

Business and Human Rights

The Next Chapter

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Human rights traditionally have been conceived as a set of norms and practices to protect individuals from threats by the state and attributing to the state the obligation to secure the conditions necessary for people to live a life of dignity. The idea that business enterprises might have human rights responsibilities independent of legal requirements in their countries of operation is relatively new, in large part a by-product of the most recent wave of globalization.

Business and human rights became an increasingly prominent concern on the international agenda in the 1990s. The liberalization of trade, domestic deregulation and privatization throughout the world extended the scope and deepened the impact of markets. The rights of multinational corporations to operate globally increased greatly through, for example, more robust and enforceable rules protecting foreign investors and intellectual property. However, the protection of people and the environment in this transformed economic context did not keep pace. Global governance gaps widened. History shows that stark imbalances between market forces and the fabric of society are not sustainable. Efforts to narrow governance gaps followed, including by the United Nations.

In 2000, then United Nations Secretary-General Kofi Annan launched the UN Global Compact¹ as a platform for engaging companies in the support of universal values as well as promoting and amplifying businesses' positive contributions to the provision of societies' many pressing needs. The Compact has gone on to become the world's largest corporate citizenship initiative, serving as a platform for innovation in areas ranging from poverty reduction to climate change. I am proud to have been one of its main architects.

But at the same time, globalization also put on the international agenda the challenge of dealing with adverse impacts of business operations. My mandate as Special

Representative of the Secretary-General was established in 2005 to address this issue in relation to human rights.

It was clear to me that in a world of profit-maximizing firms and states guarding their sovereign prerogatives, there would be no single or simple way of ensuring, at the global level, that individuals and communities are effectively protected against corporate-related human rights harm. Two widely held illusions added to what was an already difficult challenge: one, that this aim is best achieved by seeking to subject the entire bundle of business and human rights issues to some overarching binding international legal instrument, and the other, that voluntary initiatives and the identification of best practices on their own will generate enough momentum for companies themselves to truly move markets.

Neither can do what it promises: the first because it expects too much from the system of international public governance and the second because it permits too little. The successful expansion of the international human rights regime to encompass business enterprises must activate and mobilize the full array of rationales and institutional means that affect corporate conduct. That is what the United Nations Guiding Principles on Business and Human Rights seek to do.²

On 16 June 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles, which I had developed over the course of six years. This marked two firsts. It was the first authoritative guidance the United Nations had ever issued on how to meet the complex global challenges of business and human rights. It was also the first time that the Human Rights Council or its predecessor, the Commission, had ever endorsed a normative text on any subject that governments did not negotiate themselves. The story of how these Guiding Principles came to be is told in my new book: *Just Business: Multinational Corporations and Human Rights*.³ In brief, the Guiding Principles are the product of nearly 50 international consultations with all stakeholder groups, numerous site visits to the operations of companies and neighboring communities, pilot projects and several thousand pages of research reports.

Precisely what do these Guiding Principles do? And where do we stand today, more than two years after their endorsement by the United Nations?

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1. <www.unglobalcompact.org>.

2. The full text is available at <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

3. Ruggie 2013.

The Guiding Principles build on the recognition that at the global level today, corporate conduct is shaped by three distinct governance systems: the first is the system of public law and governance, domestic and international; the second is a civil governance system involving stakeholders affected by business enterprises, employing social compliance mechanisms; the third is corporate governance, which internalizes elements of the other two.

In a nutshell, the Guiding Principles prescribe paths for strengthening and better aligning these governance systems in relation to business and human rights. They aim to generate a mutually reinforcing dynamic that produces cumulative change.

- For states, the focus is on the legal obligations they have under the international human rights regime to protect human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations.
- For businesses, beyond compliance with legal obligations that vary across countries in their applicability and enforcement, the Guiding Principles focus on the need to manage the risk of involvement in human rights abuses, which requires acting with due diligence to avoid infringing on the rights of others, and to address harm where it does occur.
- For affected individuals and groups, the Guiding Principles serve as a basis for further empowerment through prescribed engagement with them by business enterprises, as well as greater access to effective remedy, both judicial and non-judicial.

Simply put, states must protect, companies must respect, and those who are harmed must have redress. The Guiding Principles stipulate how.

Where do things stand now? Core elements of the Guiding Principles have been incorporated by numerous other international and national standard-setting bodies, each of which has its own implementation mechanisms, as well as by businesses and other stakeholder groups. Examples include the following:

- The new OECD Guidelines for Multinational Enterprises 2011, which have a human rights chapter drawn from the Guiding Principles and which provide for national complaints mechanisms (called National Contact Points or NCPs) in the 42 adhering states concerning the conduct of multinationals operating in or from those states.⁴
- New provisions in the OECD Common Approaches for Export Credit Agencies, which affect access to capital at the national level.
- The new International Finance Corporation Sustainability Principles and Performance Standards, which affect access to international capital, amplified manifold because they are tracked by 80+ private sector lending institutions.

4. See on this process and the role of National Contact Points the contribution by Prof. Roel Nieuwenkamp in this issue, p. 171.

- ISO 26000, which energizes a worldwide army of consultants eager to help companies come into compliance – and which among other countries China is actively promoting.
- In the European Union, the Commission has asked Member States to submit national plans for implementing the Guiding Principles, and the Commission itself has issued additional guidance for several industry sectors and for small and medium-sized enterprises. The United Kingdom was the first EU country to launch its national plan.
- In the United States, the concept of human rights due diligence, a central component of the corporate responsibility to respect human rights, found its way into Section 1502 of the Dodd-Frank Wall Street Reform Act, in relation to conflict minerals procured in the Democratic Republic of the Congo.
- The U.S. government also has referenced the Guiding Principles as a benchmark in a new reporting requirement for U.S. entities investing more than \$500,000 in Myanmar, now that most economic sanctions have been suspended.
- ASEAN is exploring ways to align its new business and human rights program with the Guiding Principles; the African Union is on a similar track.
- The number of companies developing human rights policies, due diligence procedures and grievance mechanisms, drawing on the Guiding Principles, is rising significantly.
- International business associations and labor federations have issued user's guides to the Guiding Principles; civil society groups invoke them in their work, as do National Human Rights Institutions.
- A new global resource center for addressing conflicts between businesses and communities has been established in The Hague; it is a direct follow-up to the Guiding Principles' provisions on non-judicial remedy and is appropriately named Access.

These examples illustrate the fact that we have achieved, for the first time, broad convergence around a common set of politically authoritative and socially legitimated norms and policy guidance for business and human rights. This provides us with a strong foundation on which to build. But, of course, the work of building on it has only just begun.

There is much to be learned from the experience of even this short period of time. I suspect they may vary in their specifics by region and sector. Therefore, let me just note three broad issues that I believe deserve attention in this next phase.

The first concerns capacity building. Limited capacity is a far greater obstacle to rapid progress in business and human rights than we tend to acknowledge; it is much easier to blame someone. Limited capacity affects the ability of all stakeholder groups, including governments, businesses, NGOs and the UN system to play their necessary roles. The problem is particularly pronounced in relation to middle- and lower-income countries as well as small and medium-sized enterprises. Therefore, I

welcome the decision by the Human Rights Council to explore the feasibility of establishing a capacity-building fund to promote implementation of the Guiding Principles and of the EU's guidance for SMEs. Capacity building is also ideal territory for collaborative action among and within various stakeholder groups.

However, capacity building is not simply a resource issue. Most companies still do a poor job of assessing and aggregating at corporate levels the costs to themselves of getting things wrong, which typically are rolled into local operating expenses, never attracting the attention of senior management, boards and shareholders. Also, too many governments as well as companies do not yet fully appreciate how much of their own capacity gaps stem from poor internal coordination, where one unit creates problems that another then has to try and cope with. In short, the challenge here involves both resource allocation and institutional reengineering. The need to address these issues is the first general lesson I would draw for future work.

A second lesson is directly related to the widespread uptake of the Guiding Principles by a broad array of actors. That was precisely the hoped-for result. But it also brings its own challenges. As time goes on, there is a risk that some of the coherence and cumulative momentum provided by the Guiding Principles may diminish unless they are reinforced. Yet in our social media world, it should be possible to establish means of sharing up-to-date information in real time about major developments and trends, coupled with occasional commentaries from an authoritative source. Perhaps the Working Group established to succeed my mandate, supported by the Office of the High Commissioner as well as other external experts, could play such a role.

My final observation concerns the further development of international law and the issue of extraterritorial jurisdiction. The research and consultations conducted under my mandate found that states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled within their jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Some UN Human Rights Treaty Bodies have been urging states to become more proactive than they have been in the past.

Governments are increasingly adopting domestic measures with extraterritorial effects to help prevent corporate-related human rights harm abroad – as in the case of export credit agencies requiring companies to conduct human rights due diligence as a condition for public support. As noted earlier, governments are also imposing human rights reporting requirements on companies, including their global operations. In addition, a growing number of national courts are agreeing to hear cases against companies for conduct by overseas affiliates because the parent company itself may have been negligent, through omission or commission. These forms of extraterritorial jurisdiction are evolving rapidly at national levels, as governments come to recognize that

nothing less than the social sustainability of globalization is at stake.

But there is one area that requires more immediate international attention. States need to specify clearly that international standards prohibiting gross human rights abuses, potentially amounting to international crimes, apply to all persons, natural and legal. Such abuses may arise in areas where the human rights regime cannot be expected to function as intended, as in conflict zones or similar sources of heightened risk, where typically the allegations involve corporate complicity in acts committed by related parties. In those situations, plaintiffs may turn to home country courts because local courts may be unable or unwilling to act.

The international community has determined, and fair-minded observers everywhere would agree, that sovereignty can no longer serve as a shield behind which governments are allowed to commit or be complicit in the worst human rights violations. Surely the same must be true of the corporate form.

I began my mandate amid deep and divisive debates between business and civil society as well as among governments. In sharp contrast, today we see convergence around a strongly supported foundation and widespread efforts to build on it. I am under no illusion that the Guiding Principles will bring to an end all business and human challenges. But, as I said to the Human Rights Council in my final presentation, they do mark the end of the beginning.

Bibliography

J.G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, New York, W.W. Norton & Company, Inc., 2013.