

# THE UNITED NATIONS MANDATE ON BUSINESS AND HUMAN RIGHTS: FUTURE LINES OF ACTION

## EL MANDATO DE LAS NACIONES UNIDAS SOBRE EMPRESAS Y DERECHOS HUMANOS: LAS FUTURAS LÍNEAS DE ACCIÓN

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Summary: I. INTRODUCTION. II. HISTORICAL BACKGROUND OF THE UNITED NATIONS MANDATE ON BUSINESS AND HUMAN RIGHTS. III. THE BUSINESS AND HUMAN RIGHTS FRAMEWORK AND GUIDING PRINCIPLES. IV. FUTURE LINES OF ACTION. V. CONCLUSIONS.

Sumario: I. INTRODUCCIÓN. II. ANTECEDENTES DEL MANDATO DE LAS NACIONES UNIDAS SOBRE EMPRESAS Y DERECHOS HUMANOS. III. EL MARCO DE LAS NACIONES UNIDAS SOBRE EMPRESAS Y DERECHOS HUMANOS Y LOS PRINCIPIOS RECTORES. IV. LAS FUTURAS LÍNEAS DE ACCIÓN. V. CONCLUSIONES.

### I. INTRODUCTION

Corporations had not been given attention in the founding texts of the new international order after the Second World War. Since then they have grown in scale and scope, and particularly since the 1990s “reflecting the dramatic worldwide expansion of the private sector at the time, coupled with a corresponding rise in transnational economic activity”.<sup>2</sup> While these economic actors have delivered innovations and efficiencies that have contributed to raise standards of living of people around the world, they have also caused and are involved in human rights abuses around the world. Globalization and other world developments have deepened the strong impact of corporations on the realization of human rights. These impacts are not merely confined to labour rights and environment but span the full panoply of fundamental rights.<sup>3</sup> In this context, it becomes necessary from an international law human rights perspective to address the responsibilities of corporations for the protection and

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<sup>2</sup> Introduction to the *Guiding Principles on Business and Human Rights*, A/HRC/17/31 p. 3.

<sup>3</sup> Regarding some of those human rights impacts, see Human Rights Watch report entitled *On the Margins of Profit: Rights at Risk in the Global Economy*, February 2008 (accessible at <http://hrm.org/reports/2008/bhr0208>).

promotion of human rights. As Paust has noted “in terms of potential impact, decisions and activities of many large multinational corporations are capable of doing more harm to persons and resources in ways that thwart human rights than decisions and activities of some nation-states”.<sup>4</sup>

That explains the great deal of *interest* and *concern* raised in recent years over the profound impact on human rights of the increased activities and working methods of transnational corporations (TCNs), as it is shown by the academic literature and information resources devoted to this topic. While efforts to regulate corporate activities began decades ago, when the Human Rights Council unanimously endorsed John Ruggie’s Guiding Principles on 16 June 2011, it was the first time that the United Nations Organization (UN) stated authoritatively its position and expectations in the field of business and human rights.

This paper presents an overview of the UN Special Representative mandate (2005-2011) and critically examines the UN Framework and Guiding Principles on business and human rights in order to explore future lines of action. The historical background of the corporate accountability movement within the United Nations are examined in the first place, followed by discussion of the work and mandate of the UN Special Representative on the topic of human rights and transnational corporations and other business enterprises, including an analysis of the Protect, Respect and Remedy Framework, and of the Guiding Principles aimed at operationalizing the framework. Then, consideration is given to the future lines of action that stem from following-up the concluded mandate. The focus will be on decisions adopted by the Human Rights Council and other future lines of action that could be appropriate to ensure corporate accountability. The paper concludes with recommendations for steps that the international community should adopt to advance the accountability of transnational corporations.

## **II. HISTORICAL BACKGROUND OF THE UNITED NATIONS MANDATE ON BUSINESS AND HUMAN RIGHTS**

The process of de-colonization led to major transformations of international society and of international relations. At the United Nations Organization the representatives of the so-called Third World claimed the establishment of a new international economic order (NIEO), as a response to the prevailing international economic order imposed by Western countries. In this context, UN concern about corporate activities can be traced back to more than forty years ago, when the Economic and Social Council ordered a study of the role of transnational corporations and their impact on the development

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<sup>4</sup> J. PAUST, “Human Rights Responsibilities of Private Corporations”, *Vanderbilt Journal of Transnational Law*, vol. 35 num 3 may 2002, pp. 801-824 ( at p. 802). Also in this line the following statement made in the Human Development Report 2000: “Global corporations have an enormous impact on human rights – in their employment practices, in their environmental impact, in their support for corrupt regimes or their advocacy for policy changes.”

process as well as on international relations<sup>5</sup>. That request led to the establishment of the UN Commission on Transnational Corporations (UNCTC) as an advisory body in December 1974.

During its existence the UNCTC was entrusted with different tasks.<sup>6</sup> First, the agency furthered understanding of the political, economic, social, and legal effects of activities undertaken by transnational corporations, especially in developing countries. Second, it secured international arrangements that promoted the positive contributions of transnational corporations. The agency also devised national development targets and goals for world economic growth while attempting to eliminate possible negative effects. Third, the UNCTC sought to strengthen the negotiating capacity of host countries, in particular developing nations, in their dealings with transnational corporations. In addition to these tasks, one of the UNCTC's primary goals was to create an international code of conduct for transnational corporations. It began formulating such a code in 1977 and completed a final draft in 1990.<sup>7</sup>

Despite the UNCTC's efforts, the Commission failed in adopting a corporate code of conduct, and it was dissolved in 1994, when its responsibilities were transferred to the United Nations Conference on Trade and Development.

Alongside, there have been a number of initiatives to develop codes of conduct for business by multilateral agencies<sup>8</sup> like the Organization for Economic Cooperation and Development (OECD), which issued the first version of its Guidelines for Multinational Enterprises in 1976; or for particular sectors: The Fair Labor Association to improve working conditions in factories was incorporated in 1999; the Voluntary Principles on Security and Human Rights for extractive companies were announced in 2000.

In addition to various UN-developed instruments, other voluntary codes and systems have been introduced over the years. Among the most widely recognized and accepted are the OECD Guidelines for Multinational Enterprises and the International Labour

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<sup>5</sup> UN Economic and Social Council, Resolution 1721 (LIII), July 28, 1972. A similar text was reflected in the *Charter of rights and economic duties of States* adopted by the UN General Assembly in December 1974 which provides "Each state (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;

<sup>6</sup> UN Center on Transnational Corporations, "Background and Activities of the Commission and the Centre on Transnational Corporations, 1972 to 1975", [unctc.unctad.org/asp/UNCTC%20from%201972%20to%201975.aspx](http://unctc.unctad.org/asp/UNCTC%20from%201972%20to%201975.aspx) (the name of the Commission was then changed to Center).

<sup>7</sup> United Nations Draft International Code of Conduct on Transnational Corporations, *23 International Legal Materials* 626 (1984).

<sup>8</sup> For in-depth analysis of those instruments see O. MARTÍN-ORTEGA, *Empresas multinacionales y derechos humanos en Derecho Internacional*, Bosch, 2008, chapter 3.

Organization's (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.<sup>9</sup>

The OECD Guidelines were drafted in 1976. Talks on updating them began in June 2010, and on May 25, 2011, forty-two governments adopted the update at the fiftieth anniversary OECD ministerial meeting. The Guidelines, which are an annex to the OECD Declaration on International Investment and Multinational Enterprises, cover business ethics on employment, human rights, the environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. Governments signing on to the Declaration commit to promoting the Guidelines among multinational enterprises operating in or from their territories, with observance of the Guidelines supported by National Contact Points (NCPs), a unique implementation mechanism.<sup>10</sup>

The ILO Tripartite Declaration was first issued in 1977<sup>11</sup>. The principles enshrined therein address several areas of corporate activity, including the promotion of employment and equality of opportunity and treatment, and discuss ways for governments to develop national policies for vocational training and skill development that are closely connected to employment. In addition, favorable conditions of work and life, which include freedom of association and the right to organize, are encouraged. Periodic surveys are to be conducted to monitor the effect given to the Declaration by multinational enterprises, governments, and employer and worker organizations. A summary and an analysis of the replies received are submitted to the ILO governing body for discussion. One weakness of the Declaration is that it covers only a limited area: worker's rights. Thus, as a narrowly crafted mechanism, it cannot be used to address the broader range of human rights violations that corporations often commit. The OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles sought to directly engage corporations in the development of human rights programs within their businesses as well as add a layer of accountability over their implementation of the proposed standards. Although these codes are useful in addressing and emphasizing the importance of corporate participation in the protection of human rights, they, however, remain voluntary, reliant on the goodwill of corporations to implement them.

At the 1999 World Economic Forum, the then UN Secretary-General Kofi Annan proposed the adoption by corporations of a Global Compact which became the

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<sup>9</sup> Organisation for Economic Cooperation and Development, OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, [www.oecd.org/about/0,3347,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,3347,en_2649_34889_1_1_1_1_1,00.html); International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (hereafter Tripartite Declaration), 4th ed., [http://www.ilo.org/empent/Whatwedo/Publications/lang--en/docName--WCMS\\_094386/index.htm](http://www.ilo.org/empent/Whatwedo/Publications/lang--en/docName--WCMS_094386/index.htm).

<sup>10</sup> Each signatory establishes an NCP, which becomes the forum for promoting the Guidelines on a national level. An NCP handles all enquiries and matters related to the Guidelines in that particular country, including investigating complaints about a company operating or headquartered there.

<sup>11</sup> The most recent edition of the ILO Tripartite Declaration was released in 2006.

United Nations Global Compact launched in 2000.<sup>12</sup> The Compact includes ten principles and invites companies to embrace, support, and enact, within their sphere of influence, a set of core values in the areas of human rights, labor standards, the environment, and corruption. The principles are based on the idea that businesses should support and respect the protection of internationally proclaimed human rights and ensure that they avoid complicity in human rights abuses.<sup>13</sup> Further, the Compact called on businesses to protect the labor rights of their workers, including the elimination of forced labor and discrimination. In addition, corporations were to promote and encourage environmental responsibility and actively work against all forms of corruption. The objectives of the program were to place the ten principles at the centre of business activities whilst also giving support to broader UN goals.

The initiatives described above remained voluntary initiatives that came from multilateral institutions embracing a range of corporations. They have contributed to foster the voluntary approach to corporate responsibility and have promoted a trend in the last fifteen years for companies to adopt their own codes of conduct, thereby developing the so-called “corporate social responsibility”(CSR) concept<sup>14</sup>.

In 2003 at the United Nations a different approach was taken in an effort to address the shortcomings of a voluntary approach to corporate responsibility<sup>15</sup>: the UN Commission on Human Rights received from the Sub-Commission on the Promotion and Protection of Human Rights, one of its subsidiary bodies, a proposed code of conduct for transnational corporations for its approval: “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (the Draft Norms).<sup>16</sup> The Draft Norms “provided that virtually every human right gives rise to a wide range of duties on virtually every corporation”. Along this line the Norms asserted that “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

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<sup>12</sup> See at [www.unglobalcompact.org/](http://www.unglobalcompact.org/).

<sup>13</sup> Principle 1 and 2 of the Global Compact.

<sup>14</sup> There is no universally accepted definition of CSR. According to the definition in the “Green Paper-Promoting a European Framework for Corporate Social Responsibility” of the European Commission (18/07/2000), CSR is described as a concept whereby companies integrate social and environmental concerns in the business operations and in the interactions with their stakeholders on a voluntary basis, at [europa.eu.int/comm/employment\\_social/soc-dial/csr/](http://europa.eu.int/comm/employment_social/soc-dial/csr/).

<sup>15</sup> See WEISSBRODT & KRUGER, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, *AJIL*, vol. 97, 2003, pp. 901. This article provides great detail about the process through which the Norms were created. The authors argue that the norms are not voluntary, but other commentators disagree, claiming that “[t]he document is not directly binding against corporations and has been described by some of its drafters as a mere restatement of existing international human rights laws.” T. RULE, “Developments: Using “Norms” to Change International Law: UN Human Rights Laws Sneaking in through the Back Door?”, *CHI. JIL.*, vol. 5 2004, p. 325.

<sup>16</sup> 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

human rights recognized in international as well as national law.”<sup>17</sup> 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. The Draft Norms provoked a strong negative reaction from the International Organization of Employers and the International Chamber of Commerce, who asserted that the Norms were a “counterproductive” attempt to shift responsibilities to companies for “what are and should remain government responsibilities and functions.”

In part because of that opposition, a number of states lined up to oppose the Draft Norms. The fact that the Sub-Commission that drafted the Norms involved few states or companies in the process may have also contributed to the lack of support. Some NGOs championed the Norms but their support wasn't enough for the Commission on Human Rights, which declined to consider them.

Scholarly analysis of the Norms has been widespread- and it is not intended to be reviewed it here; then, as now, as Radu Mares has put it, the “Draft Norms continue to polarize writers”.<sup>18</sup>

In 2005, the Commission requested that the Secretary-General appoint a Special Representative to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights”. Then-Secretary-General Kofi Annan appointed Harvard Professor John Ruggie.<sup>19</sup> In 2008, Ruggie presented to the Human Rights Council (which replaced the Commission in 2006) the “*Protect, Respect and Remedy*” Framework<sup>20</sup>, which he described as the “conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors.” The Council passed a resolution welcoming the framework and gave Ruggie a new three-year mandate to develop more practical guidance.

From the outset, 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.<sup>21</sup> 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”, human rights law does not currently impose direct obligations on corporations or any other non-state

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<sup>17</sup> Draft Norms 4.

<sup>18</sup> R. MARES, “Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress”, in R. MARES (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, Nijhoff 2011, at 10.

<sup>19</sup> For an excellent account of Ruggie’s work, see R. MARES, *supra* note 18, pp 1-50.

<sup>20</sup> A/HRC/8/5 (7 April 2008).

<sup>21</sup> 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).

actors.”<sup>22</sup> 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.

Rather than proposing a new international legal framework, 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.<sup>23</sup> Ruggie emphasized that the Framework required no changes to existing law, only a better understanding of it. He underscored that international human rights law already encompass 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.<sup>24</sup> 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.

On 21 March 2011, Ruggie released the final version of the *Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework*.<sup>25</sup> This version was the result of a November 2010 draft of the principles and an online discussion on the draft open until January 31, 2011. In presenting the Guiding Principles to the Council in June 2011, Ruggie stated that “[t]he Guiding Principles’ normative contribution lies *not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.*”

Two weeks after Ruggie’s presentation, the Human Rights Council adopted by consensus a resolution endorsing the Guiding Principles<sup>26</sup>. The Council also established a Working Group to “promote the effective and comprehensive dissemination and implementation of the Guiding Principles”. The Working Group is also mandated to

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<sup>22</sup> 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).

<sup>23</sup> 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].

<sup>24</sup> 2007 Mapping Report.

<sup>25</sup> A/HRC/17/31, [www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf).

<sup>26</sup> The Council gives limited support to Special Procedures, but throughout his mandate Ruggie raised funds from governments to hire staff, visit stakeholders and sites, and hold meetings around the world, many of which were organized in partnership with civil society organizations. He held large regional multistakeholder consultations in Bangkok, Bogota, Buenos Aires, Johannesburg, Moscow, and New Delhi; separate business and NGO consultations; small expert gatherings on subjects including corporate law and investment; numerous meetings with government representatives in Geneva and in their home capitals; and an online forum that attracted hundreds of comments and thousands of viewers.

identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles; to continue to explore options for enhancing effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas; to integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children". The mandate of the Working Group also includes to provide guidance to the work of the annual Forum.<sup>27</sup>

### III. THE BUSINESS AND HUMAN RIGHTS FRAMEWORK AND GUIDING PRINCIPLES

Among those involved in the mandate over its six years, there was a palpable sense of relief at the Council's endorsement of the Guiding Principles— meaning that consensus has been achieved from a truly global set of stakeholders representing all actors, governmental, intergovernmental, civil society organizations and enterprises involved in this field. However, it should be stressed that the Guiding Principles received a warmer welcome from corporations than from human rights organisations, 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. Even those critics, however, eventually urged the Human Rights Council to build on, rather than reject, the Framework and Guiding Principles. As to the positions of states, they were generally more in favour.

To understand the success of the Special Representative's mandate, it is also worth considering the Guiding Principles in the context of the financial crisis bringing scrutiny to corporate practices and state failures; growing economic power from non-Western countries; heightened transparency through technology and social media; debates over global governance within institutions like the United Nations and the G20, and over transnational/global issues like climate change and financial regulation.

#### 1. The Framework

In the Framework, Ruggie presents three pillars for analyzing the respective duties and responsibilities of entities with respect to human rights.

The first pillar is the *State duty to protect* against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication. According to Ruggie, this pillar does not require changes to existing law, only a better understanding of it. In his view, human rights law already requires this principle of the Framework, because it provides for states obligation to protect the human rights of those within their jurisdiction from interference by non-state actors, including corporations.<sup>28</sup> He also argued that to protect human rights effectively, states must provide remedies for misconduct. the framework suggests that states, in carrying out

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<sup>27</sup> [www.ohchr.org/Documents/Issues/Business/ConceptNoteStakeholderConsultationBHRForum.pdf](http://www.ohchr.org/Documents/Issues/Business/ConceptNoteStakeholderConsultationBHRForum.pdf).

<sup>28</sup> 2007 Mapping Report, para. 18. See M. HAKIMI, *State Bystander Responsibility*, 21 EJIL, (2010); J H. KNOX, *Horizontal Human Rights Law*, 102 AJIL, 18-27 (2008).



this duty, focus on five priorities to promote corporate respect for human rights and prevent corporate-related abuse: strive to achieve coherence and effectiveness within government operations when working with businesses, including ensuring their ability to protect rights; promote respect for human rights when they do business with companies; foster corporate cultures respectful of human rights at home and abroad; create policies to guide companies operating in conflict-affected areas; and address the issue of extraterritorial control over corporate activity.

The second pillar is the *corporate responsibility to respect* human rights. This requires corporations to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that do occur. This responsibility applies to all aspects of business activity and requires corporations to consider their impact on all internationally recognized rights. The third pillar is putting emphasis on the need for greater *access by victims to effective judicial and non-judicial remedies* for violations they suffer.

The formulation of this second pillar seems to echo the Draft Norms. But Ruggie added a crucial point of differentiation since in his approach, the responsibility stems from *societal expectations* rather than human rights law.<sup>29</sup> 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 this responsibility can be enforced through domestic legal sanctions as well as in the court of public opinion.<sup>30</sup>

## **2. The Guiding Principles on Business and Human Rights**

The Guiding Principles were developed to “operationalize” the framework and to provide concrete and practical recommendations for its implementation. Each of the thirty-one principles is accompanied by commentary and elaboration on how states and corporations can carry out their respective pillars of the framework. Along with some of the positive advancements made as a result of the principles, certain areas deserve additional analysis.

The state duty to protect section of the Guiding Principles makes 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.”<sup>31</sup> 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.

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<sup>29</sup> 2008 Framework Report, *supra* note 19, para. 9.

<sup>30</sup> *Id.* para. 54.

<sup>31</sup> GP, Foundational principle 1, at p. 6.

The Principles limit the duty to protect to abuses within a state's territory or jurisdiction, which means that "they decline to characterize states' human rights obligations as generally extending extraterritorially".<sup>32</sup> This limitation is very controversial, because many human rights organizations and scholars 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,<sup>33</sup> 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.<sup>34</sup>

Extraterritorial jurisdiction—what powers and duties governments have when companies domiciled in their countries commit or contribute to human rights abuses abroad—was, and continues to be one of the most complex and controversial issue within the Duty to Protect pillar.

The Corporate Responsibility to Respect was defined by Ruggie as the responsibility for business not to infringe on the rights of others and address negative impacts with which they are involved. 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.<sup>35</sup> To implement this responsibility corporations should conduct "human rights due diligence, which is outlined in this second pillar of the Guiding Principles as part of a process for companies to "know and show" that they are meeting their responsibility to respect human rights<sup>36</sup>: Companies should have a human rights policy; conduct human rights due diligence, which includes assessing actual and potential impacts, integrating human rights throughout their operations, and tracking and reporting outcomes; and remediate any adverse impacts that they have caused or contributed to.<sup>37</sup> According to the Guiding Principles, the human rights that companies must respect at a minimum are those outlined in the international human rights norms and ILO core conventions (as opposed to the limited subset of rights that the Draft Norms named). Ruggie was very careful to point out that international human rights law generally does not currently impose direct legal obligations on business enterprises (which is disputed), although it is enshrined in domestic jurisdictions in numerous ways, such as legislation on labor standards,

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<sup>32</sup> J. KNOX, "The Human Rights Council Endorses "Guiding Principles" For Corporations", *ASIL Insights*, August 1, vol. 15 issue 1, 2011.

<sup>33</sup> Guiding Principles, *supra* note 24, at 7.

<sup>34</sup> Special Representative of the Secretary-General, Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework, para. 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."

<sup>35</sup> GP (*supra* note 24), princ. 13

<sup>36</sup> *Id.* princs. 17-21

<sup>37</sup> *Id.* princ. 22.

privacy, or land use. Rather, the “responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate.”

My interpretation is in line with those scholars that have argued that “respect” is too low a bar, that companies should have so-called “positive” obligations as well including to fulfill or realize rights. Ruggie responded that the responsibility to respect is indeed “not merely a passive responsibility for firms”; and that “[t]here may be situations in which companies have additional responsibilities. But the responsibility to respect is the *baseline norm for all companies in all situations.*”

Other issues debated during the development of the Corporate Responsibility to Respect principles and addressed to varying extents in the final text included the applicability of the Guiding Principles to small- and medium-sized enterprises; whether financial institutions merit special attention; and the extent of a company’s responsibility for impacts occurring in its value chain.

The Access to Remedy pillar of the framework addressed both state responsibilities to ensure that those affected by corporate human rights abuses within their territory and/or jurisdiction have access to effective judicial and non-judicial mechanisms, and the corporate responsibility to prevent and remediate any negative impacts that they cause or contribute to.<sup>38</sup> The criteria that such mechanisms should meet are also articulated: *inter alia*, they should be legitimate, accessible, predictable, equitable, and transparent.<sup>39</sup>

One subtopic within this pillar that captured broad attention for breaking new ground was the criteria for effective company-based grievance mechanisms. Such criteria were piloted by companies in different sectors and regions, and made the subject of a separate online resource.

One of the most-debated topics was the status and enforcement of the principles themselves. Business and NGO concerns alike wondered whether the Guiding Principles would be yet another voluntary code of conduct, or whether they would be enforced into hard law. Ruggie tried to move the debate beyond this voluntary-versus-mandatory dichotomy: Saying that “no single silver bullet can resolve the business and human rights challenge” became a common refrain, as he tried to avoid the ill-fated Norms debate that focused on one international instrument. In his 2007 report that mapped the spectrum of ways in which corporations are held accountable for human rights abuses, he emphasized that many voluntary initiatives have accountability mechanisms. He worked to embed the Guiding Principles into other standards that have their own enforcement mechanisms, like the OECD Guidelines for Multinational Enterprises. And he emphasized that his role was *not to create international law, but to provide policy recommendations to the Human Rights Council*, whose member states

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<sup>38</sup> *Id.* princ. 25, 26, 27.

<sup>39</sup> *Id.* princ. 31.

would then be responsible for implementing his recommendations should they be adopted.<sup>40</sup>

Ruggie said in his final presentation to the Human Rights Council in June, invoking Winston Churchill, “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>41</sup> It is indeed a beginning, although it is to be regretted that important human rights principles have been sacrificed to achieve consensus.

### 3. Positive and contested sides of the Guiding Principles

Among the positive sides of the Guiding Principles, it is to be highlighted the following:

- Framing of business activities in human rights terms: Human rights have become one of the dominant discourses in society today and this trend will be reflected in evolving standards and norms as well as jurisprudence.
- Institutional take-up of the Ruggie Framework: The culmination of Ruggie’s mandate has coincided with the conclusion of three significant multilateral standards, each of which has been influenced to some extent by Ruggie: the revision of the OECD Guidelines for Multinational Enterprises; the International Finance Corporation’s Policy and Performance Standards on Social and Environmental Sustainability; and the OECD Recommendations on Common Approaches on the Environment and Officially Supported Export Credits. Ruggie has also had an influence in the area of bilateral investment treaties, by bringing attention to the problems which arise when the rights of foreign investors come into conflict with a state’s duty to give effect to its international human rights commitments.
- Role of national human rights commissions: The Guidelines have reinforced the role of national human rights commissions in examining the human rights impacts of business activities, as was illustrated by the Edinburgh Declaration of the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights. The Declaration called on national human rights bodies to strengthen their work across all three pillars of the Ruggie Framework.
- Clarity about the basis of the state duty to protect. It is the “States’ international human rights law obligations [that] require that they respect, protect and fulfill the human rights of individuals within their territory and / or jurisdiction», and this includes the duty to protect against human rights abuses by business enterprises. In fact, this duty requires taking steps to prevent, investigate, punish, and redress corporate human rights

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<sup>40</sup> Some NGOs continued to lament the lack of an overarching accountability mechanism in the Guiding Principles themselves. At the same time, some business concerns fretted that “nonbinding UN guidelines could inform binding common law. Or a non-binding UN report could inspire binding statutory law, which is after all one of the report’s goals.”

<sup>41</sup> John Ruggie, “Presentation of Report to United Nations Human Rights Council”, 30 May 2011, [www.businesshumanrights.org/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf](http://www.businesshumanrights.org/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf) (accessed 10 April 2012).

abuses”. This language makes clear that states have a clear duty to protect human rights in accordance with international law.

- Creation of independent monitoring and accountability mechanisms in situations where states privatize the delivery of services that may have human rights impacts.<sup>42</sup> The language is clear that in these situations, states are not permitted to abandon their international human rights law duties. In fact, “[f]ailure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself”<sup>43</sup>. As Ruggie notes in the Guiding Principles, the danger of human rights abuses should influence and change how states choose to privatize government functions.

-The Guiding Principles also seek to address situations in which the state's involvement extends beyond merely being a “host” country to a corporation. The duty to protect is especially important, as the commentary points out, when the business receives substantial support and services from the state, directly or indirectly. This increases the responsibility of the state to ensure that corporations respect human rights. Further, the Guiding Principles note that the state duty to protect includes imposing human rights due diligence requirements on corporations “where the nature of business operations or operating contexts pose significant risk to human rights”. This principle emphasizes that the state's responsibility to protect is especially important when it is involved in the corporation's business operations.

-Assertion of the corporation's responsibility to respect as “a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and / or willingness to fulfil their own human rights obligations, and does not diminish those obligations”.<sup>44</sup> Ruggie reinforces this point by emphasizing that this responsibility supersedes national laws that may govern business conduct in relation to human rights.<sup>35</sup> This is a critical principle underpinning the need to fully engage corporations in adopting a business model that respects human rights.

-Need for business to adopt policies that demonstrate their commitment to human rights. Notably, corporations should show their respect for human rights through communication and other transparent measures. The standard requires that “[b]usiness enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them”. Such reporting mechanisms would provide for more transparency regarding businesses' response to their human rights impact as well as make it more feasible to provide remedies to victims.

- The concept of human rights due diligence. In the Guiding Principles, Ruggie notes, “In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”<sup>45</sup> Ruggie properly states that the process of due diligence is not a defense for potential corporate liability for human rights violations. While due

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<sup>42</sup> GP (*supra* note 24). Principle 5.

<sup>43</sup> Ibid. (commentary).

<sup>44</sup> Ibid., Principle 11 (commentary).

<sup>45</sup> Ibid., Principle 17.

diligence may offer evidence that a company has taken reasonable steps to avoid negative impacts on human rights, it does not absolve it from liability under relevant legal regimes. Thus, the due diligence process empowers companies to understand the nature and extent of their impacts and to work proactively in mitigating potential human rights-related risks.

- In addressing the need for remedy, Ruggie, as a result of stakeholder feedback, greatly expanded the commentary regarding the effectiveness criteria for non-judicial grievance mechanisms. In the final version of the Guiding Principles, he clarifies the terms, expectations, and reasons for the use of criteria to ensure that the concerns and needs of victims of human rights violations are fully addressed in a legitimate and transparent manner. The goal is to ensure that all parties to a grievance process are able to trust and maintain confidence in the process's ability to serve their needs.

Under the same vein, the Guiding Principles present a negative side. One of the critiques adverted in international legal scholarly works focus on the state duty to protect which is the first pillar in the Framework. In international and human rights law, the state has a general duty to protect everyone within its jurisdiction, including from abuse by third parties: this was the finding of the Inter-American Court of Human Rights in *Velasquez Rodriguez v Honduras* in 1989, and has since been confirmed by subsequent cases of the European Court of Human Rights and other bodies. The state's duty to protect should extend to extra-territorial jurisdiction over companies. This area has not been dealt with sufficiently in Ruggie's Framework and Guiding Principles, which distinguishes between home state and host state duty to protect. It is necessary to clarify the human rights obligations of both.

States already practice extra-territoriality in a range of areas, so there is no reason why the principle cannot be applied to human rights protection as well. The reality is that many developing states are in a weaker position than corporations which are based elsewhere but conduct operations on their territory. Particular issues arise where corporations are exercising home government authority, where corporations are acting under the direct control of the home state, and where a state assists and aids a corporation in its activities with knowledge of that unlawful activity. The issue of state-owned enterprises is also quite complex and challenging and is dealt with very poorly by the Guiding Principles.

The Principles are also weak in the area of states' universal jurisdiction over crimes against humanity and gross violations of human rights. The Principles recognise the risk of businesses being involved in gross human rights abuses, particularly in conflict-affected areas, and states are urged to ensure business enterprises are not involved in such abuses. However, this is very weak in light of recent developments in the area, such as the 2008 report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes.

In addition, the third pillar ("Remedy") is probably among the weakest. One of the main problems is the *ad hoc* nature of the remedies. Grievance procedures are by

and large positive – they often provide a better result for victims – but there is a need for states to provide for this on a more systematic basis. Access to litigation is subject to chance.

One relevant concern about the Guiding Principles is that they do not provide for strong mechanisms in situations where states are unable or unwilling to protect citizens from corporate human rights abuses. Although Principle 7 specifically addresses state duties in conflict areas, the commentary merely provides for a voluntary effort when the “host” state of a corporation is unable to assert effective control. The commentary suggests that in such situations, the “home” states of offending transnational corporations have a role to play in ensuring that businesses are not involved in human rights abuses. It also proposes that “neighboring States can provide important additional support”.

This reinforces the fact that often home states hold the power to protect human rights and should impose real and meaningful consequences on businesses complicit or engaged in human rights abuses.

Although it is important that the Guiding Principles recognize the particular human rights vulnerabilities in conflict situations, the required acknowledgments are all voluntary and hold no meaningful consequences for states whose businesses are operating in such areas. Ruggie notes, however, that to create a truly effective accountability mechanism, states should take appropriate steps to address gaps in human rights due diligence by “exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and /or jurisdiction that commit or contribute to gross human rights abuses”. Further guidance or examples would have been helpful for contextualizing the conflict zone situations and providing assistance to states looking to craft accountability frameworks for them.

Another important concern involves the Guiding Principles' recommendation that corporations assess their human rights impact. The suggested methods of assessment include having businesses identify their potential and real effects on human rights, respond to remedy such effects, and create a public reporting mechanism to inform stakeholders about their efforts. In presenting only a general set of recommendations, the lack of examples and specificity will lead to inconsistent application by businesses, if they make the effort at all. In fact, the Guiding Principles state that when corporations assess any adverse impact their operations may have had, the process should “involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation”. It appears that the intent was to create flexibility to ensure the greatest amount of participation from businesses across economic sectors and operations. The reality is that without additional specificity, there is no concrete structure guiding businesses in implementing due diligence.

An effective assessment mechanism would specify the manner and frequency for all corporations to provide evaluations and would also detail how reporting of human

rights impacts should take place. It would require an oversight body to which businesses would provide their gathered information, to ensure that there is a fair and legitimate process. Such an oversight body would offer victims of human rights abuses a centralized place to seek remedy for their grievances instead of having to approach the various corporations themselves. Corporations should be able to adjust these requirements to their specific method of business operations, but without a concrete framework, businesses will continue to be unmethodical in implementing their responsibility to respect human rights.

A further problem with the Guiding Principles is the failure to account for situations where corporations willfully violate human rights and refuse to implement remedies or are deceptive in their implementation. The principles offer no actual consequences for businesses that do not implement these principles although there is language to suggest the possibility of penalties. For example, if a corporation were to choose to continue a business relationship that contributes to human right abuses, the principles warn that the business entity “should be prepared to accept any consequences – reputational, financial or legal”.<sup>49</sup> There is no mention, however, of actual measures that could be used against violators or under whose jurisdiction the corporation would fall.

While the Protect, Respect, and Remedy Framework and the Guiding Principles are certainly welcome, their voluntary nature remains the primary concern. Without *hard law* and a legal mechanism in place, it will be difficult to offer consistent remedies for victims. Another concern is that although the Human Rights Council directed the Special Representative “[t]o integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children”, Ruggie does not sufficiently do so in the principles. There is no guidance for corporations on how to include this perspective in their behavior.<sup>46</sup>

#### IV. FUTURE LINES OF ACTION

On June 16, 2011, the Human Rights Council adopted a resolution establishing a Working Group within the Special Procedures to focus on promoting implementation of the Guiding Principles, developing a regular dialogue on corporate accountability, and identifying possible areas of cooperation with governments.<sup>47</sup> There are some positive aspects about the manner in which the UNHRC has chosen to continue this mandate,

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<sup>46</sup> For example, the commentary for Principle 12 mentions that enterprises should respect the human rights of specific groups who may be vulnerable and goes on to mention women, indigenous people, and children. This commentary, however, does not provide procedures for addressing situations when the rights of children, women, and other vulnerable groups may be affected.

<sup>47</sup> UN Human Rights Council in Resolution A/HRC/17/4, “Human Rights and Transnational Corporations and Other Business Enterprises”, UN doc. A/HRC/17/L.17/Rev.1. For more information about the activities of the Working Group see [www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx). By now the WG has presented its first report to the UN General Assembly (A/67/285, 10 August 2012).



but since it has focused further activity on dissemination of the Guiding Principles, this approach can be criticized.

The Working Group (WG) involves the participation of five members selected from all regions of the world, increasing the possibility that a broad and independent perspective will be included in the work on the mandate. Further, a Forum created under the guidance of the WG will offer an additional opportunity for all actors involved to add their input on the subject since it is open to governments, UN bodies, corporations, and other stakeholders.<sup>48</sup> When the UNHRC endorsed the Guiding Principles, it noted that despite the role that they may play in “providing comprehensive recommendations for the implementation of the United Nations Framework”, they do not foreclose other “long-term development, including further enhancement standards”.<sup>49</sup> Thus, recognition is given to the need to develop enforcement standards: In paragraph 4(e), the WG is requested “[t]o continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities”. Despite the negative side of the Guiding Principles, their endorsement by the Council provides an additional source for corporate accountability at the international level.

The mandate of the WG revolves around the dissemination, good practices, and support of the Guiding Principles. This focus is regrettable. Without the mandate to continue the gathering and drafting of accountability standards, further development of soft law standards might be hampered. The request that the Working Group explore remedies at all levels, however, leaves a great deal of leeway for further development in the third prong of the framework.

An early draft of the resolution provided that the WG consider complaints of victims related to the violation of human rights. This development had the possibility of being an important step toward starting the process of accountability and remedies; it is commonly included in the thematic mandates of the UNHRC. Unfortunately, this part of the mandate was deleted in the final draft submitted to the UNHRC, though on a positive note, the mandate leaves open the possibility of country visits, which could possibly include meetings with victims. Another issue concerns funding, since it remains unclear how much funding will be made available to the WG and the forum. Without adequate financial support, it will be difficult for them to carry out the terms of the mandate.<sup>50</sup>

Although it is unfortunate that the continued oversight by the UNHRC on this topic will initially focus on the dissemination and promotion of the Guiding Principles, room remains for constructive developments toward holding transnational corporations and other business enterprises accountable for human rights violations. It will be up to the

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<sup>48</sup>See [www.ohchr.org/EN/Issues/Business/Pages/ForumonBusinessandHR2012.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/ForumonBusinessandHR2012.aspx). The first annual Forum will take place on 3-5 December 2012.

<sup>49</sup> *Ibid.*, para. 4.

<sup>50</sup> Until now the WG has celebrated two sessions (the third session is convened for the dates 26-30 November 2012) and has carried out a first country visit to Mongolia.

concerned actors, including governments, business, and civil society, to continue their involvement to ensure this goal.

Legal mechanisms are needed if are aiming to change a traditional culture of impunity among transnational corporations and their approach to human rights violations. The international community needs to seriously consider the viability of creating and implementing international legal mechanisms, including accountability and monitoring instruments, and providing effective remedies for victims aggrieved by business impacts.

## V. CONCLUSIONS

The Guiding Principles came about because the UN Draft Norms went too far. The non-binding nature of the Guiding Principles does not mean that they are not without legal significance. Some of it is already hard law, and it is necessary to recognize that it could lead to a treaty. On a more practical level, the approach chosen by the Special Representative has some practical advantages. As Jochnick has put it *“At the end of the day, the Framework and Principles have to be judged on the basis of whether they succeed in driving more energy and more effective attention to real accountability for companies. They will take on more “obligatory” force as they are incorporated into other existing standards, processes, laws and contracts. They’ll become meaningful when companies ... insist on human rights “due diligence” in their supplier contracts, when the EU ensures that its trade policies are consistent with the “duty to protect”, when communities use the Principles to demand more substantive remedies from corporate predators”*.<sup>51</sup> Nonetheless, it is also necessary to go much further to effectively hold corporations and all those involved in their operations liable for the human rights abuses that they commit. With that aim in mind it should be stressed the importance of clarifying the international/global legal framework applicable to transnational corporations as a way to prevent corporate actors from further violating human rights. Therefore, there is the need to continue building an international architecture to tackle the governance gaps identified by Ruggie as being at the origin of the business and human rights agenda. This would also involve continuing work in terms of fostering a culture of respect, establishing clear rules for all actors, building effective institutions and improving capacity of State and non-state actors where needed.

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<sup>51</sup> C. JOCHNICK, *Making headway on business and human rights*, February 11<sup>th</sup> (Oxfam), 2011.