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The Human Rights Council Endorses “Guiding Principles” for Corporations

By John H. Knox



Introduction

On June 16, 2011, the United Nations Human Rights Council endorsed Guiding Principles on Business and Human Rights. This *Insight* describes the background to the Guiding Principles, the Principles themselves, and the Council's decision to endorse them.

From the Draft Norms to the Ruggie Framework

Large corporations that operate across national boundaries might seem to be a natural subject for international regulation. Nevertheless, the United Nations has struggled for years to develop corporate standards. Negotiation of a Draft Code of Conduct for Transnational Corporations in the 1970s and 1980s proved so contentious that the effort was eventually abandoned.^[1] In 1999, then UN Secretary-General Kofi Annan launched the Global Compact, an effort to encourage corporations to abide by basic principles on human rights, labor, environmental protection, and corruption.^[2] Although thousands of businesses around the world have agreed to participate in the Global Compact, its effectiveness is limited by its voluntary nature and the generality of its principles.^[3]

In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights, a group of independent experts, proposed that the Human Rights Commission, the predecessor to the Human Rights Council, adopt Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.^[4] The Draft Norms provided that virtually every human right gives rise to a wide range of duties on virtually every corporation.^[5] Although neither the Sub-Commission nor the Commission had the authority to make the Norms legally binding, if adopted by the Commission the Norms could have become the basis for a later binding instrument or influenced the development of customary international law.

But the Draft Norms proved to be controversial. While human rights groups strongly supported them, most corporations opposed them, and the governments on the Human Rights Commission decided not to adopt them. Instead, the Commission requested the Secretary-General in 2005 to appoint a special representative on human rights and transnational corporations and other business enterprises, with a mandate to clarify existing standards and elaborate on the role of states in effectively regulating corporations.^[6] Annan named John Ruggie, a Harvard professor who had helped to establish the Global Compact when he served as Annan's Assistant Secretary-General for Strategic Planning.

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From the outset of his tenure as Special Representative, Ruggie made clear that he would take a different approach from that of the Draft Norms. He criticized the Norms' "exaggerated legal claims" that human rights law directly imposes a wide spectrum of duties on corporations.^[7] Instead, he took the position that, with the potential exceptions of "the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture, and some crimes against humanity,"^[8] human rights law does not currently impose direct obligations on corporations or any other non-state actors.^[9] Ruggie also made clear that he would not try to convince states to adopt a new declaration or agreement that would impose direct obligations, arguing that the negotiation of any such instrument would not be complete for many years, if ever.^[10]

Rather than proposing new legal norms, Ruggie sought to establish a consensus on the application of current human rights standards to corporations. In 2008, he submitted to the Human Rights Council a Framework for Business and Human Rights consisting of three principles: a state duty to protect against human rights abuses by corporations; a corporate responsibility to respect human rights; and a need for more effective remedies for corporate human rights abuses.^[11] Ruggie emphasized that the Framework required no changes to existing law, only a better understanding of it. He underscored that human rights law already requires the first principle of the Framework, because it requires states to protect the human rights of those within their jurisdiction from interference by non-state actors, including corporations.^[12] He also argued that to protect human rights effectively, states must provide remedies for misconduct, and he presented the necessity of such remedies as the Framework's third principle.

The second principle—the corporate responsibility to respect human rights—appears in some ways to echo the Draft Norms. But Ruggie treated it as different in a crucial respect. In his view, the responsibility stems from *societal expectations* rather than human rights law.^[13] Unlike the Norms, the Framework does not claim to impose human rights obligations directly on corporations. Nevertheless, the corporate responsibility to respect is not mediated through the primary state duty to protect; the responsibility does apply directly to corporations. Moreover, Ruggie stressed that the responsibility is not toothless. It can be enforced through domestic legal sanctions as well as in the court of public opinion.^[14]

The Guiding Principles

Ruggie presented the "Protect, Respect and Remedy" Framework as a potential "authoritative focal point" that, if accepted by the Human Rights Council, could lead to more detailed development of the three principles. In 2008, the Human Rights Council agreed. It decided by consensus to welcome the Framework and to request Ruggie to take three more years to elaborate the Framework and make it operational.^[15] Three years later, in June 2011, Ruggie submitted the Guiding Principles on Business and Human Rights.^[16]

The thirty-one Guiding Principles are organized into three sections, corresponding to the three principles in the Framework, and each of the Principles is accompanied by a commentary. The first ten Principles concern the state duty to protect. They make clear that while the duty is one of conduct rather than result, so that a state is not necessarily responsible for human rights abuses committed by corporations, states have obligations to take "appropriate steps to prevent, investigate, punish and redress such abuse."^[17] While the Guiding Principles leave states with a great deal of discretion in deciding exactly what steps are appropriate, they do provide some additional guidance. For example, they indicate that each state should take additional steps to protect against misconduct by entities that the state owns, controls, or substantially supports, and to promote respect for human rights by corporations with which the state does business.^[18]

The Principles limit the duty to protect to abuses within a state's territory or jurisdiction.^[19] In other words, they decline to characterize states' human rights obligations as generally

extending extraterritorially.[20] This limitation was controversial, because many human rights advocates have argued that developed states have a duty to protect against foreign abuses committed by corporations domiciled in their territory. The commentary to the Principles does note, however, that states *may* regulate such extraterritorial conduct as long as they have a recognized jurisdictional basis for doing so,[21] and Ruggie has urged states to make greater efforts to ensure that companies within their jurisdiction do not commit or contribute to human rights abuses abroad.[22]

The second section of the Guiding Principles elaborates on the responsibility to respect. The responsibility requires not only that business enterprises avoid causing adverse impacts to human rights themselves, but also that they prevent or mitigate abuses that are directly linked to their operations, even if the corporations have not contributed to the problem.[23] The Principles state that the human rights covered include, at a minimum, those recognized in the International Bill of Rights and the International Labour Organization Declaration on Fundamental Principles and Rights at Work.[24] To implement their responsibility to respect human rights, corporations should conduct “human rights due diligence,” which includes carrying out human rights impact assessments, integrating the findings from the assessments, tracking the effectiveness of their responses to any impacts, and publicly communicating their responses.[25] In addition, corporations should provide, or cooperate in efforts to provide, remedies for human rights abuses that they have caused or to which they have contributed.[26]

The last set of Guiding Principles concerns access to effective remedies. These Principles indicate that states are required, as part of their duty to protect, to take steps to ensure that those affected by corporate human rights abuses within their territory and/or jurisdiction have access to effective remedies.[27] In addition to providing effective *legal* remedies, states should provide non-judicial grievance mechanisms,[28] as should businesses.[29] The Principles set out criteria that such mechanisms should meet: *inter alia*, they should be legitimate, accessible, predictable, equitable, and transparent.[30]

The Human Rights Council Resolution Endorsing the Guiding Principles

In contrast to the reception accorded the Draft Norms eight years before, the Guiding Principles received a warmer welcome from corporations[31] than from human rights groups, some of which criticized the Principles as too weak. They were particularly concerned that the Principles did not characterize the duty to protect as extending extraterritorially.[32] Even those critics, however, eventually urged the Human Rights Council to build on, rather than reject, the Framework and Guiding Principles.[33] Governments were generally more enthusiastic. The resolution endorsing the Principles was co-sponsored by a broad range of countries, including Argentina, Guatemala, Canada, India, Nigeria, Norway, Russia, Turkey, and the United States.[34] In the end, the Human Rights Council adopted the resolution by consensus.[35]

To some degree, the broad support for the Guiding Principles may have been due to a widespread feeling that they represented the best opportunity to develop UN standards for corporate social responsibility likely to arise in the foreseeable future. Credit must also go to the personal efforts of John Ruggie, who in the course of his mandate held dozens of consultations and site visits in many different countries, and encouraged contributions from hundreds of government officials, corporate executives, human rights activists, and scholars.[36]

In his final report, Ruggie stated that the Human Rights Council's endorsement of the Guiding Principles “will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.”[37] In support of the Principles, the Council established a working group on human rights and transnational corporations and other

business enterprises. It will consist of five independent experts with a three-year mandate to, *inter alia*, promote the dissemination and implementation of the Guiding Principles and to assess them on the basis of information received from all relevant sources.[38] Human rights groups criticized the Council for not giving the working group the explicit authority to receive communications from victims of corporate human rights abuses, or to evaluate gaps in legal protection with a view toward preparing a foundation for a legally binding instrument.[39]

Conclusion

In the wake of the debate over the Draft Norms, the appointment of John Ruggie was something of a gamble that he could bring consensus out of the controversy over the application of human rights principles to corporations. To a remarkable degree, he did so. The Human Rights Council's endorsement of the Guiding Principles opens a new chapter in the continuing effort to bring human rights law to bear on corporations. It remains to be seen, however, how successful the Guiding Principles will eventually prove at curbing corporate abuses of human rights.

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Endnotes:

[1] See Sean D. Murphy, *Taking Multinational Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 403-05 (2005).

[2] See *id.* at 411-13. See GLOBAL COMPACT, <http://www.unglobalcompact.org/>.

[3] For example, its two principles on human rights state, in their entirety: "Businesses should support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses."

[4] Sub-Comm'n Res. 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11, at 52 (Aug. 13, 2003); 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, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (Aug. 13, 2003) [hereinafter Draft Norms]. See also Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev. 2 (2003); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

[5] *E.g.*, Draft Norms, *supra* note 4, ¶ 1 ("Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."). The Norms define "other business enterprise" to include "any business entity, regardless of the international or domestic nature of its activities." *Id.* ¶ 21.

[6] H. R. Comm'n Res. 2005/69 (Apr. 20, 2005), available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc.

[7] Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 59, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter 2006 Interim Report]. Reports and other documents pertaining to Ruggie's mandate are available at <http://www.business-humanrights.org/SpecialRepPortal/Home>.

[8] *Id.* ¶ 61.

[9] See Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, ¶ 44, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) [hereinafter 2007 Mapping Report]. Ruggie criticized the Norms on other grounds as well, including that their failure to demarcate the respective

responsibilities of governments and businesses could undermine efforts to make governments more responsible. 2006 Interim Report, *supra* note 7, ¶¶ 66-68; John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 826 (2007).

[10] John Ruggie, *Treaty Road Not Travelled*, ETHICAL CORP.42-43 (May 6, 2008), available at http://www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf.

[11] Special Representative of the Secretary-General, Protect, Respect and Remedy: A Framework for Business and Human Rights, U.N. Doc. A/HRC/8/5 (2008) [hereinafter 2008 Framework Report]. See Christiana Ochoa, *The 2008 Ruggie Report: A Framework for Business and Human Rights*, ASIL INSIGHTS (June 18, 2008), available at <http://www.asil.org/insights080618.cfm>.

[12] *E.g.*, 2007 Mapping Report, *supra* note 9, ¶ 18 (“In sum, the State duty to protect against non-State abuses is part of the very foundation of the international human rights regime. The duty requires States to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.”). See generally Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341 (2010); John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 18-27 (2008).

[13] 2008 Framework Report, *supra* note 11, ¶ 9.

[14] *Id.* ¶ 54.

[15] H.R.Council Res. 8/7, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf.

[16] Special Representative of the Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter Guiding Principles]. The Principles are included as an Annex to the report, and are referred to hereafter as “Guiding Principles.”

[17] Guiding Principles, *supra* note 16, princ. 1.

[18] *Id.* princs. 4, 7.

[19] *Id.* princ. 1. The Guiding Principles do urge states to discourage such abuses, however. *Id.* princ. 2.

[20] *Id.* princ. 2 (*commentary*); 2007 Mapping Report, *supra* note 9, ¶ 15. See generally UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS (Mark Gibney & Sigrun Skogly eds., 2010); EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004).

[21] Guiding Principles, *supra* note 16, at 7.

[22] Special Representative of the Secretary-General, Business and Human Rights: Further Steps Toward the Operationalization of the “Protect, Respect and Remedy” Framework, ¶ 47, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010). Principle 2 of the Guiding Principles also provides that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.” Guiding Principles, *supra* note 16, princ. 2.

[23] *Id.* princ. 13.

[24] *Id.* princ. 12.

[25] *Id.* princs. 17-21.

[26] *Id.* princ. 22.

[27] *Id.* princ. 25.

[28] *Id.* princs. 26, 27.

[29] *Id.* princ. 29.

[30] *Id.* princ. 31.

[31] See, *e.g.*, International Organisation of Employers, International Chamber of Commerce & Business and Industry Advisory Committee to the OECD, Joint Statement on Business and Human Rights to the Human Rights Council (May 30, 2011), available at http://www.business-humanrights.org/media/documents/ioe-icc-biac-submission-to_the-un-hrc-may-2011.pdf.

[32] See, *e.g.*, Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights (Jan. 2011), available at http://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf (also criticizing the Guiding Principles, *inter alia*, for not providing that states must require corporations to

conduct human rights impact assessments and not spending more attention on judicial remediation).

[33] See Joint Civil Society Statement on Business and Human Rights to the 17th Session of the UN Human Rights Council (June 15, 2011), *available at* http://www.escr-net.org/actions_more/actions_more_show.htm?doc_id=1605781; Amnesty International, A Call for Action to Better Protect the Rights of Those Affected by Business-related Human Rights Abuses (June 14, 2011), *available at* <http://www.amnesty.org/en/library/asset/IOR40/009/2011/en/55fab4a5-fb8a-4572-93f3-67581b2dca45/ior400092011en.html>.

[34] The text of the U.S. Statement on the resolution is available at <http://www.humanrights.gov/2011/06/16/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights/>.

[35] Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

[36] See Guiding Principles, *supra* note 16, ¶ 8. I should disclose that in 2007-08, I was one of the many who provided Ruggie *pro bono* research assistance.

[37] *Id.*, *supra* note 16, ¶ 13.

[38] Human Rights Council Res. 17/4, *supra* note 35, ¶ 6. In addition, the Council established a “forum on business and human rights,” which will meet annually, for two days, to discuss trends and challenges in the implementation of the Guiding Principles. *Id.* ¶¶ 13, 15.

[39] Joint Civil Society Statement, Advancing the Global Business and Human Rights Agenda: Follow-up to the Work of the Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations and Other Business Enterprises (May 2011), *available at* <http://www.fidh.org/IMG/pdf/Joint-civil-society-statement-on-business-and-human-rights-May-2011.pdf>.