

# The State Duty to Protect Human Rights: Operational Principles—General State Regulatory and Policy Functions (UNGP Principle ¶ 3)

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## 8.1 Introduction

After the unnumbered introductory section entitled “General Principles” which serves as a chapeau to the framing and structural principles that follow,<sup>1</sup> 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)<sup>2</sup> and the premises on which they were elaborated.<sup>3</sup> The Three Pillar Framework was welcomed by the UNHRC and on the elaboration of which the SRSG’s mandate was extended.<sup>4</sup> 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.

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);<sup>5</sup> “The State-Business Nexus;” (UNGP Principles 4-6);<sup>6</sup> “Supporting

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<sup>1</sup> Discussed Chapter 6.1.

<sup>2</sup> 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.

<sup>3</sup> Discussed Chapter 3.2.4.2.

<sup>4</sup> 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](https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf)] (hereafter the UNHRC 2008 Resolution). Discussed Chapter 3.3.2.

<sup>5</sup> Discussed in Chapter 8.

<sup>6</sup> Discussed in Chapter 9.

Respect for Human Rights in Conflict-Affected Areas,” (UNGP Principle 7);<sup>7</sup> and “Ensuring Policy Coherence,” (UNGP Principles 8-10).<sup>8</sup> Its conceptual genesis was developed in two of the SRSG’s 2007 Reports.<sup>9</sup> This Chapter considers the operational principles to the UNGP’s State duty to protect human rights.

Unlike UNGP Principles 1 and 2, which set the foundational principles for the State duty to protect human rights, UNGP Principle 3 turns to the first of the specification of principles under which the foundational directives can be implemented. The operational principles are just that—guidance respecting the tools available to States connected to the broad objectives of the foundational principles to the fulfillment of which their deployment is to be directed. UNGP Principle 3 serves as the expression of the SRSG’s second mandate from the UN Human Rights Council to operationalize the Three Pillar framework introduced by the SRSG in his 2008 Reports.<sup>10</sup> This operationalization was to be undertaken through the elaboration of “‘practical recommendations’ and ‘concrete guidance’ to states, businesses and other social actors on its implementation.”<sup>11</sup> The resulting framework, condensed to a short text and longer Official Commentary, provide a dense set of principles, expectations, and interpretive challenges. The fundamental interpretive characteristic of the UNGP as a whole, however, remains unchanged. The principle is grounded in a fixed set of objectives, but they produce a set of pathways toward its realization that create a sometimes quite broad range of discretionary choices that can be used to reflect sometimes substantial differences in conditions on the ground and in the conceptual framing of political-economic models. Those discretionary choices, then, can also produce a certain amount of incoherence at the international level, which reflect the sometimes irreconcilable differences between fundamental premises among political systems and the way in which they identify and value actions and effects with human rights impacts.

## 8.2 UNGP Principle 3 Text

UNGP Principle 3 Text develops guidance on general State regulatory and policy functions and is divided into four parts.

3. In meeting their duty to protect, States should:
  - (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

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<sup>7</sup> Discussed Chapter 10.

<sup>8</sup> Discussed Chapter 11.

<sup>9</sup> 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.

<sup>10</sup> Discussed Chapter 3.2.4.

<sup>11</sup> UNHRC Resolution 8/7 2008--Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/Res/8/7 (18 June 2008) [[https://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_8\\_7.pdf](https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf)]; ¶ 4(a).

- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

### 8.3 UNGP Principle 3: Textual Commentary

UNGP Principle 3 makes the scope of its content clear. It describes the spectrum of actions available to States that seek to meet their duty to protect human rights. It does NOT suggest either a hierarchy of methods, nor a preference. Its palette is descriptive—choice is political, and perhaps multi-contextual—relying on balancing State internal constitutional structures and principles against the international legal obligations of States with respect to human rights against which the State duty to protect human rights is to be measured.

In a way similar to UNGP Principle 2 and unlike Principle 1,<sup>12</sup> Principle 3 speaks in terms of “should” and not in terms of “must.” The term might best be interpreted and applied in both Principles in the same way. Should identifies the correct thing to do, and even a preference for specified action, choice or activity described in the text. However, the term does not command, it urges. It is as plausible, in context, then, to embrace what is urged and to adopt what is suggested as the “correct” course—or to reject it on the basis of some equally weighty countervailing set of principles. These can include the imperatives of the political-economic system within which UNGP Principle 3 is to be applied. More importantly, it may be based on the ways these political-economic systems value or order human rights within their national orders.<sup>13</sup> For example, systems that believe that civil and political rights are gateways to economic, social, and political rights may value and order regulatory systems to reflect that hierarchy of value; systems that value development as the concept against other human rights may be valued would order their regulatory and policy compliance differently.

UNGP Principle 3 would have little to say about those choices, except at the margins. Those margins are grounded in the principle implication of “should”—that whatever the State does, it must exercise its authority in some way in order to meet its international legal obligations and any additional human rights related obligations it has undertaken. One last point on the chapeau to the list of acts described in UNGP Principle 3. There is a fundamental relationship between the specific objective to which UNGP Principle 3 is directed—meeting a State’s duty to protect human rights, an obligation made mandatory under UNGP Principle 1<sup>14</sup>—and the measures that recommended to a State in UNGP Principle 3. That is, a State’s duty to “protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”<sup>15</sup> is to be assessed by the measures it has adopted toward those ends. UNGP Principle 3, then, builds in a quantifiable measure of accountability into the 1<sup>st</sup> Pillar

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<sup>12</sup> Discussed Chapter 7.3.2

<sup>13</sup> See, for example, Larry Catá Backer, The Chinese Path for Business and Human Rights, Business and Human Rights Law Journal Blog (14 June 2024); available [<https://bhrj.blog/2024/06/14/the-chinese-path-for-business-and-human-rights/>], last accessed 20 June 2024; Chinese language version available here [[https://lbackerblogger.blogspot.com/2024/06/symposium-on-business-and-human-rights\\_17.html](https://lbackerblogger.blogspot.com/2024/06/symposium-on-business-and-human-rights_17.html)], last accessed 26 June 2024.

<sup>14</sup> Discussed Chapter 7.2.2.

<sup>15</sup> UNGP Principle 1; discussion at Chapter 7.7.

“duty to protect” that is grounded in BOTH the choice of measures (including but not limited to those specified in UNGP Principle 3) and in their effectiveness. The object against which all of this is measured are the quantity and quality of human rights abuse against which State measures might have had some reductive effect.

Interestingly, while both the English and Spanish versions use the same wording UNGP Principles 2 and 3, in the French version, the UNGP word choice for Principle 2 (carry forward the same word “should”/”deben” with the potential connotation in the Spanish of a greater sense of obligation, in the French version the critical text does not use the term used in UNGP Principle 2 (*devraient*), but rather reads “*sont tenus*”, which carries with it the notion of a requirement, that is under a French reading of UNGP Principle 3 one might read the chapeau as stating that to comply with their duty to protect, States *are required* to undertake the measures set out in that principle. In context, the word might be understood as “are obligated” or “are bound to” rather than required. In any case, the Spanish and French versions suggest a greater quantum of obligation than the English version.

The remainder of UNGP Principle 3’s text focuses on the descriptive elaboration of the measures that the State “should” consider applying in undertaking its duty to protect Human Rights. Each is considered in turn. The first two touch on the constitution and operation of law within a State (territory and jurisdiction); the last two touch on policy and guidance measures.

UNGP Principle 3(a) targets enforcement of law. Two sorts of law are highlighted. The first are those laws “that are aimed at” mandatory measures imposed on business enterprises to respect human rights. The second are those laws that “have the effect of” such mandatory measures. The nature and breadth of those mandatory measures is unspecified, though that means that theoretically they can be broad enough to displace entirely the markets and private law based Pillar 2 Principles through legal measures that can apply to the full extent of the reach of a State’s territory and jurisdiction. Likewise it can also theoretically mean that the State might through law mandate that responsibility to private law, the enterprise and the market with respect to prevention and mitigation measures, while permitting individual rights holders to vindicate their rights through remedial measures.

It may be assumed that any organ of state or public power (international, local, religious, or the like) is permitted some scope of interpretation about the meaning and application of these triggering standards—“aimed at” and “have the effect of.” It is also to be assumed that in the final analysis—at least within the territory and jurisdiction of a State, it will be the supreme organs of legal interpretation that will make and apply those interpretations. Nonetheless, it is possible for international organizations to have and apply, within their mandates and jurisdiction, a view of the meaning of these terms quite at variance with those adopted by a State—at least in the absence of an international binding instrument that either specifies that interpretation or creates a binding interpretive organ, perhaps in the form of a judicial institution, to make that determination.

UNGP Principle 3(a) also connects law to assessment and reform. There are two underlying, if unstated, sub-principles applied to that part of the “should” in UNGP Principle 3(a) touching on assessment of “It is also escribed as a significant factor is adequacy assessments under UNGP Principle 3(a).<sup>16</sup> of such laws” and of the suggestion to “address any gaps.” The first is that the State measures undertaken to meet its duty to protect human rights must include systems of assessment of effectiveness. The second is that the State has an ongoing obligation to address gaps in the adequacy of any such measures it adopts (including those specified in UNGP Principle 3(a)). These two subprinciples align with

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<sup>16</sup> UNGP Principle 3 Commentary (failure to enforce produces adequacy gaps).

the 2<sup>nd</sup> Pillar corporate responsibility to respect human right’s assessment and gap filling human rights due diligence systems.<sup>17</sup>

The Principle is silent both as to the nature of the assessment and the forms that gap filling would have to take. It is important to note, however, that the requirement on States is to “address” not to eliminate gaps that periodic assessment reveals. That creates a potentially large space for constituting assessment and assessment analytics, and for responding to the results of that analysis, all consistent with the UNGP Principle 3(a) mandate. Again, the Principle leaves a large space for State actors to provide their own assessment of assessment systems and to draw such insights from their application as the premises of their social and political systems permit. These in turn would likely be assessed by international organs in carrying out their own duties, But the UNGP have little to say about the operation of international organs other than to admit that they exist and they operate. Likewise, the Principle is silent respecting how gaps are to be filled—law, policy, or guidance; national or international measures, and the like. The “should” best practice points to the need for both respecting law (in this case). What is critically important for interpretation, however, and important not just for UNGP 3(a) but throughout the INGP, are the role that assessment and objectives based gap filling play in the operationalization of the UNGP.<sup>18</sup>

UNGP Principle 3(b) adds to the practices of human rights legality the need to apply effectively a principle of coordination or coherence in law and policy. That principle appeared from the earliest reports of the SRSG<sup>19</sup> and are embedded in this form in the context of a State’s range of available measures in Principle 3. The principle of legal/policy coherence is specifically directed to the coordination of corporate law and the application of measures intended to prevent/mitigate/remedy adverse human rights effects of economic activity by enterprises, including those operating in corporate form. Nonetheless the coherence principle applies to all law/policy of enterprise “creation and ongoing operations.” Principle 3(b) appears to include a suggestion for positive as well as negative measures to enhance coordination or coherence. The Principle is not written merely to caution States to avoid incoherence or conflict, but rather that States (presumably following the implications of the need for assessment and gap filling in Principle 3(a)) will also will “enable business respect for human rights.” Lastly, one notes the connection between UNGP Principle 3(b) and UNGP Principles 8-10. These treat the issue of policy coherence in substantially more detail. UNGP Principle 8 with respect to internal legal and policy coherence in States; UNGP Principle 9 with respect to a State’s outward projecting economic policies and objectives, and UNGP Principle 10 with respect to States in multilateral institutions.

Principle 3(c ) turns to the guidance elements of State authority. State guidance is to be “effective.” Effectiveness, in turn, must be assessed under the subprinciples of UNGP Principle 3(a) for adequacy and to address gaps. The Principle, however, is silent on the definition of effectiveness as well as the measure and analysis of either adequacy or gaps. That suggests that the Principle contemplates or at least tolerates (through its text) a large scope of discretion, a substantial margin of appreciation, in which States may apply their own value and political-economic system premises and analytical lenses to the fulfillment of the suggestion in this Principle. It is important to note that the broad reach of State measures—including its potential projection beyond State territorial limits—are emphasized through the repetition, from UNGP Principle 2, of the “throughout their operations” language. In that respect Principle 3(c ) and 2 ought to be read together. In addition, it raises the issues of which law is to be extended throughout the operations of a business. On the one hand this can refer to all State regulatory

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<sup>17</sup> Discussed Chapter 5.3, and Part IV.

<sup>18</sup> Discussed respecting the intent memorialized in the formal reporting of the SRSG at Chapter 3.2.5.

<sup>19</sup> Chapters 3.2.2 and 2.3.3.

efforts. On the other hand, it may refer to regulatory mandates that arise from the application or implementation of a State's international legal obligations (UNGP General Principles). If the latter is used, then a State might argue that it is not projecting national power abroad but rather merely applying international law and norms which are also the international legal obligation of the States into which such projection is made. In this sense, what may be projected in UNGP Principle 2 and 3C ) are guidance grounded in international law rather than guidance that reflects national interests. If that is the case, then such measures might be judged and received (and limited in effectiveness) on that basis. But the UNGP are silent on the matter.

Lastly, UNGP Principle 3(d) speaks to disclosure and communication. In this context the State ought to "encourage, and where appropriate require" communication on how business enterprises address their human rights impacts. The relationship between communication and general principles of transparency are not treated in the black letter of UNGP Principle 3(d). The text is also silent on the definition of key terms: "encourage," "appropriate," and "communicate." These can be interpreted and applied in a variety of ways, again, contextually dependent on both the extent of a State's interpretation of the breadth of its duty, the way in which a State understands the scope of its international legal obligations, and the politics of the interplay of interpretation between the State, enterprises, international organizations and other collectives. Of significance is the connection, respecting communication, between human rights related communication and the complex systems of disclosure that lie at the heart of corporate and securities legal regimes.<sup>20</sup> These implicate obligations under UNGP Principle 3(b), as well as choices among mandatory and voluntary measures that balance choices among UNGO Principles 3(a) and 3(c).<sup>21</sup>

It should be noted that there is some correspondence here between the description of the exercise of the State duty under the 1<sup>st</sup> Pillar and the construction of the 2<sup>nd</sup> Pillar corporate responsibility to protect human rights, especially with respect to the establishment and operation of human rights due diligence systems. UNGP Principle 3(a) has special resonance with the 2<sup>nd</sup> Pillar's fundamental principle of respecting human rights (UNGP Principle 10). It also has a connection to legalization of the operational principles that together constitute the system of human rights due diligence (UNGP Principles 16-21). UNGP Principle 3(b) might have special resonance with and connection to UNGP Principles 13 and 19. UNGP Principle 3(c) touches on the entirety of the 2<sup>nd</sup> Pillar. And lastly UNGP Principle 3(d) is especially relevant to UNGP 21. The correspondences are offered only to point to particularly obvious alignments. It should be noted, however, that there is nothing in the UNGP that prevents a State from effectively displacing the 2<sup>nd</sup> Pillar through its own assertion of mandatory measures, guidance and regulation. But that displacement, of course, would be effectively only to the fullest extent of a State's territorial or other jurisdiction. At their limits the extent of that jurisdiction may be a function of the willingness of other States to tolerate its outward projection.

## 8.4 UNGP Principle 3: Official Commentary

The Official Commentary adds detail—and intention—to the text of UNGP Principle 3. It starts with its guiding premise: "States should not assume that businesses invariably prefer, or benefit from, State

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<sup>20</sup> Discussed in Larry Catá Backer, 'Transparency Between Norm, Technique and Property in International Law and Governance: The Example of Corporate Disclosure Regimes and Environmental Impacts', (2013) 22:1 *Minnesota Journal of International Law* 247-281.

<sup>21</sup> *Ibid.*, and Larry Catá Backer, 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations,' (2008) 39(4) *Georgetown J. International Law* 591-653 (2008)

inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights.”<sup>22</sup> Indeed, more than the text of UNGP Principle 3, this principle, embedded in Commentary, has become one of the more well known and applied principles of the UNGP, especially but not entirely focused on the 1<sup>st</sup> Pillar State duty.

The principle can be broken down into its two quite distinct though related elements. The first rejects an assumption that State inaction is bad for business and embraces its opposite—that there is a strong business case for State regulatory intervention in economic activity. This assumption of business expectation for State regulatory intervention was derived from the principled pragmatism of the SRSB that sought to get a sense of business expectation during the first part of his mandate.<sup>23</sup> Perhaps better put, the principle is that one ought to assume that business expects a certain measure of positive activity from the State with respect to the regulation of matters touching on their activities. These, in turn, traditionally deal principally with business internal affairs: the matters of business organization, operation, allocation of risk and authority and the like.<sup>24</sup> The principle becomes more contested when the scope of regulation touches on issues with human rights elements. For example, board diversity statutes have been well received in Europe,<sup>25</sup> but a recent effort to enact such a provision in California was found to violate national constitutional principles.<sup>26</sup> Such state interventions appear constitutionally less problematic in the U.S. when imposed through private law by, for example, stock exchanges,<sup>27</sup> though here the issue becomes more complicated when such rules are approved by administrative agencies whose jurisdiction may be challenged.<sup>28</sup> But complication does not affect the presumption.

The second, and by far the more influential, was the consequential principle that in the face of an assumption of business willingness (or expectation of) State regulatory intervention, a “smart mix of measures” (“assortiment judicieux de mesures”/“combinación inteligente de medidas”) should be considered. This smart mix consists of “national and international, mandatory and voluntary” measures with the object “to foster respect for human rights.” There is very little guidance on the meaning of the phrase “smart mix of measures.” There are several interpretive approaches grounded in text. One approach to read smart mix as requiring some mix of each of the identified regulatory frameworks—some combination of national and international mandatory measures coupled with national and international public and private voluntary measures. Another is to invert that reading to permit a State to adopt any one of the measures and ignore the others. In this reading, UNGP 3 would permit a smart mix consisting only of voluntary measures, or of mandatory State measures, and the like. A third approach would be to read smart mixes as permitting a broad discretion as to how much of each sort of measures makes sense in a particular context. Lastly, all of these interpretive positions are meant to be dynamic—that, perhaps, is the essence of the obligation in UNGP Principle 3(a) for periodic assessments and modification of the mix of measures. Every iteration is meant to be a “snapshot in time on the development of a smart mix” in a

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<sup>22</sup> UNGP Principle 3 Official Commentary.

<sup>23</sup> Discussed Chapter 3.2.3.

<sup>24</sup> In some jurisdictions. Like the United States, the issue of the “internal affairs” of corporations has become a matter of both statutory and constitutional law, subject to judicial interpretation and application. See, e.g., *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del., 2020).

<sup>25</sup> EU Directive 2022/2381(L 315/44; 23 Nov. 2023).

<sup>26</sup> Sarah Fortt, Betty Huber, and Maj Vaseghi, -California Gender Board Diversity Law is Held Unconstitutional,- Harvard Law School Forum on Corporate Governance (12 June 2022); available [<https://corpgov.law.harvard.edu/2022/06/12/california-gender-board-diversity-law-is-held-unconstitutional/>], last accessed 23 June 2024.

<sup>27</sup> *Alliance for Fair Board Recruitment v. SEC*, No. 21-60626 (5th Cir.; slip op. 15 October 2023).

<sup>28</sup> *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. Sup. Ct. slip op., 28 June 2024) (rejecting deference to administrative interpretation of its regulatory jurisdiction).

particular place,<sup>29</sup> and with respect to a particular sector of economic production.<sup>30</sup> The text of the UNGP does not take a position. That choice is political, temporal, contextual, and ideological.

The remainder of the Commentary speaks to each of the four measures described in UNGP Principle 3. The Commentary identifies a “failure to enforce existing laws,” identified in UNGP Principle 3(a), as a “significant legal gap in State practice” especially with respect to law that directly or indirectly regulate business respect for human rights. The Commentary describes the sorts of laws that may fall within the meaning of directly or indirectly regulating business respect to include “from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws.” The scope of such laws may be broader especially where human rights (or human rights impacts) are broadly defined. States overcome the “enforcement gap” by assessment and reform measures (“whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation”).

The Commentary emphasizes that the presence of “enforcement gaps” and its remediation through systems of assessment and reform described in UNGP Principle 3(a) are central to the providing the regulatory “environment conducive to business respect for human rights” in UNGP Principle 3(b)-(c). The Commentary stresses the importance, with respect to this objective, of the need for clarity to aid business, and rules that avoid adverse impact to aid rights holders.<sup>31</sup> That clarity is subject to constant contextualization—it must change as circumstances change over time. That sets up the inherent dialectic built into the UNGP as a regulatory project—State regulation affects business behavior that in turn affects the nature and impacts of its activities in its operations that then must affect State regulation. This is referenced in the Commentary as an assessment standard grounded in “evolving circumstances.” The dialectic is grounded in an unchanging premise against which it is measured and assessed: “whether, together with relevant policies, they provide an environment conducive to business respect for human rights.”

At the same time, the “enforcement gap” analysis is intimately tied to the consequences of adequacy analysis built around the impacts of regulatory or enforcement gaps. The Commentary notes that a response to an adequacy analysis may involve regulatory reform. “Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.” That regulatory reform, though, may take any of the forms specified in UNGP Principle 3—including mandatory or voluntary measures. More importantly, and drawing from the Commentary’s references to the matrix of sources of measures in the development of “smart mixes”, these regulatory responses are likely to require a further assessment of whether reform measures ought to be sourced in international, regional, or local measures—mandatory or voluntary—and the extent to which international or regional measures and approaches ought to inform any such adequacy assessment or plans for response. The implication, drawn from reading this text together with that of the General Principles, appears to be that international legal obligations serve to

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<sup>29</sup> Gabrielle Holly, Linnea Kristiansson and Signe Andreasen Lysgaard, ‘Smart Mix’ in the Nordics: A Stocktake on Measures to Foster Business Respect for Human Rights (The Danish Institute for Human Rights, 2021, p. 5).

<sup>30</sup> Philip Schleifer and Luc Fransen, Towards a Smart Mix 2.0: Harnessing Regulatory Heterogeneity for Sustainable Global Supply Chain, Working Paper Nr. 4 (August 2022), Stiftung Wissenschaft und Politik; available [[https://www.swp-berlin.org/publications/products/arbeitspapiere/WP04\\_SmartMix2.0\\_Schleifer\\_Fransen.pdf](https://www.swp-berlin.org/publications/products/arbeitspapiere/WP04_SmartMix2.0_Schleifer_Fransen.pdf)], last accessed 1 July 2024 (Palm Oil).

<sup>31</sup> The Commentary to UNGP Principle 3(b) provides an illustration: “For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.”



define and drive national regulatory measures—as well as private measures under the corporate responsibility to respect human rights. The difficulty is that State may approach their international legal obligations in quite distinct ways, thus making convergence, even under the umbrella of international standards more elusive.

Underlying this Commentary is an emphasis, not within the black letter text of the Principle, of the intimate interconnection among the four forms of measures described in UNGP Principle 3. That is, it is understood that none of the described measures can be approached as stand-alone application of State objectives respecting business and human rights. That aligns the listing in UNGP Principle 3 with the “take appropriate steps” command in UNGP Principle 1,<sup>32</sup> the broad range of measures encouraged in the Commentary to UNGP Principle 2,<sup>33</sup> and with the General Principle that characterizes the UNGP “as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights.”<sup>34</sup> It should be noted that UNGP Principle 3(a) speaks to “addressing any gaps.” The implication, of course, is that such gaps ought to be eliminated. But one might read the Commentary as addressing only the need to move toward though not necessarily completely eliminating these gaps. As such, an assessment of State performance with respect to addressing gaps might be based on the extent to which the gap is narrowed, rather than on whether the gap is eliminated.

The Commentary also references the objective of regulatory coherence expressed in UNGP Principle 3(b). The Commentary focuses on corporate and securities laws. But in the process also references the underlying premises of such legal fields, the core organizing principles of which may create incompatibilities with the business and human rights project, in theory or in practice.<sup>35</sup> The SRSG noted, years after the endorsement of the UNGP that changes in fundamental legal principles might well be inevitable, even if they were slow in coming with respect to fundamentals of corporate law principles.<sup>36</sup> That, in turn, reflects an application of ideas already well developed during the course of the SRSG mandate which found their way into the SRSG’s travaux Préparatoire.<sup>37</sup> Reflecting the principled pragmatism reflected in the work of the SRSG and memorialized in the travaux préparatoire, the Commentary emphasizes that the “implications for human rights remain poorly understood.”<sup>38</sup> The Commentary, though, suggests multiple pathways to reform. “Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.” While the “do not constrain” principle of UNGP 3(b) suggests that human rights concerns invariably drive reform of other laws, including

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<sup>32</sup> Discussed Chapter 7.2.

<sup>33</sup> Discussed Chapter 7.3.

<sup>34</sup> Discussed Chapter 6.3.4.

<sup>35</sup> Discussed in Larry Catá Backer, ‘Multinational corporations, transnational law : the United Nations’ norms on the responsibilities of transnational corporations as a harbinger of corporate social responsibilities in international law,’ *Columbia Human Rights Law Review* (2006) 37:287-390. One begins to see those contradictions exposed in the academic literature in the years after the endorsement of the UNGP. In the form of so-called “norms scholarship, there is an effort to first challenge and then suggest ways of abandoning corporate and securities law principles—and the structures of law built around them, starting with notions of corporate purpose rooted in profit, to the entity welfare maximization principle. See, e.g., René Wolfstetter and Yingru Li, ‘Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness,’ *Human Rights Review* (2022) 23:1-17.

<sup>36</sup> See, John G. Ruggie, Caroline Rees, and Rachel Davis, ‘Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations,’ *Business and Human Rights Law Journal* (2021) 6:179-197.

<sup>37</sup> Discussed Chapters 3.2.3 and 3.2.4.

<sup>38</sup> Discussed Chapter 3.2 and Chapter 5.2.

corporate and securities laws, it is possible to read the provision with more nuance. To the extent that corporate and securities law emphasize one set of human rights law over others, the issue becomes one of balancing among human rights. The suggestion, then which might be implied that corporate and securities law do not already embody elements of human rights, need not be read into the Principle. This arises, especially where, for example, development and collective rights may negatively impact other human rights.<sup>39</sup>

With respect to UNGP Principle 3(c), the Commentary suggests that effective guidance “should indicate expected outcomes and help share best practices. “ While the Commentary does not suggest the content or forms of that expected outcomes ought to take, it does point to the means by which those outcomes ought to be achieved (human rights due diligence under the 2<sup>nd</sup> Pillar) and critical areas with respect to which outcomes ought to be expressed.<sup>40</sup> Here, again, the Commentary suggests an overlap between State regulatory authority (and its application under the UNGP) and the corporate responsibility to respect human rights as an expression of expectations in markets autonomous of State control. In addition, the Commentary suggests an alignment between State regulatory and policy functions and national human rights institutions that are Paris Principles<sup>41</sup> compliant. They would prove most useful in analyzing alignment of national law with human rights obligations and effective enforcement. While that function could be quite broadly structured, it is also possible for a State to limit the scope of that operation to its legal obligations under international law under the UNGP’s General Principles.<sup>42</sup>

Finally, the Commentary considers the communications focus of UNGP Principle 3(d). It defines the scope of communications broadly. The Commentary describes communication as actions that can range “from informal engagement with affected stakeholders to formal public reporting.” The Commentary (though not the black letter of UNGP Principle 3(d) aligned communication with fostering respect for human rights. Tied to this fostering are guidance on means of communicating (for example clarity, accessibility, and accuracy). On the basis of that alignment between communication and the objective of fostering respect for human rights by enterprises, the Commentary described incentives for communication (regulation and guidance) grounded in access to the remedial authority of State organs, including “provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding.” The Commentary also suggests a “significant risk” standard for determining when guidance should be mandatory.<sup>43</sup> The Commentary ends with a focus on two areas of communication. The first is the protection of privacy rights of rights holders and the legitimate commercial interests of enterprises. The second touches on the effects of communication regulation or guidance on the structures, meaning and interpretation of financial reporting statutes. This then connects the coherence objectives of UNGP Principle 3(b) and those of communication under UNGP Principle 3(d). In particular, the Commentary

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<sup>39</sup> For a discussion along these lines in the context of Chinese State Owned Enterprises operating in Latin America, see, Larry Catá Backer, ‘Chinese State-Owned Companies and Investment in Latin America and Europe,’ in Judith Schönsteiner and Markus Krajewski (eds), *Human Rights and Environmental Sustainability in State Owned Enterprises* (London: Routledge, 2024), pp. 147-191.

<sup>40</sup> UNGP Principle 3 Commentary (“issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families”).

<sup>41</sup> United Nations General Assembly, Resolution: Principles relating to the Status of National Institutions (The Paris Principles) GA/RES/48/134 (20 December 1993); available [<https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>] last accessed 2 July 2024.

<sup>42</sup> Discussed Chapter 6.3.5.

<sup>43</sup> UNGP Principle 3(d) Commentary (“here the nature of business operations or operating contexts pose a significant risk to human rights”).

focuses on the need to clarify “that human rights impacts in some instances may be “material” or “significant” to the economic performance of the business enterprise.”

Taken together, the Commentary adds possibility and a set of specific perspectives to the black letter of UNGP 3. At the same time, the suggested principles and premises can be as helpful and persuasive as a State or other actor determines them to be in a specific context or more generally. The result is that some references in the Commentary have assumed quite an influential place in the discussion of the UNGP. Principal among them is the first paragraph of the Commentary and its reference to the “smart mix of measures. Nonetheless, its importance suggests a framework for analysis but not necessarily the resolution that comes from its application. Also significantly important contributions from the Commentary are the principle of assessment and its connection to constantly applied legal reform. The Commentary makes clear that a principal objective in the choice of regulatory measures is the fostering of respect for human rights by enterprises (and it might bear stating also by rights holders, State officials, and others). It suggests a leading role for mandatory measures, but does not specify their character. Mandatory measures, for example, may include specific commands setting objectives or conduct requirements. On the other hand, mandatory measures may speak to disclosure and compliance measures. The relationship between national and international measures—voluntary and mandatory—are unspecified, though the issue of the hierarchy of law remains an issue. Lastly, the centrality of communication is stressed, as is the need to balance between disclosure and the protection of the privacy interest of all stakeholders, including enterprises. However, the Commentary does little to reduce ambiguity with respect to certain important terms and concepts. Important among them are the means for determining when a law or guidance directly or indirectly regulate business respect for human rights.

## **8.5 UNGP Principle 3: Authoritative Interpretation/Commentary**

### 8.5.1 The 2010 Draft UNGP

What became UNGP Principle 3 in its final form was circulated in the Draft UNGP as its Principle 5.<sup>44</sup> The final form of UNGP Principle 3 diverged from its draft form in some respects. These differences may shed light on the meaning and plausible interpretation of text, or at least limit the scope of the plausibility of textual interpretation and application.

First, what became UNGP 3 as the first of the State duty’s “Operational Principles,” in the 2010 Draft UNGP the Principle appeared as part of principles advancing that part of the State duty that would advance the objective of fostering business respect for human rights. That in part, changed the complexion and focus of the draft Principle. While the Principle in final form retained references to fostering business respect for human rights, the focus of the Principle changed. Part of the language of the Draft Principle was moved to what became UNGP Principle 2 (“clearly set out expectations”). The limiting references in 2010 Draft Principle 5 to “all business enterprises operating or domiciled in their territory and/or jurisdiction” were eliminated. Territorial application also became part of the final version of UNGP Principle 2. Lastly, the reference in the draft principle to the objectives of state regulatory

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<sup>44</sup> 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.dgyn.de/fileadmin/user\\_upload/menschenr\\_durchsetzen/bilder/Menschenrechtsdokumente/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf](https://menschenrechte-durchsetzen.dgyn.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.

functions (“take the necessary steps to support, encourage and where appropriate require them to do so”) was also eliminated. The choice of States to provide voluntary or mandatory measures or guidance was embedded in the body of the Principle.

Second, the scope of UNGP Principle 3(a) were broadened. The Draft UNGP Principle 5(a) provided only that States foster respect for human rights by business by “enforcing laws that require business enterprises to respect human rights.” The final version added the broadening language “aimed at, or have the effect of.” It also added the principles of periodic assessment and reform to address gaps. Interestingly, the principles of assessment and reform to address gaps was included in the 2010 Draft Commentary. Its importance might well have been signaled by moving the two principles from Commentary to the black letter of the final version of UNGP Principle 3(a).

Third, UNGP Principles 3(b) and (c) are substantially the same in both versions. The exception, and an important one, is the inclusion of the language that broadens the reach of State voluntary and mandatory measures as part of the State duty (“throughout their operations”). The issue remains, and remain unaddressed in the Commentary—what is the nature of the law and guidance that may be projected by a state throughout the operations of the enterprise. The UNGP suggests a choice between international law/obligations based projections and projections of human rights that have been nationalized in some contextually relevant way.<sup>45</sup>

Lastly, UNGP Principle 3(d) remains substantially unchanged from its draft version. There is one exception that may be telling. In the Draft UNGP, the standard is to “adequate communication.” In the final version the standard is to communication. It is possible to read the change as broadening the scope of a State’s authority to choose the manner and level of communication that is deemed to satisfy national (as well as international) expectations. Again, the focus appears to be a preference for providing room for variation in application by States to suit context, place, space, and time.

### 8.5.2 Travaux Préparatoire and Pre-Mandate Text

The interpretation of UNGP 3 might be best understood against the backdrop of the SRSG’s extension of mandate by the UN Human Rights Council.<sup>46</sup> In particular, UNGP Principle 3 may express the way in which the SRSG was able to express formally the resolution of the issue presented for resolution by the UNHRC in its UNHRC 2008 Resolution in its preambular materials: the determination that states were the source of proper regulation of business enterprises through which the promotion, protection and fulfillment of respect for human rights could be realized; that States currently were unable or unwilling to uniformly exercise that authority through regulation and guidance; and that in any case gaps in such approaches at the international, regional, and national levels had to be bridged.<sup>47</sup> The operationalization principles were meant to provide a framework for meeting these challenges. UNGP Principle 3, then, represents an effort to frame a response at the national level by focusing on the State’s duty expressed (practically) in regulation and guidance, but with a mind that such expression would also have to contribute to bridging gaps between private expectations and practices (the 2<sup>nd</sup> Pillar) and the international framework within which State assertions of regulatory and

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<sup>45</sup> See discussion Chapter 7.3.

<sup>46</sup> UNHRC Resolution 8/7 2008--Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/Res/8/7 (18 June 2008) [[https://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_8\\_7.pdf](https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf)] (hereafter the UNHRC 2008 Resolution). Discussed at Chapter 3.3.2.

<sup>47</sup> UNHRC 2008 Resolution, Preamble.

guidance authority might have to conform (again by reference to the constraining effect of a State’s international legal obligations in the General Principles). The gap filling element, then, provided both a space in which to frame the approach of States toward the application of their duty as a function of their objective (to prevent/mitigate/remedy adverse human rights impacts of economic activity) and a substantial degree of discretionary authority in the way in which that framework was actually applied in context. The result presented challenges of its own.<sup>48</sup>

At the same time, UNGP Principle 3 was also meant to avoid the mandatory legalization thrust of its predecessor efforts at inserting human rights elements into economic activity.<sup>49</sup> The contrast, and thus the way toward interpretation of the direction in UNGP Principle 3, might be refined by consideration against its predecessor. This is especially the case with respect to issues of coherence, especially respecting corporate and securities law, or more broadly the regulation and understanding of the character of markets.<sup>50</sup>

The structural characteristics of the operational element of UNGP Principle 3 were explored in the SRS’G’s reports, especially those produced in the second part of the mandate in 2009 and 2010.<sup>51</sup> For example, the SRS’G’s Report 11/13 (Operationalizing),<sup>52</sup> considered both the realities of present regulatory and guidance frameworks and sought to use those as a basis for evolving both toward the fundamental obligations of States later expressed in UNGP Principles 1-2.<sup>53</sup> The 2010 SRS’G Report 65/310 GA<sup>54</sup> further refined the approach that was ultimately adopted. That, in turn, emphasized both current practice and the provisions of pathways toward evolution that would close gaps between national, international and regional, as well as between public and private. Convergence in social expectation would also align voluntary and mandatory measures. Nonetheless, until that convergence matured, States were to be guided in the toolkits that had available and in the uses to which they might be employed. Policy, guidance, mandatory and voluntary measures were meant to be used not just to shape behaviors but also the expectations that made conformity to emerging behaviors palatable or inevitable. All of this, however, was to remain contextually driven both in terms of place and space (the assessment reform principle), as well as tied to expressions of ideology framing economic-political models (principled pragmatism<sup>55</sup>). These ideological baselines might be fought over internally and externally as stakeholders sought reform,<sup>56</sup>

It is worth noting that the “smart mix” was mentioned once in the travaux Préparatoire—in the SRS’G Report GA 64/216.<sup>57</sup> The context was to refute the position of some governments advocating pure

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<sup>48</sup> Discussed Chapter 5.1.

<sup>49</sup> Discussed in Chapter 4.2.1.

<sup>50</sup> Discussed Chapter 4.2.3.

<sup>51</sup> Discussed Chapter 3.2.5 and 3.2.6. See also discussion Chapter 5.4.

<sup>52</sup> Ibid.

<sup>53</sup> Discussed Chapter 3.2.5.1.

<sup>54</sup> Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Report to the UN General Assembly Human rights and transnational corporations and other business enterprises A/65/310 (19 August 2010); available [<https://undocs.org/en/A/65/310>]; last accessed 25 February 2024.

<sup>55</sup> Discussed Chapter 3.1.

<sup>56</sup> In the case of UNGP Principle 3, see Chapter 8.5.3.

<sup>57</sup> Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Report to the UN General Assembly: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/64/216 (3 August 2009); available [<https://undocs.org/en/A/64/216>]; last accessed 25 February 2024. Discussed Chapter 3.2.5.3.

voluntarism. This position, the SRSR asserted, did business no favor. “There is a need to recognize that a smart mix of mandatory and voluntary measures is required and to get on with practical problem solving.”<sup>58</sup> The term, however, acquired a life of its own, and assumed a relevance beyond what its positioning in Commentary might suggest.

In explaining the term in 2019, Mr. Ruggie declared that the UNGP “embody two core strategic concepts: advocating a “smart mix of measures,” and using “leverage.”<sup>59</sup> Mr. Ruggie rejected the argument that smart mix of measures mean voluntary measures alone. Drawing on the implications of UNGP Principle 1 (requirement that States have effective legislation and regulation in place) and UNGP Principle 3 (periodic assessment and review and adequacy of State regulatory measures; legal coherence) Mr. Ruggie insisted that “a smart mix means exactly what it says: a combination of voluntary and mandatory, as well as national and international measures.”<sup>60</sup> Caroline Rees, a lead advisor on the SRSR team (2007-2011), added depth to these remarks by suggesting that the smart mix concept served the SRSR’s principled pragmatism. “From the early days of the mandate, it was always clear that both the NGOs advocating for an international treaty and the push from companies suggesting that all you needed were more voluntary initiatives, not adequate responses.”<sup>61</sup>

Actually it means more than that—it requires that States periodically assess the adequacy of their measures and address gaps—and that this addressing must consider both voluntary and mandatory measures under international and national legal regimes. That suggests the range of possibility (discretionary) implied in the text—something that was elaborated by the NGO Shift in a publication in which it sought to convince that it had a sense of what that optimum mix might consist of.<sup>62</sup> The object in this case was to help support the development of mandatory human rights due diligence as compatible with the UNGPs and consistent with one application of the “smart mix” principle.<sup>63</sup> The UN Working Group for Business and Human Rights advanced a similar position grounded in the invocation of “smart mixes” to strengthen their position that, in that case, State resistance to the adoption of the EU then draft Corporate Sustainability Due Diligence Directive would be inconsistent with the smart mix principle.<sup>64</sup> Of course, that position was strictly correct, but at the same time it was misleading to the extent it suggested that the CSDDD must or could be the best or only manifestation of smart mixes in the context in which it was debated.

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<sup>58</sup> *Ibid.*, ¶ 41.

<sup>59</sup> John G. Ruggie, Keynote Address by John Ruggie at the Conference ‘Business & Human Rights: Towards a Common Agenda for Action’ (2 December 2019); available [<https://shiftproject.org/resource/john-ruggie-keynote-finland2019/>], last accessed 17 June 2024. The term “smart mix” was embedded in UNGP Principle 3 Commentary; the concept of leverage was embedded in UNGP Principle 19 Commentary.

<sup>60</sup> *Id.*

<sup>61</sup> ‘Shaping Corporate Responsibility from the UN Guiding Principles: New Legislation in Human Rights and Supply Chain Management: A Q&A With Caroline Rees,’ Harvard Advanced Leadership Initiative Social Impact Review (28 February 2024); available [<https://www.sir.advancedleadership.harvard.edu/articles/shaping-corporate-responsibility-un-guiding-principles-legislation-human-rights-supply-chain-management>], last accessed 1 July 2024.

<sup>62</sup> Shift, A Statement on the role of “Mandatory Measures” in a “Smart Mix” When Implementing the UNGPs (2019); available [[http://shiftproject.org/wp-content/uploads/2020/05/Shift\\_SmartMix.pdf](http://shiftproject.org/wp-content/uploads/2020/05/Shift_SmartMix.pdf)], last accessed 30 June 2024.

<sup>63</sup> *Ibid.*, p. 4.

<sup>64</sup> Statement by the United Nations Working Group encourages European Union Member States to adopt the draft Corporate Sustainability Due Diligence Directive (7 February 2024); available [<https://media.business-humanrights.org/media/documents/20240207-Corporate-Sustainability-Due-Diligence-Directive.pdf>], last accessed 30 June 2024.

Nonetheless, smart mix principles might also be used as a means of measuring and avoiding abuse. That was, for example, a warning made by then High Commissioner for Human Rights Michelle Bachelet in 2020, in opening the 6<sup>th</sup> session of the open ended Intergovernmental Working Group on Transnational Corporations. She noted the applicability of the UNGP’s principle of “smart mixes” to the movement to develop a business and human rights treaty. Smart mixes, she noted, “can clearly include relevant and meaningful legal developments at the international, regional and national levels. It is therefore important that the treaty process not be misused to undermine or halt implementation of the Guiding Principles.”<sup>65</sup>

By 2022 Civil society were speaking about “smart mix 2.0,” which was described as adding to the UNGP four part mix (national-international; mandatory-voluntary “public-private complementarities, . . . the integration of governance measures across the demand side and supply side of global supply chains.”<sup>66</sup> The focus, in all cases, is to determine what, in a specific context, appears to the authors or advocates to be the best mix. That, in a sense, aligns a broad reading of the UNGP Principle 3 text (including Commentary) with the expectations of the business and human rights community, on in which the search for smart mixes are highly contextual and temporal.

All of this, of course, is highly contingent on the forms of government in place in a particular State, as well as on the ideologies of government.<sup>67</sup> Indeed, it may be necessary, in considering these approaches and interpretations, to also view the choices for smart mixes as a function of particular premises and expectations about the functioning of the State’s institutions, something that may be taken as given in any particular state or among any specific group, but which may not reflect a global consensus of expectation and that may manifest itself differently in different states. To some extent, those choices may be tied to sometimes vigorous debates about the nature and role of administrative organs, and the officials who run them, as a function of core principle or premises around democratic self-government as governance knowledge becomes more technical both in terms of the complexity of mandatory rules and as a function of the technical capacity necessary to manage the oversight of field specific behaviors.<sup>68</sup> The UNGP are silent on the matter. The SRSO and the travaux préparatoire appear to assume a preference for the liberal democratic administrative regulatory model perfected after 1945 in OECD states. It’s manifestation in 2024 was expressed in the form of a premise of interlocking techno-administrative organs focused on a core set of shared objectives, the policy basis of which would originate in the State and its application in economic activity would be left to operational economic organs.<sup>69</sup> That tends to reflect a fair reading of the underlying premise in UNGP Principle 3.

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<sup>65</sup> Michelle Bachelet, Opening statement by Michelle Bachelet, UN High Commissioner for Human Rights 26 October 2020, made at the 6th Session of the Open Ended Inter Governmental Working Group in charge of the elaboration of an international legally binding instrument on transnational corporations and other business enterprises, with respect to human rights; available [<https://www.ohchr.org/en/statements/2020/10/6th-session-open-ended-inter-governmental-working-group-charge-elaboration>], last accessed 20 April 2024.

<sup>66</sup> Philip Schleifer and Luc Fransen, Towards a Smart Mix 2.0: Harnessing Regulatory Heterogeneity for Sustainable Global Supply Chain, Working Paper Nr. 4 (August 2022), Stiftung Wissenschaft und Politik; available [[https://www.swp-berlin.org/publications/products/arbeitspapiere/WP04\\_SmartMix2.0\\_Schleifer\\_Fransen.pdf](https://www.swp-berlin.org/publications/products/arbeitspapiere/WP04_SmartMix2.0_Schleifer_Fransen.pdf)], last accessed 1 July 2024, p. 40.

<sup>67</sup> See, e.g., Larry Catá Backer, ‘Reifying Law - Government, Law and the Rule of Law in Governance Systems,’ *Pennsylvania State International Law Review* (2008) 521-563.

<sup>68</sup> See, e.g., Stephen Turner, ‘The Ideology of Anti-Populism and the Administrative State,’ in Stephen Turner and George Mazur (eds) *Making Democratic Theory Democratic: Democracy, Law, and Administration After Weber and Kelson* (Routledge, 2023), pp. 66-84.

<sup>69</sup> Ursula von der Leyen, Special Address by President von der Leyen at the World Economic Forum (16 January 2024); available [[https://ec.europa.eu/commission/presscorner/detail/en/speech\\_24\\_221](https://ec.europa.eu/commission/presscorner/detail/en/speech_24_221)], last accessed 1 July 2024;

Nonetheless, UNGP Principle 3's text permits a broad scope of approaches that is neither linear nor two dimensional in its starting or framing premises. At one end UNGP Principle 3 can be read as premised on a presumption of voluntarism and of the separation of the political and economic spheres, It might be grounded in the expectation that individuals drive objectives through their autonomous choices in and as markets. The role of the State in that context is to help shape the expectations within which markets operate. At another end, UNGP Principle 3 might rest on a presumption of mandatory State measures as a starting point. This presumption might be grounded in the expectation that the purpose of economic activity is to manifest, within permitted spectrums of discretion, public policy objectives. At yet another end of ordering spectrums, the guiding premise may rest on the presumption of the binding superiority of international law and norms—taking its cue from the idea of the superiority of State legal obligations under international law as a starting point. This premise, in turn, may be guided by both mandatory (treaty) and voluntary (soft law) measures. And it may be operationalized by deeply integrated bureaucracies in the public and private, local, state, and national spheres.

### 8.5.3 Other Glosses

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

Anil Yilmaz and Rachel Chambers have provided a gloss on UNGP Principle 1.<sup>70</sup> They situate UNGP Principle 3 in the recognition under international human rights law (IHRL) and the UNGP themselves, that States are the primary duty bearers respecting the prevention of negative human rights impacts.<sup>71</sup> The consequences are mirrored in the UNGP—States must determine the steps it must take to fulfill its duty; the failure to fulfill may give rise to State responsibility. That is the context in which UNGP Principle 3 ought to be read—as a roadmap for fulfilling its duty.<sup>72</sup> Drawing on the travaux préparatoire, Yilmaz and Chambers argue that as matters stand now, UNGP Principle 3 suggests the gap between the extent of the State duty and the current state of its fulfillment.

Yilmaz and Chambers first focus on UNGP Principle 3(a)—the enforcement of law principle. They suggest that the extent of the failures of the State with respect to their legal and policy orders. These include the failures to ratify and transpose international human rights related instruments, to enforce domestic law related to human rights and to de regulate business activity to advance what the authors call a neoliberal economic agenda across the world contributes to the failures that UNGP Principle 3(a) describes. They draw on the work of international organizations and others to assess the state of attainment of the objectives embedded in UNGP Principle 3(a) and find it wanting precisely

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discussed in Larry Catá Backer, *The Transformative Consequences of Risk Spirals: "Special Address by President von der Leyen at the World Economic Forum 16 January 2024, Law at the End of the Day (21 January 2024); available [https://lcbackerblog.blogspot.com/2024/01/the-transformative-consequences-of-risk.html], last accessed 30 June 2024.*

<sup>70</sup> Anil Yilmaz and Rachel Chambers, ‘Guiding Principle 3: General State Regulatory and Policy Functions,’ in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 28-34.

<sup>71</sup> *Ibid.*, p. 28.

<sup>72</sup> *Ibid.*, p. 29.



because States have failed to aggressively assess their human rights failures or to address gaps. These gaps are as much a matter of international law as it is about the failures at the national level.<sup>73</sup> With reference to UNGP Principle 3(b) and its Commentary, they note the need to reform corporate law and other laws regulating markets to conform to the text of UNGP Principle 3(b).<sup>74</sup> Likewise they note the resources already available to deliver effective guidance.

Yilmaz and Chambers note the richness of resources at the international level and within civil society that are available to states and business enterprises and to States respecting both the premises, content and of guidance for regulation and policy. And, indeed, they make the point that the UNGPs in general, and particularly UNGP Principle 3 cannot be read in a vacuum. Legislation and regulation exists within a rich field of politics. And politics produces a rich foundation that both provides the basis for pragmatically navigating the possibilities available to States in applying UNGP Principle 3. The main interpretive contribution, then, is this: UNGP Principle 3 cannot be understood to be applied on or to a political blank slate. The interpretative, or at least the slate of ranges of application, including the premises and ideological objectives from which they are drawn, are already there, and are evolving as time, place and context changes. One cannot apply or interpret UNGP Principle 3 except within the context of its possibilities in national and international regulatory spaces and among the ideological premises within which these are crafted and through which they evolve.

Lastly, Yilmaz and Chambers note the strong institutional interpenetration that marks any effort to apply UNGP Principle 3. That interpenetration focuses on the apparatus of human rights related international organizations, but also national human rights institutions specifically referenced in the UNGA Principle 3 Official Commentary, but also the UN Working Group, itself created by the UNHRC in the course of endorsing the UNGP.<sup>75</sup> Taken together Yilmaz and Chambers describe UNGP Principle 3 as a critical part of the UNGP roadmap that can itself provide the basis for building a thick architecture of institutions around which excises like the assessment and reform principles and the determination, periodically, of smart mixes may be determined in local-national-regional-international context.

## 8.6 Conclusion

Chapter 8's focus on UNGP Principle 3, the "General State Regulatory and Policy Functions" suggest the range of regulatory means available to the State to fulfill the mandatory duty to protect human rights set put in UNGP Principle 1 (mandatory at a minimum to the extent of the State's international legal obligations), and the strong suggestion to clearly describe the expectations that constitute respect for human rights by economic enterprises expressed in UNGP Principle 2. With respect to UNGP Principle 3, the text is first considered, followed by an examination of the official commentary as a means of adding some content to the text and perhaps suggesting intent. In both cases textual ambiguity and spaces for substantial interpretive scope are considered. Layered onto this is a consideration of authoritative interpretation and other glosses.

Chapter 8 describes the arsenal of regulatory measures available to States to meet their mandatory obligations to protect human rights (UNGP Principle 1) and to advance their expected

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<sup>73</sup> Ibid., pp. 30-31.

<sup>74</sup> Ibid., p. 32.

<sup>75</sup> Ibid., 33.

obligation to manage expectations around the corporate responsibility to respect human rights at least within their territory/jurisdiction (UNGP Principle 2). But the Principle does more than that. It introduces key sub-principles in its black letter. Among them are the principle of "periodic assessment" of regulation and policy which was to be guided by the application of an "adequacy" standard. It tied this principle of periodic assessment to an obligation to "address gaps" revealed by periodic adequacy assessments, but not necessarily to resolve or bridge them completely. It also articulated a principle of regulatory coherence, built around the superiority of the State obligation to build a regulatory system around the duty to prevent/mitigate/remedy adverse human rights impacts, though it did not specify how these were to be identified and measured. It elevated policy and guidance efforts as an essential tool of the State duty and adopted a principle of communication as a necessary means of fostering respect for human rights by business (though the concept could be generalized).

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