

## Section 2.3

### Incorporating human rights: lessons learned, and next steps

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#### 1 Introduction

In March 2015, the Economist Intelligence Unit published a report entitled ‘The Road from Principles to Practice: Today’s Challenges for Business in Respecting Human Rights’. It drew on a global survey of 853 senior executives. Among the headline findings was this:

83% of respondents agree (74% of whom do so strongly) that human rights are a matter for business as well as governments. Similarly, 71% say that their company’s responsibility to respect these rights goes beyond simple obedience to local law.<sup>1</sup>

The report quotes Arvind Ganesan, who directs business and human rights at Human Rights Watch, as saying that as recently as the late 1990s ‘there was no recognition that companies had human rights responsibilities’.<sup>2</sup> While many factors contributed to this shift, the ‘watershed event’, as the report puts it, was ‘the UN Human Rights Council’s endorsement in 2011 of the Guiding Principles on Business and Human Rights’<sup>3</sup> (Guiding Principles).

The Guiding Principles are the first official guidance the Council and its predecessor, the Commission on Human Rights, have issued for states and business enterprises on their respective obligations in relation to business and human rights. This marked the first time that either body ‘endorsed’ a normative text on *any* subject that governments did not negotiate themselves, and endorsement was unanimous. I developed the Guiding Principles over the course of a six-year mandate as Special Representative of the Secretary-General for Business and Human Rights, through nearly 50 international consultations, voluminous research reports and pilot projects.<sup>4</sup> UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, describes the Guiding Principles as ‘the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights’.<sup>5</sup> Compared with normative and policy developments in other highly complex and contested domains, like climate change, uptake of key elements of the Guiding Principles has been relatively swift: by other international standard-setting bodies, states, businesses, civil society and workers’ organizations and bar associations.

Needless to say, much more needs to be done. When I presented the Guiding Principles to the Human Rights Council in 2011, I stated that ‘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’.<sup>6</sup> By this I meant that the Guiding Principles would provide an authoritative foundation on which to build. They were intended to trigger an evolution, not as the final word on the subject.

Our task now is to identify plausible paths ahead. But it is equally important to understand how we got here, why the Guiding Principles succeeded where previous such efforts failed. Critics believe it is because the Guiding Principles do not, in themselves, impose new legal obligations on states or businesses.<sup>7</sup> This is a partial and therefore misleading answer. More to the point is the recognition by John Tasioulas, Professor of Moral and Legal Philosophy at King's College London, that the Guiding Principles' success lies in breaking through certain conventional conceptual and doctrinal 'shackles'.<sup>8</sup> These contributed to past failures, and they would do so again if turned loose on future developments. Hence this chapter is divided into two parts: the premises underlying the Guiding Principles, and how to build on them.

## 2 Foundational logics

I drew the first premise from Harvard colleague and Nobel Laureate Amartya Sen: the need to rigorously distinguish human rights from human rights law. Sen maintains that treating human rights merely as the parents or progeny of law unduly constricts – he actually uses the term 'incarcerate' – the social logics and processes other than law that drive enduring public recognition of rights.<sup>9</sup> What were some practical implications of this premise?

The debate around the initiative preceding my mandate, the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights',<sup>10</sup> was bogged down by doctrinal differences concerning whether international human rights law applies directly to business enterprises. Advocates and the Norms said yes; businesses and most states said no. The Commission (now Council) rejected the Norms and created my mandate instead. I saw no reason to replicate the debate. Instead, I adopted the position that companies should look to internationally recognized rights for an authoritative enumeration not of human rights *laws* that might apply to them, but of human *rights* they should respect.

This had three decisive consequences. It permitted a clear differentiation between state duties and corporate responsibilities, satisfying a demand by states and businesses alike. It shifted the debate from doctrine to the practical question of how businesses can know and show they respect rights, to which the Guiding Principles provided the answer: through the human rights due diligence process the Guiding Principles stipulate for business enterprises to avoid infringing on the rights of others and address adverse impacts with which they are involved. And it made it possible for states to endorse the Guiding Principles even if they had not ratified all of the core human rights conventions – importantly including China in relation to the civil and political covenant,<sup>11</sup> and the United States vis-à-vis the economic, social and cultural covenant.<sup>12</sup>

The second premise underlying the Guiding Principles reflects the growing fragmentation of international law into separate and autonomous spheres of law. Human rights discourse is infused with the assumption of a rights-based hierarchy – the idea that human rights trump not only in a moral sense but that they also do, or at least should, in terms of the law. Yet in an influential report to the UN General Assembly, the authoritative International Law Commission concluded that 'no homogenous

hierarchical meta-system is realistically available' within the international legal order to resolve the problem of incompatible provisions among different bodies of law, including when different tribunals that have overlapping jurisdictions address exactly the same set of facts and yet reach different conclusions.<sup>13</sup> In other words, resolution cannot be deduced from first principle. It has to be worked out in concrete realms of practice, where objectives are defined and can be aligned to achieve greater normative compatibility.<sup>14</sup> Thus, the Guiding Principles stress the importance of national policy coherence, of addressing cognate areas of policy and law that should be amended to provide greater space for human rights protection, and of states carrying that policy coherence with them when they participate in intergovernmental organizations.

Third, I observed that since the late 1990s the number of new multilateral treaties has dropped precipitously; not one has been deposited with the United Nations since 2010 and the most recent were targeted.<sup>15</sup> Earlier comprehensive treaties in complex and contested areas, such as the Kyoto Protocol,<sup>16</sup> have not fared well. Current indications are that Kyoto's top-down specification of emission cuts will be replaced by national pledges coupled with peer pressure – essentially an intergovernmental naming-and-shaming regime. Yet soft-law instruments and informal lawmaking are flourishing, as are many multi-stakeholder initiatives.<sup>17</sup> The causes are numerous, but among the main factors are the sheer complexity of transnational challenges, and global geopolitical/geo-economic shifts, generating a larger number and greater diversity of interests.

The inference I drew from this observation is that a trade-off exists between the 'comprehensiveness' of international instruments in complex and contested domains, and their 'binding-ness'. If you want comprehensiveness, go the soft-law route. If you aspire to binding-ness, take a targeted approach. I chose comprehensiveness in establishing a foundation, with follow-up binding instruments conceived as 'precision tools'.<sup>18</sup> In contrast, a non-governmental organization business and human rights 'treaty alliance' is demanding comprehensiveness (all rights and all businesses), binding-ness (a hard-law instrument) and universal jurisdiction.<sup>19</sup> This is so far beyond being feasible or reasonable as to constitute a purely symbolic gesture.

Fourth, the Guiding Principles rest on the recognition that global corporate conduct is shaped by three distinct governance systems. The first is the traditional system of public law and governance, domestic and international. Important as it is, by itself it has been unable to do all the heavy lifting on this and many other global challenges. The second is a system of civil governance involving stakeholders affected by business enterprises and their representatives, employing such social compliance mechanisms as advocacy campaigns, law suits and other forms of pressure, and also partnering with companies to induce positive change. The third is corporate governance, which internalizes elements of the other two as constraints, risks and opportunities. While the doctrine of separate legal personality between parent company and subsidiaries may govern the partitioning of assets and legal liability by multinational enterprises, risk management and identifying strategic opportunities typically are enterprise-wide functions.

Developing the Guiding Principles involved participants from each of these governance systems; it was an instance of polycentric governance. The intellectual and policy challenge was to construct a conceptual and normative platform whereby

the three governance systems become better aligned in relation to business and human rights, compensate for one another's shortcomings and play mutually reinforcing roles from which cumulative change can evolve over time.

To foster that alignment the Guiding Principles invoke the different discourses and rationales that reflect the different social roles these governance systems play in regulating corporate conduct. Thus, for states the emphasis is on their legal obligations under the international human rights regime to protect against 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, the Guiding Principles focus on the need to manage the risk of involvement in human rights abuses, which means that enterprises must act with due diligence to avoid infringing on the rights of others and address adverse impacts that occur. For affected individuals and communities, the Guiding Principles reinforce ways for their further empowerment to realize their right to remedy.

Finally, I sought to ensure that promoting implementation and building on the Guiding Principles would not be limited to the UN. Other actors have their own and often more powerful sources of leverage over business-related matters. Thus, I worked with individual governments and businesses, as well as civil society and workers' organizations. I also promoted uptake of the Guiding Principles with other international standard-setting bodies: the International Organization for Standardization (ISO); the Organisation for Economic Co-operation and Development (OECD); the International Finance Corporation; the European Union; the Association of South East Asian Nations; the African Union; and the Organization of American States. The result is implementation (highly variable, to be sure) through, and cascading effects beyond, these distributed networks, national and international, public and private – even as the expert working group that succeeded my mandate promotes the Guiding Principles from within the UN human rights machinery.

In sum, the answer to the question of why the Guiding Principles succeeded where other such initiatives have failed is far more complex than the dichotomy of voluntary vs mandatory measures that critics invoke. And if, going forward, these premises are ignored and the process reverts to prior conventional modalities, it could well revert to prior failures as well.

### 3 Next steps

Implementation of what is already on the table of course comes first. Let me illustrate how the dynamics of implementation unfold and should be reinforced in two areas in which the Guiding Principles have enjoyed rapid and widespread uptake: human rights due diligence and non-judicial grievance mechanisms. I then address three areas of law that should be prioritized.

Human rights due diligence is central to the corporate responsibility to respect human rights. Mark Taylor traced its path from my mandate into conflict minerals legislation even before the Guiding Principles were finalized.<sup>20</sup> Recently, the European Union adopted mandatory non-financial reporting requirements referencing the Guiding Principles,<sup>21</sup> and several governments and stock exchanges have moved in a

similar direction. But there was no reporting framework based specifically on the Guiding Principles. As noted elsewhere in this book,<sup>22</sup> Shift, the non-profit founded by former members of my UN team, has produced such a framework.<sup>23</sup> It helps companies take a deep dive into whether and how well they are aligning their due diligence practices with the Guiding Principles. The results, in turn, will provide information for sophisticated benchmarking.<sup>24</sup> Beyond that, governments requiring and companies conducting due diligence on their own accord are likely to find the need for more specific sectoral standards than exist in most industries. This is the focus of the NYU Stern Center for Business and Human Rights. The demand for assurance frameworks may come next. In short, due diligence has a built-in dynamic that should be reinforced because it helps reduce the incidence of corporate-related human rights harm.

The Guiding Principles also promote effective non-judicial grievance mechanisms, state-based and firm-level. Among the former, the National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises have the greatest global reach. The Guidelines were updated in 2011 and now include the Guiding Principles' corporate responsibility to respect provisions. The number of human rights complaints has since spiked, and the fraction of such cases accepted for NCP consideration is higher than for other types of complaint.<sup>25</sup> But NCP findings against companies generally have had no material consequences. Canada recently adopted new corporate responsibility requirements to change that, referencing the Guiding Principles. Extractive companies listed in Canada that do not comply with the requirements now can lose government support through export credits and consular services.<sup>26</sup> Other governments should adopt comparable policies.

I turn next to three priority areas for further legal development. One is international investment law, contained in nearly 3,000 bilateral investment treaties and investment chapters of free trade agreements. These allow multinational corporations to sue states for damages, not only in cases of expropriation without prompt and adequate compensation, but also if the economic equilibrium that existed when the investment was made is upset through policy measures that an arbitration panel might construe as regulatory takings, which can include labour regulations, human rights standards and environmental requirements. Moreover, there is a far higher degree of speculative litigation under the investment regime – trying to push the boundaries in favour of investors – than in the World Trade Organization.<sup>27</sup> A priority for business and human rights should be to ensure that bona fide public interest considerations gain greater protection as investment agreements come up for renewal.

A second area is corporate law, particularly the interpretation it has been given in recent decades in the Anglo-American system: as requiring maximizing short-term shareholder value. This has raised the incentive for CEOs to manage to the share price, discounting other factors, including harm to people and planet. A broader social conception of the corporation is necessary if we are to meet these challenges. Towards that end, University of London Professor Peter Muchlinski has outlined how the Guiding Principles' due diligence requirements could lead towards a more robust corporate duty of care.<sup>28</sup>

My final point concerns judicial remedy for harm done. The current treaty proposal seeks a comprehensive and binding instrument coupled with extraterritorial jurisdiction.<sup>29</sup> This raises serious practical problems. First, given the complex and

contested nature of business and human rights, a comprehensive and legally binding instrument would have to be pitched at so high a level of generality that it would be of little use to real people in real places. Second, the proposal excludes national companies from its scope. This virtually guarantees opposition from multinational firms and their home states, thus polarizing the process and undermining the hard-won consensus that has been achieved. Consequently, ‘success’ at best would mean ending up with the functional equivalent of the UN migrant workers convention.<sup>30</sup> Adopted in 1990, it has yet to provide needed protection for migrant workers because, as expected, it has not been ratified by any country receiving significant numbers of migrant workers. Third, even that scenario may be overly optimistic because there is little indication that most *host* states of multinationals are prepared to accept home state judicial intrusion into their jurisdiction covering the entire range of internationally recognized rights, from extrajudicial killings to providing an adequate work/life balance.

Recognizing these constraints, I have advocated a ‘precision tools’ approach to further international legalization in this space. One obvious candidate is corporate involvement in ‘gross abuses’.<sup>31</sup> This is because of the severity of the harms; because the underlying prohibitions in relation to natural persons already enjoy widespread consensus among states yet there remains considerable confusion about how they should be implemented in practice when it comes to legal persons; and because the knock-on effects for other aspects of the business and human rights agenda would be considerable, as was true of the US Alien Tort Statute before the Supreme Court gutted it.<sup>32</sup> To those who say this does not go far enough, Stanford Law Professor Jenny Martinez, who supports my proposal, provides a compelling response: ‘a first step is better than no step at all’.<sup>33</sup> In effect, ‘no step’ would result from insisting on an ‘all-in’ treaty.

## Notes

- 1 The Economist Intelligence Unit, ‘The Road from Principles to Practices: Today’s Challenges for Business in Respecting Human Rights’, *The Economist*, 16 March 2015.
- 2 *Ibid.*
- 3 *Ibid.*
- 4 Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/17/31 (21 March 2011).
- 5 Z. Ra’ad Al Hussein, ‘Ethical Pursuit of Prosperity’, *Law Society Gazette*, 23 March 2015, [www.lawgazette.co.uk/analysis/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.fullarticle](http://www.lawgazette.co.uk/analysis/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.fullarticle).
- 6 See ‘Presentation of Report to United Nations Human Rights Council, Professor John G. Ruggie, Special Representative of the Secretary-General for Business and Human Rights’, Geneva, 30 May 2011, [www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011\\_Remarks\\_Final\\_JR.pdf](http://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf).
- 7 See, e.g. Global Policy Forum, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* (June 2014), [www.globalpolicy.org/home/221-transnational-corporations/52638-new-working-paper-corporate-influence-on-the-business-and-human-rights-agenda-of-the-un.html](http://www.globalpolicy.org/home/221-transnational-corporations/52638-new-working-paper-corporate-influence-on-the-business-and-human-rights-agenda-of-the-un.html).
- 8 See J. Tasioulas, ‘Human Rights, No Dogmas: The UN Guiding Principles on Business and Human Rights’, <http://jamesstewart.com/human-rights-no-dogmas-the-un-guiding-principles-on-business-and-human-rights>.
- 9 A. Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy and Public Affairs* 319.
- 10 United Nations Sub-Commission on the Promotion and Protection of Human Rights, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
- 11 *International Covenant on Civil and Political Rights*, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171.
- 12 *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, in force 3 January 1976, 999 UNTS 3.