



A UN Business and Human Rights Treaty?

An Issues Brief by John G. Ruggie

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At the September 2013 session of the United Nations Human Rights Council, the delegation of Ecuador delivered a statement stressing “the necessity of moving forward toward a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business enterprises.” Ecuador was speaking not only in its own behalf but also for the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru. Following up on its statement, Ecuador is convening an expert workshop during the Council’s March session. This proposal potentially brings the business and human rights agenda to a new inflection point.

Ecuador acknowledges that the UN Guiding Principles on Business and Human Rights (GPs) are “a first step,” intended to “provide global standards for preventing and addressing the risk of adverse impacts on human rights linked to business activity,” and also that movement toward a legally binding instrument would take time. This appears to affirm the existing consensus behind the GPs rather than posing a false dichotomy between the GPs and any further international legal development.

The consensus in the Human Rights Council was powerful indeed. The GPs are the first authoritative guidance that the Council and its predecessor body, the Commission on Human Rights, have issued for states and business enterprises on their responsibilities in relation to business and human rights; it marked the first time that either has ever “endorsed” a normative text on *any* subject that governments did not negotiate themselves; and every single Council member joined in the consensus.

It was my honor to develop the Guiding Principles over the course of a six year mandate as Special Representative of the UN Secretary-General for Business and Human Rights, including through nearly fifty international consultations in all regions. Drawing on that experience, I offer two suggestions below for the debates that are unfolding in Geneva. First, no matter what ultimately may be decided on the treaty front, the Council needs to determine what more it might do in the here and now to achieve the GPs implementation agenda that it set out in 2011. In turn, that requires a systematic assessment of the many ongoing efforts to implement the GPs—where things are going well, where they are not, and why. Second, if and when the Council decides to explore further international legalization in this space, it should carefully

weigh the extent to which different forms of legalization would be capable of yielding practical results where it matters most: in the daily lives of affected individuals and communities around the world.

Before elaborating on these points, I briefly recapitulate the GPs' core provisions. As may be recalled, they rest on three pillars:

1. The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
2. An independent corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved;
3. Greater access by victims to effective remedy, judicial and non-judicial.

The GPs comprise thirty-one principles, each with commentary elaborating its meaning and implications for law, policy, and practice. They encompass all internationally recognized rights, and they apply to all states and all business enterprises.

My first suggestion concerns the issue of ongoing implementation efforts. It inevitably takes time for any major new initiative to take root. But in comparison with normative and policy developments in other difficult domains, the GPs uptake since the Council's endorsement in June 2011 has been relatively swift and widespread.

Elements of the GPs currently are being acted upon by individual governments (whether through national action plans, their role as national contact points under the revised OECD Guidelines for Multinational Enterprises, or in the form discrete legal and policy measures); by the European Union (for example, through its new corporate social responsibility policy and mandatory non-financial reporting requirements); the International Finance Corporation (through its new sustainability framework and some performance standards); ASEAN (where the Intergovernmental Commission on Human Rights is drawing on the GPs in its own work); the African Union (in relation to the Africa Mining Vision); the International Organization for Standardization (ISO 26000); and the Equator Principles Banks (covering three-fourths of all international project financing). International and national business associations have issued 'user guides' for different business sectors, company sizes, and human rights-related issues, while ever-increasing numbers of companies report that they are bringing internal management and oversight systems into greater alignment with the GPs. Human rights groups and workers organizations are using the GPs as a public and judicial advocacy tool, and the International Bar Association is promoting the GPs' incorporation into the legal profession, including through law firms' client advisory work. These include the most visible efforts; others undoubtedly are under way.

In short, Human Rights Council endorsement of the Guiding Principles has generated a wide array of implementation measures, national and international, public

and private. But no systematic assessment is available of overall results to date. There are only anecdotal fragments, which may merely reflect observers' prior preferences. The Council's considerations of where and how it can strengthen its own 2011 implementation agenda should be informed by a more robust evidentiary basis—even more so if discussion of a possible future treaty process may be involved. Therefore, my first suggestion is that the Council arrange for an assessment of major changes in policies and practices that have resulted from the uptake of the GPs, and where such efforts are falling short.

I turn to my second point. The Guiding Principles reflect international law obligations but propose no new ones. The mandate did not encompass that, and had I attempted to do so the GPs flight would never have left the tarmac. Instead, I focused on gaining broad consensus across the different stakeholder groups for a normative framework and authoritative policy guidance to bring greater coherence, larger-scale effects, and cumulative change than the prior patchwork of limited and uncoordinated business and human rights schemes was able to generate. I deliberately emphasized measures that states and businesses could adopt relatively quickly, because they can have an immediate effect on reducing the overall incidence of corporate-related human rights harm, thereby benefiting victims.

But then was then, and now is now. Nearly three years after the Guiding Principles' adoption, is it time to consider launching a treaty process? My answer to that question is a cautious "it all depends" on what any such treaty would be intended to address. Let me explain.

A perfectly understandable reaction to the global problem of business-related human rights harm is to say there ought to be a law, one single international law, which binds all business enterprises everywhere under a common set of standards protecting human rights. Accordingly, some treaty advocates all along have urged the adoption of a "business and human rights treaty"—that is, a general or overarching legal instrument covering all relevant dimensions. While the aspiration is understandable, realizing it in practical terms poses monumental challenges.

Even with the best of "political will," the crux of the issue is that the category of business and human rights is not so discrete an issue-area as to lend itself to a single set of detailed treaty obligations. It includes complex clusters of different bodies of national and international law—for starters, human rights law, labor law, anti-discrimination law, humanitarian law, investment law, trade law, consumer protection law, as well as corporate law and securities regulation. The point is not that these are unrelated, but that they embody such extensive problem diversity, institutional variations, and conflicting interests across and within states that any attempt to aggregate them into a general business and human rights treaty would have to be pitched at such a high level of abstraction that it is hard to imagine it providing a basis for meaningful legal action.

Holding multinational corporations accountable for their adverse impact on the full range of human rights directly under international law seems equally intuitive. But it raises practical challenges of its own, quite apart from the doctrinal debate about corporations as “subjects” of international law. For instance, is it plausible that governments could agree on a single global corporate liability standard for every internationally recognized human right? And if only limited rights, which ones would they be, and on what basis would they be selected?

Even more fundamental, how would such a treaty be enforced—inadequate enforcement being the main shortcoming of the current system? Would it require establishing an international court for corporations? Or would it be enforced by states? Few observers believe that the former is a realistic prospect in the foreseeable future. As for the latter, if states have ratified existing human rights treaties, then they already have legal obligations flowing from them to protect individuals against human rights abuses by third parties, including business, committed within their territory and/or jurisdiction. Therefore, to add value any new treaty enforcement provision would have to involve extraterritorial jurisdiction. While some UN human rights treaty bodies have urged home states of multinationals to provide greater extraterritorial protection against corporate-related human rights abuses, and research conducted under my mandate identified the grounds on which, and the ways in which, states have done so in a variety of policy domains, state conduct generally makes it clear that they do not regard this to be an acceptable means to address violations of the entire array of internationally recognized human rights. Finally, states that have not ratified a core UN or ILO human rights instrument are unlikely to support or enforce a treaty imposing those provisions on the overseas operations of “their” multinationals.

These foundational challenges are compounded by the political near certainty that major home states of multinational corporations would insist that any proposed treaty apply not only to multinationals but also to purely national businesses. But that, in turn, is likely to give pause to at least some countries that might otherwise support a treaty if it sought to regulate only multinationals. Of course, any international legal instrument regarding business and human rights faces this particular challenge, but it becomes more daunting the wider the instrument’s proposed scope. This was one of several reasons the draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” garnered little support among states, North or South. The Commission on Human Rights declined to act on the document, which had been submitted by its expert Sub-Commission, stating explicitly that it has no legal status, and ending up establishing my mandate instead.

Where does this leave us? Are international legal developments in business and human rights simply out of reach? They must not be. The stakes are too high, for human rights *and* for business. Enumerating these challenges is not an argument

against treaties. But it is a cautionary note to avoid going down a road that would end in largely symbolic gestures, of little practical use to real people in real places, and with high potential for generating serious backlash against any form of further international legalization in this domain.

So what is the alternative? In 2007, I wrote in the *American Journal of International Law* that international legal instruments must and will play a role in the continued evolution of the business and human rights regime, but to be successful they should be “carefully constructed precision tools,” addressed to specific governance gaps that other means are not reaching. One obvious candidate concerns the worst of the worst: business involvement in gross human rights abuses, including those that may rise to the level of international crimes, such as genocide, extrajudicial killings, and slavery or slavery-like practices. Indeed, I made a proposal to this effect in a note I sent to all UN member states in February 2011, conveying my recommendations for follow-up measures to my mandate. Wide consensus exists on the underlying prohibitions, which generally enjoy greater extraterritorial application in practice than other human rights standards. But there is little shared understanding among states as to what steps they should take with regard to business enterprises, or about the role that international cooperation could play in helping states to address the inevitable dilemmas and obstacles that would accompany such steps. While this gap may not lend itself to immediate treaty negotiations, it would be highly beneficial for the Council to gain greater clarity on the key questions that any future legal instrument might address. That it does is my second suggestion.

When I presented the Guiding Principles to the Human Rights Council, I closed my remarks with these words: “I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning.” Thanks to that endorsement, we have a stronger foundation today than ever before. As the Council now considers how to build on this foundation, I very much hope that it will continue to follow the approach that has enabled us to get to this point: based on the premise that any course of action—voluntary, mandatory, or hybrid—should produce practical improvements in the lives of affected individuals and communities.

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