. The UNGP Principle 1 does not speak only to third parties that are formally constituted (autonomous legal persons), nor are they limited to mass organization. The smallest unit capable of fitting within the meaning of "third parties" is a single person—a single legal or natural person. This accords with the UNGP General Principles that also focus on its mandatory application to States and business enterprises, but did not limit its application to those collectives.[24] The scope of the object of the State duty then becomes clear in the text. At its narrowest it must include "business enterprises" however organized. At its broadest it can include any and every legal and natural person "within its territory and/or jurisdiction" who may or does cause adverse human rights abuse. The text of the UNGP Principle 1 is utterly indifferent as to the choice made within this spectrum of possibilities. The General Principles suggest that the choice must be a function of international legal obligations of the State—at a minimum. But at its broadest extent, it can be a function of local, national, and international law, norms, rules, expectations, policy or guidance either manifested directed by a State or undertaken by, through or with the consent of the State.

The second sentence of UNGP Principle 1explains the scope of the duty described in the first sentence, providing, in the process, a measure of greater certainty in the meaning and operation of the duty. It introduces a number of important concepts. The first is the concept of appropriate steps. The second is the principle of "prevent, investigate, punish, and redress abuse. The third touches on the means by which these appropriate steps and compliance measures are to be undertaken, "through effective policies, legislation, regulation, and adjudication." These three elements will play an important role in each of the three Pillars.

First a State complies with its duty by taking appropriate steps measures. Measures must be taken—the character and form of which are specified later in the sentence. The word with interpretive elasticity is "appropriate." The word, in English, commonly means suitable. And suitability suggest some connection between the measures taken and the objective of those measure. In this case that involves a connection between abuse of human rights and the response to the abuse, with the objective of correction. The appropriateness of the correction, of course, will depend on the time of intervention. Where the abuse is threatened, then prevention may be appropriate in most cases; where the abuse has already produced harm, then mitigation may be appropriate; and if the abuse has already occur then compensation of some sort may be appropriate. But it is also possible to read the provision as allowing the State to determining the appropriateness of the time at which it would intervene. And in that case appropriateness might be measured by balancing the human rights benefits against abuse.

Second, the appropriateness of the steps to be taken have as their object "to prevent, investigate, punish, and redress" abuse. This suggests both a timing element, as well as a structural element. The timing element is temporal /sequential and also normative. It is possible to read "prevent, investigate, punish, and redress" abuse linearly or dependent on when in the life cycle of abuse the State intervenes. That is, depending on the time at which the State intervenes will determine the appropriate measure to be taken—for example remediation after the occurrence of abuse; prevention where the abuse may occur but has not yet happened; and mitigation where the

[24] Discussed Chapter 6.

abuse is occurring but not yet complete. The connections are passive in the sense that State intervention measures are a function of the time in sequence when they apply. Investigation add an intentional element, one in which the State may more positively determine when in the life cycle of abuse it may choose to intervene. That intentionality is a function of knowledge of abuse—either its potential occurrence, its contemporary manifestation, or a record of its effects when the abuse ends. There is an element of linearity in the investigation action as well, that is appropriate steps identified through investigation measures may also a function of time dependent sequence. For example, investigation upon the occurrence of an event or disclosure that triggers State response.

There is a normative element to sequential response tied to proactive investigation measures. These arise where the abuse may be countered by a related human rights benefit. This arises, in contemporary context, for example, where a right to development (collective benefit) may be incompatible with indigenous rights, or where a right to a clean and healthy environment may conflict with a right to raise the living standards of a community, or where the right to political equality under principles of Laïcité may conflict with a right to express religious belief through clothing.[25] The issues are contentious and reflex sometimes fundamental differences in perspectives on human rights among great ideological camps, especially between Marxist-Leninist, advanced liberal democratic, and post-colonial collectives.[26]

This normative element then has an impact on the way in which one might read the "prevent, investigate, punish, and redress" language. For example, one way of understanding the "prevent, investigate, punish, and redress" language are as guardrails guiding an assessment of the appropriateness of measures. Another is to suggest that the ultimate duty of the State is to prevent, that investigation is the chief means of preventing all human rights abuses (the ideal state of things or the ultimate objective), and that the bureaucracies constituted toward those ends ought to be vested with the authority to punish (human rights abusers through civil or criminal penalties) and redress (stand in the place of those whose rights were abused and provide compensation of some sort). Yet another way of approaching this text is to presume that it does not mandate a particular outcome or form, as long as States create a rational system, compatible with their normative and legal orders to strive for prevention, to base actions on investigations, and to ensure in some way that those who abuse human rights are punished and that those who suffer human rights are compensated. Yet again, "appropriate steps" may also include measures in the form of rules which absolve certain abuses, or which grant concessions for such abuse by third parties, when undertaken to advance other human rights either at the direction of the State, or under some sort of general license.

The structural element is techno-bureaucratic. The normative element also suggests the nature of the role of the State in the vindication of rights that have been abused. That reading might then suggest that UNGP Principle 1 advances a presumption that the State duty as set out in the principle is fundamentally administrative in character. That obligation necessitates an administrative apparatus to investigate, and thereafter to prevent, punish, and redress. That also suggests the development of a compliance mechanism through which information is

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[25] See, Frédéric Mégret, 'Lost in Translation? Bill 21, International Human Rights, and the Margin of Appreciation,' (2020) 66(1) *McGill Law Journal* 213-252. Consider the critical analysis in Shu-Perng Hwang, 'Margin of Appreciation in Pursuit of Pluralism? Critical Remarks on the Judgments of the European Court of Human Rights on the 'Burqa Bans', (2020) 20(2) *Human Rights Law Review* 361-380; and Eva Brems, 'Misunderstanding the margin?: The reception of the ECtHR's margin of appreciation at the national level,' (2023) 21(3) *I-CON* 884-903; but see, Maria Iglesias Vila, 'Who misunderstands the margin of appreciation?: A reply to Eva Brems,' (2023) 21(3) *I-CON* 904-912.

[26] Considered in Larry Catá Backer, 'Chinese State-Owned Companies and Investment in Latin America and Europe,' (February 1, 2023); available at SSRN: [https://ssrn.com/abstract=4344235] or [http://dx.doi.org/10.2139/ssrn.4344235], last accessed 12 April 2024.

made available to assist the bureaucratic apparatus in its task of investigation to prevent, punish and redress. But it is also possible to read the text as providing the State with a broad margin of appreciation respecting the manner in which prevention, investigation, punishment and redress is undertaken. Thus, for example, it is possible to read the "appropriate steps" in this context as broadening the scope of the right of individuals and collectives aggrieved by human rights abuses to access to courts and to permit the development of appropriate steps through traditional jurisprudence in a way compatible with the legal system of the state (common law, civil law, socialist law, indigenous law, etc.). That then would center individual claimants and the courts rather than a managerial administrative apparatus and technically proficient state officials. And, of course, a State is free to exercise its discretion in choosing the smart mix of approaches.

Third, appropriate steps measures to prevent, investigate, punish, and redress human rights abuses are to be undertaken by a set of specific measures—that is, "through effective policies, legislation, regulations, and adjudication." The text suggests here that the State duty is not limited by nor must these be expressed solely through, the language, rules, and sensibilities of law (however that is expressed and understood in any jurisdiction). Instead, appropriate steps may be developed and undertaken through legislative measures, but also through administrative means (regulations), by the State or natural and legal persons through judicial means, and by the articulation of non-legal guidance. That guidance (policy) may take the form of nonbinding measures, but may also be advanced through means by which States intervene in markets or interact with third parties, including business enterprises. The effect is to reinforce the premise that the State may use all mechanisms which its constitutional order allows a State to access and deploy, in taking appropriate steps to adopt measures to protect against "human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises." Again, States are not required to use all of these mechanisms. Or to utilize them in a particular order or for specific objectives. There is a substantial margin of appreciation[27] for States respecting that smart mix of measures, though the object of all of this is clear—to prevent, investigate, punish and redress human rights abuse—as those terms are understood by the States and in the way in which the State determines is appropriate.

7.2.3 UNGP Principle 1: 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 1. Much of the Commentary restates the text of the Principle. Nonetheless, the Commentary adds some guidance in the restating.

Perhaps the central point of the Commentary is to frame the focus of the entirety of the State Duty to protect human right (UNGP Principles 1-10). "This chapter focuses on preventative measures while chapter III outlines remedial measures." This underscores an important categorical division within the UNGP between preventive measures and remedial measures. Preventive measures focus on legality and compliance. They tend to rely on the operations of administrative organs and on their administration by technically proficient bureaucrats. These produce and apply the rules, regulations, policies and guidance at every phase of economic activity that are meant to detect, prevent or minimize human rights abuses. Prevention of human rights abuse, then, is a function of systems of management and detection. And systems of management detection require data produced by those persons and institutions that belong to the category of actors whose conduct may produce human rights abuse as specified under the legal framework of the State applying measures. Mitigation measures occupy a space between prevention and remediation. Mitigation may be used by prevention based system and by grievance and remedial bodies to the same effect—to limit the abuse. One will originate on the administrative side and focus on systemic integrity; the other will focus on the access to justice side and focus on individuals or communities suffering harm.

[27] The extent of these margins of appreciation are discussed in Chapter 8 and arise under UNGP Principle 3.

Nonetheless, a focus on prevention does not necessarily exclude consideration of mitigation and remedial measures within the UNGP State Duty Principles. Indeed, by its very terms, the State is directed to punish and redress human rights abuses within the black letter of UNGP Principle 1. Remediation and mitigation measures are in any case connected to prevention strategies and the development of "appropriate steps." What is not covered in the State duty section are a more detailed development of the specific mechanisms for remediation, and the principles under which they are to operate. Otherwise, in accord with the General Principles, the UNGP "should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices."[28]

First, the Commentary connects the UNGP General Principles premise that a State duty to protect human rights is grounded in, or at least no less than the sum of a State's "international law obligations [that] require that they respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction." The core premise of "respect, protect, fulfill" was introduced in the General Principles as the basis of the State duty. The General Principles also provided that this duty was, at its minimal core, grounded in whatever international *law* obligations that a State undertook, or was otherwise subject to.[29] While the source of the duty emerges from a State's international law obligations, there are expectations that follow from that premise. The first is that the State will fulfill those obligations . The second is that the fulfillment of those obligations will be undertaken using all of the modes of action permitted to States—that is, under the black letter of Principle 1, "through effective policies, legislation, regulations, and adjudications." The Commentary reinforces the expectation, explicit in the black letter of UNGP Principle 1 that States enjoy a margin of appreciation in determining what mix of measures they will deploy. The extent of that discretion, and the manner of determining its limits, are unspecified. It may be reasonable to assume, however, that any standard that is based either on formal principles (the extent to which a State has formally utilized these measures) or functional principles (the extent to which this mix of measures have been effective as judged by some contextually relevant basis) may be adequate. The consequence is that there may be little coherence in applying standards absent some mandatory international legal obligation to which States are willing to adhere.

That, in turn, suggests an expectation of transposition, especially for those States whose constitutional orders do not provide that international legal obligations are self-executing.[30] And even where it is possible for a State's international legal obligations to be self-executing (or have direct effect), there are complications in the jurisprudence of its application in some domestic legal orders.[31] But expectations are not mandates, and the traditional rules of international law respecting State compliance with their international legal obligations continues to control. Those can, in turn, be changed or developed in ways that extend both the scope and remedies available under international law for State non-compliance. But that is not a matter directly taken up by the UNGP.

None of this appears to suggest that the extent of human rights duties may not be augmented or developed within an international legal order under the UNGP. Rather it suggests that the starting point under the UNGP are

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[28] UNGP General Principles, discussed Chapter 6.
[29] See discussion Chapter 6.
[30] See, Jean-Marie Henckaerts, 'Self-Executing Treaties and the Impact of International Law on National Legal Systems: A Research Guide,' (1998) 26 *International Journal of Legal Information* 56-159 (dated but with many still quite useful sources); David L. Sloss, 'Domestic Application of Treaties,' (2011); available [http://digitalcommons.law.scu.edu/facpubs/635], last accessed 12 April 2024.
[31] See, e.g., David L. Sloss, 'Executing Foster v. Neilson: The Two Step Approach to Analyzing Self-Executing Treaties,' (2012) 53 *Harvard International Law Journal* 135-188 (criticizing the application of the doctrine in the United States).

a State's international legal obligations. It also suggests that "respect, protect, and fulfill" is not limited to or undertaken solely pursuit to positive legal measures. For States, that opening is provided by the reference to policy. These may be based on law but are essentially political and interpretive rather than formal and legal. The political and administrative organs of a State may seek to guide, suggest, lead, or point to specific forms of engagement by "third parties" with their compliance with the "legislation, regulations, and adjudications" produced by State organs. That produces an interesting point of juncture: the duty to respect appears to tie in to the corporate responsibility to respect human rights (elaborated in UNGP Principles 11 et seq.) if only because of the repetition of the word *respect*. Assuming that the word is intended to mean the same thing both as applied to States and to enterprises, then some of the patterns and expectations built around the State Duty to protect, built around the development of the principle of respect, may guide both duty to protect and responsibility to respect. This may become significant especially in those areas where enterprises are vested with quasi-public responsibilities (for example in conflict zones or through compliance regulations) or where States engage directly or indirectly in economic activity (for example through state owned or controlled enterprises).

Second, the Commentary repeats but does not elaborate on the meaning of territoriality or jurisdiction nor on the extent of the application of the State duty beyond business enterprises. The former is taken up in later in UNGP Principles 2 and 23. The subject of applicability to third parties beyond business enterprises is not taken up elsewhere in the UNGP. Though the focus throughout is on "business enterprises", UNGP Principle 1 does make the point that these enterprises area a subset of a much larger pool of legal and natural persons, along with other collectives, whose actions may cause human rights abuses. There is nothing in the UNGP that prevent States from transposing its principles, expectations, and the methods developed for application to business enterprises to other collectives –non-governmental entities, civil society, and the like.

Third, the Commentary emphasizes that the State duty to protect as elaborated in UNGP Principle 1 is "a standard of conduct." That is, it is *a standard of conduct for States*. That conduct centers on a State's compliance with its duty to develop and apply policy, legislation, regulations, and adjudication to "prevent, punish, and redress" adverse human rights impacts (or in the language of INGP Principle 1—human rights abuse). It does not run to the underlying conduct that results in human rights abuse caused by those natural or legal persons who are the objects of expected mandatory State measures. In the language of the Commentary: "Therefore, States are not per se responsible for human rights abuse by private actors."

There are two exceptions to the no-direct liability principle expressed in the Commentary. The first is an attribution rule.[32] Where the human rights abuse can be attributed to the State, then the State may have breached *both* the obligation to "respect, protect, and fulfill" its international legal obligations through policy, legislation, regulation and adjudication, prevent, and the international legal requirements forbidding actions or activities that produced the abuse of human rights. The second speaks to the breach of the duty to implement and monitor systems to respect, protect and fulfill a State's international legal obligations (at a minimum). In the language of the Commentary: "States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse." It is not clear where the authority for assessing these breaches lies or for determining damages lies. The current international architecture supplies a number of judicial mechanisms. Regional human rights

[32] On attribution, generally Kaj Hober, State Responsibility and Attribution, in (Peter Muchlinski et al. (eds) *The Oxford Handbook of International Investment Law* (OUP, 2008), at 553.

institutions also provide judicial mechanisms.[33] In the first instance that may be a matter of domestic law,[34] though principles of sovereign immunity may make any reasonable access to remedy difficult. More likely, the traditional methods for asserting State breach of duty (tied in some juridically acceptable way to a State's international law obligations of course) may apply.[35] Underlying all of this, as well, is the notion of efficient breach of law—where the benefits of breach exceed whatever penalty may be assessed for the harm caused.[36] These may be modified, for example, within the structures of regional human rights charters.[37] The standards are moving targets; the principles may evolve.[38] Lastly, the Commentary underscore the application of the UGP's Genera Principles of equality and fairness, as well rule of law principles (accountability, legal certainty, and procedural and legal transparency).

7.2.4 UNGP Principle 1: Other Authoritative Interpretation/Commentary

7.2.4.1 The Travaux Préparatoires and the 2010 Draft. Draft UNGP Principle 1, circulated from the end of 2010,[39] diverged from the final text in three 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, while the final text speaks to a State duty to protect against "human rights abuse," the 2010 Draft Principle 1 spoke to "business-related human rights abuse." The difference is both obvious and important. Initially the SRSG meant to keep a focus on the core of the mandate as it had evolved since 2005—the focus on business abuse. The final text broadened the State duty in a way in which business related abuse becomes a sub-set of the larger State duty to protect against all human rights abuse. In either case the general principles (the "Introduction" in the 2010 Draft) applies—these touch on the State's "primary role in promoting and protecting

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[33] See, e.g., essays in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (OUP, 2013).
[34] See, André Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts,' (2007) 101(4) *The American Journal of International Law* 760-799.
[35] For a general description of the responsibility of States, the obligations of a breaching State, and the rights of an injured State, see generally, Sean D. Murphy, *Principles of International Law* (2nd ed, West, 2006), pp. 202-220.
[36] Eric A. Posner and Alan Sykes, 'Efficient Breach of International Law: Optimal Remedies, "Legalized Non-Compliance", and Related Issues,' (2011) 110(2) *Michigan Law Review* 243-294 ("a variety of circumstances arise under which violations of international law are desirable from an economic standpoint").
[37] See, e.g., Thomas Buergenthal, 'The Evolving International Human Rights System,' (2006) 100 *Am. J. Int'l L.* 783.
[38] See, e.g., International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), (A/56/10) II (Pt. 2) Yearbook of the International Law Commission.; available [https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf], last accessed 12 April 2024.
[39] 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.

all human rights" (2010 Draft Principles) and the understanding that all human rights for this purpose is no less than the set of international legal obligations to which a State binds itself or is otherwise bound.[40]

Second, the final text speaks to the object of this duty as "third parties, including business enterprises"—the 2010 Draft does not. The implication is that the scope of the State duty is not limited to economic activity or actors—natural or legal—engaged in them. That was an implication absent from the 2010 Draft. The change reflected the overall framing of the UNGP within rather than as an original extension of international human rights law and norms, or of domestic law and norms with human rights positive effects. At the same time it underlines the idea that just as human rights protections may be extended beyond its minima (in this case the extent of a State's international legal obligations), but that they might also extend beyond corporations or business enterprises to include all actors or stakeholders within webs of economic production—the civil society organs that purport to monitor or hold such enterprises and activities accountable, other collectives whose activities might have adverse human rights effects, or the organs and activities of the State itself.

Third, the 2010 Draft Commentary made explicit that the UNGP were not to be read or applied as a legal document or as law. That intention is meant to be manifested by the explicit discussion of the two components of the State duty—one grounded in law and the other in conduct. The object, in line with the discussion of the three pillar framework in 2008,[41] was to emphasize that the UNGP was not meant to be the province of lawyers and the administrative organs of States or other collectives. Rather, the UNGP was to be understood as a meeting and coordinating point for all rules, expectations, and principles around which human rights and its abuses could be developed, recognized, investigated, prevented and protected. That also manifests the SRSG's intent, stated clearly almost for the start of his mandate, that the framework he was developing was not be read as law but as an organizing framework around the multiple and simultaneous rules and expectation structures already a part of global economic activity.[42] These, in turn, are built around the dynamic premise of principled pragmatism—one that saw in the framework and the UNGP that followed, a dynamic instrument rather than a legal codex stuck in the place, space, and time in which it was produced.[43]

In the 2010 Draft Commentary to Principle 1, the legal dimensions of the State duty was to be grounded in the State's international legal obligations. The Draft Commentary acknowledged the obvious—that the text of these human rights instruments varied, sometimes considerably. It did not explicitly acknowledge the other element of variability—that not all States have adopted all of international human rights law, that States may have interposed reservations on their adoption, and that the interpretation of those obligations might be made a function of and limited by domestic constitutional jurisprudential principles. The 2010 Draft Commentary did, however, seek to reduce the bundle of these international legal obligations to two essential functions. The first is the traditional negative obligation their essence: "to refrain, themselves, from violating the enumerated rights of persons within their territory and/or jurisdiction, generally known as the State duty to respect human rights."[44] The second is the less traditional obligation to "'ensure' (or some functionally equivalent verb) the enjoyment or

[40] Recalling, as well, that the foundational principles describe the minimum rather than the maximum extent of the obligations, duties, and responsibilities described. See discussion Chapter 7.2.2 and Chapter 6.3.5.
[41] Discussed Chapter 3.2.4.
[42] See specifically Chapters 3.2-3.3. More generally see the discussion in Chapters 4.2.
[43] Discussed Chapter 3.1.
[44] 2010 SRSG Draft Report UNGP, Principle 1 Commentary.

realization of those rights."[45] This later "essence" speaks to positive obligations,[46] the development of which was noted by the SRSG during his mandate.[47] Yet of critical note in the Draft Commentary is the careful distinction between traditional understanding of State duty as centered on obligation to avoid violating rights, and the emerging principles of human rights as creating positive obligations *in law*. That goes to the character of the foundational principle itself—the minimal expectation of the State duty, then, is in the avoidance of rights harming conduct. It is augmented with the rising expectation of positive obligations to the extent they may be written into or extracted from law.[48]

Interestingly, it is precisely this discussion of the dimensions of the legal dimensions of the State duty to protect that were eliminated in the Commentary to the final version of the UNGP as endorsed. What remained in the final version of the Commentary was the discussion of the *policy dimensions* of the State duty. This policy dimension acquires a new structuring premise—as a "standard of conduct." It is this standard of conduct, far more flexible and useful in any transformation of the expectations around business and human rights, that is meant to be cultivated. The constraints of legal expectations are absent here—both with respect to the State duty and later with respect to the corporate responsibility to respect human rights. Much of the 2010 Draft Commentary's discussion of the State duty as a standard of conduct found its way into the final Commentary text.

7.2.4.2 Pre-Mandate Text. The UNGP Foundational Principles 1 and 2 were written against and in the shadow of nearly a generation of efforts to manage international economic activity.[49] Much of that focused on the instrumentalities of such activities especially where these instrumentalities were large and privately owned. Some of it was focused on territorial integrity grounded in the ability of States to manage entry and exist from their territory and about the rejection of foreign legal frameworks into domestic spaces. These were considered and rejected by the SRSG during the course of his mandate and against which he measured, to a great extent, the construction and character of first the Three Pillar Framework and then the UNGP, especially in the form of the *Norms*.[50] At the same time the SRSG's own involvement in alternative approaches which focused not on the State but on the enterprise within global pathways to economic activity, also contributed to the development of the foundational principles.[51]

7.2.5 Other Glosses

Many people have advanced quite decided views about what the UNGP should or must mean in a variety of contexts. That is precisely what the SRSG hoped might happen as governing collectives continued to adjust whatever might pass for (temporary) consensus in ways that align (more or less) with the tenor of the times and the

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[45] Ibid.
[46] See, e.g., Alina Tryfonidou, 'Positive State Obligations under European Law: A Tool for Achieving Substantive Equality for Sexual Minorities in Europe,' (2020) 13(3) *Erasmus Law Review* 98-112; David Russell, 'Supplementing the European Convention on Human Rights: Legislating for Positive Obligations' (2010) 61 *N Ir Legal Q* 281-294.
[47] See discussion Chapter 5.1.
[48] Discussed in Chapter 5.2 and 5.3.1.
[49] Chapter 4.
[50] This was considered in Chapter4. For the text of the Norms, see, 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.
[51] Discussed Chapters 4.3 and 5.3.1.

influence of those driving particular instances of convergence of opinion about what the UNGP is or ought to be or ought to be used for.[52] This Commentary notes the this sort of scholarship, and its importance for the application of the UNGP from time to time, and perhaps, as a time limited step toward more fundamental transformations.[53] Nonetheless, that literature provides less value as a means of understanding the UNGP itself. Rather this important work goes to the politics of aligning collective acceptance of the application of the UNGP at one point along a spectrum of plausibly justifiable approaches. It does not go to the meaning or understanding of the UNGP itself; "such debates need to be distinguished from assertions about what the UNGPs do or do not say—the text is there, 31 Principles with Commentaries."[54] That, then, certainly was the intent of the SRSG when he noted in response to an assertion about the meaning of the UNGP in a particular context.[55]

Daniel Augenstein has provided a gloss on UNGP Principle 1.[56] He starts by noting that though the UNGP have no binding legal effect, the State duty to which they refer are international legal obligations. As such, he posits, guidance on their interpretation and application must be sought in international law, at least for example, with respect to substantive scope.[57] That is important because, on his reading, UNGP Principle 1 effectively, if indirectly (through the mediative capacity of the State) imposes international human rights obligations on non-state actors—business enterprises in this case.[58] That may well be true as a plausible reading of Principle 1, though by no means the only plausible reading of the relationship of State duty to corporate responsibility.[59] He notes that wile States have an obligation to respect, protect, and fulfil human rights, each with a distinct set of obligations (non-interference, positive measures to prevent abuse, and positive measures to facilitate enjoyment). Principle 1 focuses on the State duty to protect, one which includes both the passive duty to avoid interference and a limited positive obligation to prevent abuse.[60] That leaves open the question of attribution, which Augenstein considers as a means of extending the scope of the State duty consistent with the thrust of Principle 1, and considers the Principle 1 Commentary's statement that States also have "the duty to protect and promote the rule of law"[61] as a basis for reading in duties of respect and fulfill the full range of human rights. That, certainly is one plausible reading of the scope of Principle 1, and perhaps a preferred reading; it is not, however the only reading.[62] Augenstein correctly notes the difficulty of reading Principle 1 as a legal text; yet

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[52] For examples of this type of important engagement, see, e.g., Gerardo Ryes Chavez, 'Awareness, Analysis and Action: A Rights Holder Perspective on Building the Fair Food Movement and the Way Forward for Worker-Driven Social Responsibility,' (2023) 8(1) Business and Human Rights Journal 85-89; Surya Deva. 'The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface,' (2021) 6(2) *Business and Human Rights Journal* 336-351.

[53] Andreas Rasche and Sandra Waddock, 'The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research,' (2021) 6(2) *Business and Human Rights Journal* 227-240 ("they are but a first step in what is likely to be a long-term process of change that may well involve a far more fundamental transformation of business purpose and practice so that their aspirations can be realized" ibid., 239).

[54] "Letter from John Ruggie to Saskia Wilks and Johannes Blanenbach' (19 September 2019), available [https://media.business-humanrights.org/media/documents/files/], last accessed 15 May 2024. documents/19092019_Letter_John_Ruggie.pdf (accessed 9 March 2021).

[55] See Discussion Chapter 1.1.

[56] Daniel Augenstein, 'Guiding Principle 1: Scope of Obligations,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 12-19.

[57] Ibid., p. 12.

[58] Ibid., p. 13.

[59] Chapter 7.2.2.

[60] Augenstein, 'Guiding Principle 1: Scope of Obligations,' pp. 13-14.

[61] UNGP Principle 1 Commentary.

[62] Discussion Chapter 7.2.3-7.2.4.

he also suggests the flexibility of reading the text as policy in the shadow of the more precise language f international law.

Augenstein also explains that Principle 1's direction that the State prevent, investigate, punish and redress human rights abuse through effective policies, legislation, regulations, and adjudication ought to be read broadly.[63] That obligation, he notes, has procedural and substantive dimensions. The procedural dimension focuses on informed decision making, which is in turn informed by international institutions.[64] The substantive dimension requires regulation and control of business enterprise conduct. To that end Augenstein looks to the jurisprudence of the European Court of Human Rights, the UN Committee on Economic, Social, and Cultural Rights, and the Inter-American Court of Human Rights for guidance and draws on the 2nd Pillar provisions for corporate human rights due diligence.[65] At the core of this interpretation is the central role of rules based compliance in conformity with international law. At its limit that may require States to legislate where their compliance and control systems are deficient measured as a function of international standards.[66] Augenstein concludes that UNGP Principle 1 does not distinguish between a State's obligation to respect, to protect, and to fulfill human rights with sufficient clarity. Again, that is a plausible reading; another is that the Principle does not transpose the interpretive guidance of international law as part of a package with its undertaking of international legal obligations, narrowly viewed. Augenstein, then, suggests a preferred interpretation; it is plausible and consistent with the thrust of UNGP Principle. Nonetheless it is not the only plausible reading of that principle.

7.2.6 Applications

7.3 UNGP Principle 2

7.3.1. UNGP Principle 2: Text

> States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

7.3.2.UNGP Principle 2: Textual Commentary

Unlike UNGP Principle 1 that speaks in terms of "must," UNGP Principle 2 speaks in terms of "should." In English, at least, the word "should" has lost its connection to obligation–which remains in the world shall (from which it derives) as well as in the word "must." Instead it now is meant to point to what the speaker or writer considers to be the correct or best thing to do."[67] Interestingly, the Spanish and English versions of the Guiding Principles differ on this point–the English language version speaks to "must" in UNGP Principle 1 and "should" in Principle 2; the Spanish language version speaks to "deben" in both. The infinitive form of the word, "deber" is defined as legal, natural, or divine obligation, [68] but may also include the meaning of "should" in context, though

[63] Augenstein, 'Guiding Principle 1: Scope of Obligations,' pp. 15-18.
[64] Ibid., pp.15-16.
[65] Ibid., p. 16.
[66] Ibid., pp. 16-17.
[67] Cambridge Dictionary, "Should," available [https://dictionary.cambridge.org/us/dictionary/english/should], last accessed 31 March 2024.
[68] Real Academia Española, *Diccionario de la Lengua Española* (Madrid, Real Academia, 1970), P. 422.

in some Spanish speaking places the word "debería" would be used for should. In the French version, the textual distinction of the English version is also preserved.[69]

There useful insights for commentary that can be extracted from this comparison. These insights do not merely serve to remind the reader about translation differences that reflect culture usage and difference, an old but still important element of interpretation across languages. It also suggests the need for careful reading within a language. In this case, "must" and "should" are related but not identical, with "ought" in between them (derived from "owe" but now referencing a duty or obligation which is stronger than "should" which goes more toward expediency or better practice).[70]

The range of meaning that can be read into the text of UNGP Principle 2 depends almost entirely on which of the words that constitute its text receive the greater emphasis. The gist of the principle is not ambiguous– (1) that there is an expectation that business enterprises respect human rights; (2) that this expectation extends throughout the operation of business enterprises; and (3) that States "should"/"deben"/ "devraient" clearly announce ("set out"/"enunciar"/"énoncer") that expectation. It might be noted that the notion of domicile remains for the most part a creature of national law, including its conflicts of law. These may vary considerably even among States within a single legal "family."[71]

One way of reading the text is that a "best practice" or "preferred course" (the should) for States is to declare their adherence to the UNGP Second Pillar Principles touching on the corporate responsibility to respect human rights, if only as a matter of policy, or as a matter of law. That is both simple and straightforward at first blush. It affirms something that is both obvious and yet requires expression. It requires expression because the State duty and the Corporate responsibility do not operate on the same jurisdictional plane. Nor do their jurisprudential scope necessarily align; the State duty is limited (at its minimum) to those international legal obligations that bind the State or to which the State is bound;[72] the corporate responsibility is defined (at its core) to compliance with the International Bill of Human Rights and the ILO's Declaration on Fundamental Principles and Rights at Work.[73] This best practice principle then serves to declare a State adherence to the UNGP framework; at the very least; and signals an best practice undertaking to ensure some sort of coordination between the legalities and policy of the State duty with the breadth of the corporate responsibility.

A broader reading would focus on the "setting out" language of UNGP Principle 2. That reading would take the text to describe an undertaking to facilitate or advance the Corporate responsibility to protect second pillar "within their territory and/or jurisdiction" (UNGP Principle 2). This would extend, potentially, the scope of State minimum international legal obligations, at least as a matter of policy and practice. That, in turn, might suggest the reason that the wording of UNGP Principle 2 uses the word "should"/"deben"/ "devraient" rather than UNGP Principle 1's "must"/"deben"/ "ont" is to align the "no new legal obligation" premise of the UNGP

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[69] UNGP Principle 1 ("ont l'obligation") and UNGP Principle 2 (devraient énoncer).
[70] Etymology Online , "ought", available [https://www.etymonline.com/word/ought], last accessed 20 April 2024.
[71] See, e.g., Peter McEleavy and Peter McEleavy, 'Regression and Reform in the Law of Domicile,' (2008) 56(2) *International and Comparative Law Quarterly* 453-462; Hertz Corp. v. Friend, 559 U.S. 77 (2010) (nerve center test for domicile). Concepts of domicile may be impacted by a jurisprudence of contacts or connection that go to the power of the courts of a particular place to assert authority over an entity or person. See, generally Tobias H. Tröger, ' Choice of Jurisdiction in European Corporate Law - Perspectives of European Corporate Governance,' (2005) 6(1) *European Business Organization Law Review* 3-64.
[72] UNGP General Principles, discussion at Chapter 6.
[73] UNGP Principal 13.

General Principles with the connection between the State duty and corporate responsibility pillars through a State-based management function (e.g. policy/practice) indicated in UNGP Principle 1. Since the General Principles provide that the UNGP does not create new obligations, then it is necessary to urge rather than to impose the sort of connective obligations that are at once essential to the structural integrity of the UNGP and at the same time require some sort of positive adoption (through law, policy, or otherwise–e.g., UNGP Principle 1) by the State.

Another way of reading the text is that the "best practice" or "preferred course" (the "should") focuses on two clusters of text. The first is the application of this best practice to "all business enterprises domiciled in their territory and/or jurisdiction." The second is the application to business enterprises "throughout their operations." Together these suggest a much broader application of expectations, and with it the reach of State law, policy, or other measures, through the UNGP Principles respecting responsibility to respect and applied to all of the operations of business enterprises domiciled within the territory or subject to the jurisdiction of the State. That does not mean that the text of UNGP Principle 2 requires that result, but one might plausibly reading the text as permitting it.

There are several ways to read the "all business enterprises domiciled in their territory and/or jurisdiction." One is to focus on business enterprises as a set of interlinked legal persons. At its broadest, that could extend the application of the expectation to any business enterprise domiciled within the territory/jurisdiction of the State irrespective of its position within global production chains, and without regard to their leverage or influence within that production chain, as long as there is a connection. That connection might be based on control, or more narrowly on ownership (whether one is owned or owns another). Another is to focus on the chains of production. One could, for instance, understand its scope as limited to those business enterprises who control production chains, where-ever situated and however constituted. A broader reading would include all enterprises within a chain of production. At its broadest, it might include all enterprises wherever situated as long as their activity has an effect of some sort within the territory and/or jurisdiction of the State. The text does not express a preference.[74] Alternatively one can focus on the territory and/or jurisdictional limits of domicile. A jurisdictional limit may align with territorial limits. Alternatively, jurisdictional limits may be detached from territory. It can follow a domiciled enterprise anywhere on earth (or elsewhere one can suppose); it can extend to the effects of the actions of the enterprise or its connected enterprises (connected by ownership or relationship) to establish the limits of the reach of the expectation running through an enterprise, so defined by reason of connections producing effect.

The second is the breadth of the expectations. UNGP Principle 2 would extend State expectations respecting the corporate responsibility to respect human rights "throughout their operations"/"en todas sus actividades"/"dans toutes leurs activités" (UNGP Principle 2). Again, one might read this narrowly or broadly; the text supports both. In its narrowest sense, one might read the text as extending only to the direct operations undertaken by a business enterprise domiciled in the State's territory or subject to its jurisdiction. And it would extend no farther. Assuming economic activity undertaken in corporate form, that might extend only to the direct operations of that corporation, where ever undertaken. But it would not extend to its subsidiaries, contract partners, or their operations, even if intimately connected with the operations of the enterprise subject to expectations. At its broadest, the opposite would be true. First one would take the business enterprise to be defined in economic rather than legal terms to mean the entirety of economic activity designed to bring a particular product or service to completion and sale to an ultimate consumer. Second, one would take the entirety of all activities connected with that endeavor as the limits of the clustering of enterprises subject to the expectations, irrespective of the nature of the relationships between them. Of course, there is nothing mandatory about any of

[74] For a discussion of ways of approaching an understanding of multinational enterprises, see, Larry Catá Backer,

these plausible readings; but they do provide States with a broad range of possible engagement with the UNGP consistent with its text, but with substantially varied applications.

Two important points follow. The first is that UNGP Principle 2 appear to avoid a legalistic view of economic activity that focuses on specific forms of enterprise and their characteristics at law. One does not speak to corporations in UNGP Principle 2 but to economic enterprises. An enterprise, economic in character, may be undertaken by natural and legal persons, or combinations of them. They may be structures through public or private law, and may be manifested as ownership or contractual relationships. The object is some sort of coherent aggregation of economic activity marked by some sort of unifying purpose—the enterprise of the business. The second is that the State appears only to be constrained by traditional notions of sovereign limitation (territory and/or jurisdiction) only with respect to the reach of the class of enterprises onto which it might impose its expectations. It is otherwise not limited with respect to the location of the effects of those enterprises. Indeed, the detachment of "operations" from "domicile", as well as the detachment of "business" from "enterprise" suggests that a State might extend its expectations worldwide. The only limitation appears to be some connection between the business, its enterprise, and its operations, all somehow tied back to the connection of domicile of some element of the enterprise is all that might be needed for the State to extend its expectations—should it choose to—to the global operations of any domiciliary. Or a State might chose to do no such thing consistent with its duty; remaining happy or at least contented in abiding by its international legal obligations to the extent it deems them to be in their interest. If that is the case, the State would likely limit its expectation to legal compliance to the extent its courts apply their jurisprudence of jurisdiction.

Lastly, it is worth spending a brief moment considering the object of the expectation: the operations of the business enterprise. In the English version the reference to "operations," from the Latin signifying action, or performance, effort or work,[75] might appear to be related to those activities of the business enterprise related specifically to its production. The French and Spanish versions of the UNGP reference is to "actividades/activités" rather than to "operaciones/operations". One might at first blush note that the English term is narrower than the Spanish/French versions. Yet an argument might be made that in this context the two terms ought to be read as substantially similar—that is that with respect to business activities of legal persons there is no space between operations and activities. Of course, where one speaks about the business activities of natural persons, the same may not be true.

That leaves one with the role of the word "clearly" in the text. On the one hand clearly might refer to the substance of the expectations. That is, clearly might be read to mean that the expectations must comport with the substance of the corporate responsibility to respect, and that, equally clearly, of the State's commitment to ensuring that the full scope of this responsibility will be "expected" of business enterprises domiciled in its territory or subject to its jurisdiction with respect to all of their operations (or perhaps more broadly within their activities). That is, that the State must be clear about its intentions to use its power, however constituted, to advance fully the expectations built into the corporate responsibility to protect with respect to those enterprises over which it may assert a measure of authority.

From the text, then, it is possible to glean a rage of plausible interpretations supporting application in a variety of different ways, all of which are consistent with the text. *At one end*, UNGP Principle 2 merely suggests a best practice that States to state or express ("set out") clearly respecting business enterprise respect for human rights throughout their operations. The expectation is respect for human rights. To those ends the State may, but need not, deploy effective policies, legislation, regulation, and adjudication" (UNGP Principle 1). But it need not,

[75] Etymology Online, "operation" Available [https://www.etymonline.com/word/operation] last accessed 22 April 2024.

and indeed, the expectation might run only to legal compliance of both domestic law (to the extent applicable) and the international legal obligation of the State expressing its expectation (UNGP General Principles). Those expectations might run only to those legal and natural persons domiciled in the territory or subject to a State's jurisdiction, however that is interpreted under domestic law. *At the other end*, one might read the text as suggesting that a foundational part of the State duty to protect human rights is the use of State authority to ensure business enterprise respect for human rights everywhere they operate and with respect to the entirety of their operations. That use of authority would extend to all operations of the domiciled enterprise, irrespective of the ways in which those operations are connected by ownership or other forms of connection. That State duty, expressed through the corporate responsibility, might also require the State to enforce such duty even beyond the extent of a State's international legal obligations. The effect would be to align, at a minimum, the extent of the corporate responsibility to respect as specified in UNGP Principle 12,[76] with the minimum breadth of a State's international legal obligations. In between these positions any combination could be put forward as a plausible application of UNGP Principle 2. It remains to be seen the extent to which any of these readings is consistent with the official guidance provided in the Commentary.

7.3.3 UNGP Principle 2: Official Commentary

The Official Commentary focuses almost exclusively on the relationship between the UNGP's State duty and the extent to which a State ought to project its political/legal authority into the territories and jurisdictions of other States. The issue of extraterritoriality had been one the SRSG had been wrestling with almost from the start of his mandate.[77] The Commentary starts by summarizing the state of international law: such extraterritorial projections of sovereign authority are not required and within certain constraints are not entirely prohibited.[78] The Commentary notes, however, that the preference among "some human rights treaty bodies" has been to recommend such projections of sovereign authority to prevent abuse roughly along the lines set out in UNGP Principle 2's black letter. The intent that one gathers from the Commentary, then, is that the focus is not so much on the State's duty as applied internally to business activities within its territory or jurisdiction—but to those activities that take place outside to a sovereign's territory or jurisdiction that might be "domesticated" by its connection to a natural or legal person, or an activity sufficiently robust as to take on the character of domicile, presumably under the law of the State doing the domiciling.[79]

UNGP Principle 2, then, is meant to be a measure for addressing the issue of extraterritorial actions by States without actually speaking either to extraterritoriality, or to suggest that such projections of political authority actually be mandated. This suggests the reasons, perhaps, why the requirements of UNGP Principle 1 are set out as mandatory, and those of UNGP Principle 2 are characterized as expressions of strongly suggested best practice. UNGP Principle 2, then, is meant to provide a doorway that a willing State may open and pass through, should it choose to do so. Or it permits a State to keep that door closed.

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[76] Considered in more detail in Chapter .

[77] See, 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 2: Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops A/HRC/4/35/Add.2 (15 February 2007); available [https://undocs.org/en/A/HRC/4/35/Add.2]; last accessed 25 February 2024. See also discussion Chapter 3.2.3.2.

[78] UNGP Principle 2 Commentary ("At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.").

[79] See discussion 7.3.2.

The preference in the Commentary appears to be for States to open and march through that doorway toward the constitution of an extraterritorial engagement. What makes it palatable is that the objective is not for States to push out their own domestic agendas but rather to act as agents for and the administrators of an international system of standards and expectations (the corporate responsibility to respect human rights) on the basis of which all States (in the ideal version of this vision) would be seeking to fulfill the same set of expectations. This is bound up in the Commentary's case for setting out the business expectation. "The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation."[80] The expectations extend to all domiciliaries but are especially relevant where the State is itself "involved in or supports those businesses."[81] State involvement with business enterprises is more closely developed in UNGP Principles 4-6.[82]

The last paragraph of UNGP Principle 2's Commentary tales up the issue of the sorts of approaches that might be taken to operationalize the expectations through sovereign measures. The Commentary speaks to "domestic measures with extraterritorial implications"—such as the development of broad reporting requirements, the utilization of the OECD's mechanisms,[83] and the interposition of performance standards tied to support for overseas investment. The Commentary also suggest direct extraterritorial legislation and enforcement. The scope of these, the Commentary suggests, may be a function of the extent to which these might be grounded in multilateral agreements. However, though the Commentary expresses a preference, the text of the UNGP Principle 2 still preserves the choice in and to the State.

It might follow, though it is unstated in the text, that States that might find themselves on the wrong end of the outward projection of national power, may also be free to protect the rights, including the human rights of its populations and institutions, through countermeasures. That some states might choose to project power does not means that other are prohibited from resisting that projection, within the framework of the UNGP. That this outward projection may be to fulfill the corporate responsibility to respect human rights and the international law it applies makes no difference. The UNGP General Principles remind one that every State's duty to protect is grounded only in and to the extent of its international legal obligations; where these are not the same as the international legal obligations identified in the corporate responsibility, then the State remains free to undertake only its duty.

7.3.4 UNGP Principle 2: Other Authoritative Interpretation/Commentary

7.3.4.1 The *Travaux Préparatoires and the 2010 Draft*. Draft UNGP Principle 2, circulated from the end of 2010,[84] diverged from the final text in some important respects. These differences may shed light on the

[80] UNGP Principle 2 Commentary.
[81] Ibid.
[82] Discussed Chapter 9.
[83] OECD, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD 2023) (2023 Guidelines). For application after the 2023 amendments, see, e.g., Ekaterina Aristova, Catherine Higham, and Joana Setzer, 'Corporate Climate Change Responsibilities under the OECD Guidelines for Multinational Enterprises,' (2024) 73 ICLQ 505-525.
[84] 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-

meaning and plausible interpretation of text, or at least limit the scope of the plausibility of textual interpretation and application.

First, while both the 2010 Draft and the final text of UNGP Principle 2 spoke in terms of "should" rather than "ought" or "must,"[85] the 2010 Draft Principle 2 directed willing States to "encourage" business enterprises to respect human rights. The UNGP Principle 2 final version provided that States should "clearly set out expectations." Second, the 2010 Draft Principle 2 was more specific with respect to the scope of the encouragement or expectation. The 2010 Draft provided for such respect was understood to extend "throughout their global operations, including those conducted by their subsidiaries and other related legal entities." This was perhaps meant to relate to the definition of "business enterprise" set out in the 2010 Draft Principles.[86]

The 2010 Draft Principle 2 Commentary focused almost exclusively on extraterritoriality. Much of that language was incorporated in the final version Commentary though in condensed form. It noted that the issue was "complex and sensitive." A substantial part of the 2010 Principle 2 Commentary also dealt with permissible options that might be available. The essence of the Commentary suggested that States that chose to project their regulatory authority beyond their territory and/or jurisdiction be certain of the recognized jurisdictional basis on which that effort is undertaken.

Beyond that, the textual differences suggest that between draft and final version of the UNGP Principle 2, the nature of State involvement in the corporate responsibility to respect human rights of domiciled business enterprises became more elaborated. The language changed from an encouragement to respect, to an urging for the articulation of an expectation. That, in turn, suggested that the best practice encouraged through State action in Principle 2 contain substantially more detail than what might have been extracted form a reading of the draft 2010 Principle 2—a surmise that was encouraged by the new language in the final version of the Official Comment. Read together, it becomes clearer that while States continued to be encouraged (strongly) to undertake the recommendation that was UNGP Principle 2—the scope of that suggestion changed from setting a general tone at the top to one that encouraged substantially more guidance. That, in turn, appears to suggest that the autonomy of the corporate responsibility might be made subject to guidance from and management through the State. At the same time, that attachment of the State duty and the corporate responsibility was also a function of an alignment of the international legal obligations on which both are grounded.

7.3.4.2 Pre-Mandate Text. Most relevant for a gloss on UNGP Principle 2 are the forms and structures of the UN Global Compact.[87] That effort represented a way of addressing governance gaps at the global level by developing standards at the top and implementation at the operational level.[88] But in the case of UNGP Principle 2 it is one in which the State can be reinserted as a mechanism for guidance and compliance. The standards are still generated at the international level; implementation still occurs at the operational level. But the State now

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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.

[85] Chapter 7.3.2.

[86] The 2010 Draft Principles defined the term business enterprise as referring to "to all companies, both transnational and others, regardless of sector or country of domicile or operation, of any size, ownership form or structure." 2010 SRSG Draft Report UNGP, Definitions, Annex Part B, p. 27.

[87] See, e.g., Christian Voegtlin, and Nicola M. Pless, 'Global Governance: CSR and the Role of the UN Global Compact,' (2014) 122 *J Bus Ethics* 179-191.

[88] Cf., Kenneth Abbott, K. W., & David Snidal, 'International regulation without international government: Improving IO performance through orchestration. Review of International Organizations,' (2010) 5(3) *Review of International Organizations* 315–344.

coordinates with an authority that may be by exercised by international organizations. The insights were reflected in the Travaux Préparatoire.[89] Indeed, the role of the SRSG in both the development of the Global Compact and the UNGP suggests the connection between the two, at least at a conceptual level. "While Ruggie's mandate was clear, the UNGPs do not themselves constitute law or regulation. Rather the principles, particularly principle 2, rest on a core set of social norms intended to guide practice."[90]

7.3.5 Other Glosses.

One must again distinguish between glosses on the UNGP, and efforts to argue for one or another best reading among the range of plausible approaches to an interpretation and application of the UNGP. Arguments toward a "best" or "sound" interpretation does not go to the meaning or understanding of the UNGP itself but rather to debates about its application in specific times, places, and spaces. As the SRSG noted: "such debates need to be distinguished from assertions about what the UNGPs do or do not say—the text is there, 31 Principles with Commentaries."[91] That, then, certainly was the intent of the SRSG when he noted in response to an assertion about the meaning of the UNGP in a particular context.[92]

Claire Methven O'Brien has provided a gloss on UNGP Principle 1.[93] She situates UNGP Principle 2 between Principle 1's State duty to protect against human rights abuse and UNGP Principle 3's illustration of those appropriate steps.[94] Methven O'Brien posits two principal functions of UNGP Principle 2. The first is to highlight the need for States to adopt regulatory measures addressing the corporate responsibility to respect human rights "as such."[95] The second is that this regulation ought to respect the transnational character of the object of regulation.[96] As such, UNGP Principle 2 is a means of addressing a key governance gaps that was, in some respects, a major driver of the ARAG's mandate,[97] without seeking to change existing expectations about the operation of the State system and of the core principles of private law.[98] In this respect Principle 2 does not so much constitute mandates as it provides a normative foundation for a large range of possible State efforts.

Methven O'Brien focuses on the positive obligations that may be read into both UNGP Principles 1 and 2 as a function of the State's response to human rights abuses.[99] Drawing in principles and application of international law respecting human rights, Methven O'Brien touches on the context dependence of reasonable and appropriate measures, and the broad scope of discretion enjoyed by States in crafting and applying the

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[89] Discussed Chapter 3, 4.3.
[90] Andreas Rasche and Sandra Waddock, 'The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research,' (2021) 6(2) *Business and Human Rights Journal* 227-240, 230.
[91] "Letter from John Ruggie to Saskia Wilks and Johannes Blanenbach' (19 September 2019), available [https://media.business-humanrights.org/media/documents/files/], last accessed 15 May 2024. documents/19092019_Letter_John_Ruggie.pdf (accessed 9 March 2021).
[92] See Discussion Chapter 1.1.
[93] Claire Methven O'Brien, 'Guiding Principle 2: Expecting Business to Protect Human Rights,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 20-27.
[94] Ibid., p. 20.
[95] Ibid., p. 21.
[96] Ibid.
[97] Chapters 2.3, 3.2, and 5.2.
[98] Methven O'Brien, 'Guiding Principle 2: Expecting Business to Protect Human Rights,' p. 21.
[99] Ibid., pp. 21-23.

expectations of UNGP Principle 2. She notes as well the possible relevance of principles of proportionality[100]—a principle so dear to international and European jurisprudence and normative construction.[101] Consider, however the then current division between those who view human rights as trumps and those advancing proportionality principles.[102] And the assumption that business enterprises may not also be bearers of human rights that might require protection—plausible under UNGP Principle 2, might make proportionality even more interesting.[103] The issue is important, but it is not clear that the UNGP means to resolve them, however much its drafters might have a specific preference for one over the other; and Methven O'Brien suggests some of the scope of the breadth of the plausible consistent with contemporary international law principles. [104] Methven O'Brien then suggests the utility of a contemporary expression of the expectations suggestion in UNGP Principle 2—the National Action Plan, and corporate human rights due diligence laws.[105] With respect to the former, the UN Working Group on Business and Human Rights as sought to encourage all States to produce a national action plan,[106] one encouraged by civil society elements.[107] Indeed, UNGP Principle 2 lends itself to the business of National Action Plans as a vehicle for the expectations it suggests; they have been criticized as well, though for content and focus.[108] With respect to the later, Methven O'Brien suggests that human rights due diligence is a primary mechanism through which Principle 2 might be operationalized, and other compliance based disclosure systems.[109] That has certainly been the case in Europe through the middle of the 2020s. Nonetheless, UNGP Principle 2 permits other means of producing expectations, and at its limit, permits a State to avoid the development of such expectations at all.[110]

Lastly, Methven O'Brien considers the principle of extraterritoriality.[111] She notes that the position on extraterritoriality is expressed as a discretionary choice limited by recognized jurisdictional bases. But she also notes that international bodies have sought to extend that principle. That extension, in turn, is grounded in the use of States as agents for the application of international law in a more or less consistent way. The idea appears to be that States are not applying their law extraterritorially but rather international law—and that law would be applied irrespective of sovereign borders, at least in theory. Both that insight about the specific and narrow understanding

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[100] Ibid., pp. 22-23.
[101] Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP, 2012); Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review,'(2010) 4 *Law & Ethics Hum. Rts.* 141-175, 142 (2010).
[102] Consider Mattias Klatt and Moritz Meister, '′Proportionality - A Benefit to Human Rights?: Remarks on the I-CON Controversy′ (2012) 10 Int′l J Const L 687-708.
[103] Consider Eduardo Gill-Pedro, 'Proportionality and the Human Rights of Companies Under the ECHR—Whose Interests are at Stake?,' (2020) 89 *Nordic Journal of International Law* 327-342.
[104] Methven O'Brien, 'Guiding Principle 2: Expecting Business to Protect Human Rights,' pp. 22-23.
[105] Ibid., pp. 23-26.
[106] UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (Geneva and New York: United Nations, Version 1.0 2014); available [https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG__NAPGuidance.pdf], last accessed 20 May 2024.
[107] In 2024, for example, the Danish Institute for Human Rights had developed and posted online NAP resources. See Danish Institute for Human Rights, National Action Plans on Business and Human Rights (nd); available [https://globalnaps.org/], las accessed 2 May 2024.
[108] Larry Catá Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All,' (2015) 38(2) *Fordham Int'l L J* 457-542, 468-491.
[109] Methven O'Brien, 'Guiding Principle 2: Expecting Business to Protect Human Rights,' pp. 24-26.
[110] Chapter 7.3.2.
[111] Methven O'Brien, 'Guiding Principle 2: Expecting Business to Protect Human Rights,' pp. 26-27.

of extraterritoriality and its intimate connection with the application of international law also reflects the SRSG's position reflecting both current law and aspirational goals.[112]

7.3.6 Applications

7.4 Conclusion

UNGP Principles 1 and 2 set out the foundational principles of the State duty to protect human rights. Those principles describe a set of mandatory duties (Principle 1) and a set of and urged practices (Principle 2) that would connect the State duty with the corporate responsibility through the guiding management of the State as the administrative agent of international law. Like the rest of the UNGP they are best not read as legal text. For lawyers that is hard. For functionaries in institutions—public, enterprise or civil society--this may be even harder, as the precision of legal text provides its own semiotics (a coded language with rules for interpretation and collective meaning making in an authoritative way) for embracing or avoiding duty or responsibility.[113] But neither are these foundational principles to be read as directions to public or private functionaries. They are expressions of policies—of political choice grounded in the expectations of a State's legal and political culture, and overseen by those charged with the direction of the political apparatus of the State, on the one hand, and the management of business enterprises on the other. Policy documents may describe a set of preferred outcomes, but they tend to leave a sometimes significant space for determining the means by which that objective is to be reached. The SRSG made the objective of the UNGP quite clear—a "goal-belief that the imbalance between public and private sectors has created an imbalance in the impacts of economic activity on human rights, imbalances that need correction by better aligning private sector economic activity with public sector human rights guardrails."[114] That goal-belief, in turn, is to be effectuated by "enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to as socially sustainable globalization."[115]

Within that general objective that animates the UNGP as a whole, the State duty presents its own challenges—not as a cluster of legal commands and norms, but as a set of social norms that produce the foundational expectations through which systems of collective management become feasible. These were described by the SRSG in the 2008 SRSG Report 8/5:

> The general nature of the duty to protect is well understood by human rights experts within governments and beyond. What seems less well internalized is the diverse array of policy domains through which States may fulfil this duty with respect to business activities, including how to foster a corporate culture respectful of human rights at home and abroad. This should be viewed as an urgent policy priority for governments - necessitated by the escalating exposure of

[112] Discussed Chapter 3.2.3. See, 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 2: Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops A/HRC/4/35/Add.2 (15 February 2007); available [https://undocs.org/en/A/HRC/4/35/Add.2]; last accessed 25 February 2024
[113] Roberta Kevelson, *Law as a System of Signs* (New York: Plenum Press, 1988); p. 18; Jan M. Broekman and Larry Cata Backer, *Lawyers Making Meaning: The Semiotics of Law in Legal education II* (Dordrecht: Springer, 2013), pp. 45-52.
[114] Chapter 2.3.1.
[115] UNGP General Principles, and Chapter 6.

> people and communities to corporate-related abuses, and the growing exposure of companies to social risks they clearly cannot manage adequately on their own.[116]

It is within these premises that one can most usefully approach the foundational principles of the UNGP's State duty to protect human rights. Those principles, in turn, are to be read against the general principles[117] that serve as the overall structure of the UNGP framework: (1) the State duty is undertaken, at a minimum, within a State's specific obligations to do three things–to respect, to protect, and to fulfill human rights; (2) within that duty business enterprises are to be understood as specialized social organs functionally differentiated from other specialized social organs (for example civil society), all of which are required to undertake two sets of obligations–to comply with law and to respect human rights; (3) these obligations of the State and of business enterprises must be matched with appropriate remedy; (4) the duties and responsibilities apply to all States and business enterprises; (5) the principles are to be read as a coherent whole and interpreted to enhance standards and practices that achieve tangible results for rights bearers; (6) that the UNGP do not create but neither do they prohibit, and in some instance encourage, new international law obligations for States; and (7) the rights and duties described are to be applied fairly and to further apply the principle of non-discrimination.

Within those overarching premises, UNGP Principle 1 re-states the classical duty of States to undertake their duty to protect against human rights abuse. That duty of protection operates at its most acute within the State's territory and/or jurisdiction. And it applies to human rights abuses by all third parties, with a specific emphasis on business enterprises. That duty is understood as requiring compliance with a State 's international legal obligation but also inviting a broader and more comprehensive view of the scope of the duty in every respect. That duty is not understood as a legal duty, though its sources are based, at a minimum, on the international legal obligations of States. Nonetheless, that duty is fulfilled by the taking of appropriate steps to undertake four inter-related actions with respect to such human rights abuse–prevention, investigation, punishment and redress. To those ends, the State is reminded that the duty is not fulfilled merely by the enactment and enforcement of law, but also by a combination of policy, legislation, regulation, and adjudication. The duty arises in law but is manifested in both the social language of politics, and in the formal disciplinary language of law.

In contrast, UNGP Principle 2 speaks to a "best practice" or "preferred course" (the "should") for States is to solidify their connection to and adherence of the UNGP Second Pillar Principles touching on the corporate responsibility to respect human rights. That connection is neither fixed nor specified beyond the recommendation of the core expectation that business enterprises respect human rights everywhere they operate. Yet the Principle provides a quite road scope of discretion in setting the expectation details, and in the way that the State will guide compliance with those expectations, if only as a matter of policy, or as a matter of law. State may, consistent with Principle 2 merely express a preference for compliance, or they may adopt a comprehensive set of legal measures to ensure that a specific form of that compliance is undertaken.[118] Principle 2, then, serves both as an invitation to

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[116] 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 (23 May 2008); available [https://undocs.org/en/A/HRC/8/5/Add.2], last accessed 25 February 2024, ¶ 27.

[117] Considered in Chapter 6.

[118] Council of the European Union, Press Release: 'Corporate Sustainability due diligence: Council gives its final approval,' 24 May 2024; available [https://www.consilium.europa.eu/en/press/press-releases/2024/05/24/corporate-sustainability-due-diligence-council-gives-its-final-approval/], last accessed 25 May 2024 ("The directive adopted today introduces obligations for large companies regarding adverse impacts of their activities on human rights and environmental protection. It also lays down the liabilities linked to these obligations. The rules concern not only the companies' operations, but also the activities of their subsidiaries, and those of their business partners along the companies' chain of activities." Ibid.).

draw States into global economic activity as agents of international law and norms, and to more tightly connect the markets driven social norm and private law grounded corporate responsibility with the compliance and law/policy accountability structures of public law. Even if the invitation to project national international obligations outward through the operations of locally domiciled enterprises, UNGP Principle 2 might serve as a means of more consciously coordinating the public duty of States and the private responsibility of enterprises each within their spheres of action, and each in accordance with their respective social functions.

In both Principles, though, it is worth emphasizing that neither posits a single best or correct approach against which State action or choices may be measures. State duty, to the extent the State undertakes the narrowest approach, is limited to its international legal obligations, but it need not be. That is for the State to decide. Likewise, the setting out of State expectations that all business respect human rights may take contextually differentiated forms, though it need not. The State duty can apply with equal force to organizations of human rights defenders as it does to business enterprises, and even State organs, though it need not. The nature of appropriate steps to prevent, investigate, punish and redress may take on a vastly different set of forms, guided by the ruling ideology of a political-economic system, and the contextually variegated approaches to judging these tasks in themselves and against each other. The same applies to the choice of effective measures.

At its essence, though, there is a core set of expectations around which coherent structures can be developed. The object of duty are human rights abuses. The sources of those abuses are third parties, that include business enterprises. The toolkit for protecting against human rights abuses by third parties include prevention, investigation, punishment and redress. The means by which these tools can be invoked include the whole of the palette of State or public power—policies, legislation, regulation, and adjudication. And the measure against which all of this is to be judged is *effectiveness*. Likewise, best practice suggests an alignment between the 1st and 2nd pillars. This can be achieved through the development of a set of expectations that all business enterprises that a State may assert public power respect human rights. That expectation may reach the entirety of the business enterprise's operations. Yet each of those terms may be understood and applied in quite distinct ways. All of this variation is plausibly consistent with the intent of the foundational principles. The rest is advocacy, ideology, politics, and power.