

The United Nations Guiding Principles on Business and Human Rights (2011)

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The United Nations (UN) Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights (Guiding Principles) in June 2011. These principles frame companies' responsibilities to protect human rights, and reiterate states' corresponding international duties. They represent both a landmark result of controversial discussion, and an intermediary step towards further development. The international human rights system has traditionally been state centered: with a few exceptions, only states could violate human rights, and were responsible under international law for their respect, protection and fulfillment. Yet the processes of globalization, global governance and privatization have shifted a remarkable degree of power, agency, authority, and legitimacy to non-state actors, especially companies. This includes their ability to violate as well as to protect human rights beyond the state level. They are becoming global actors: their actions cannot easily be regulated within a single jurisdiction. Business actors – especially those operating at the global level – can exploit gaps in some countries' protection of human rights norms. Furthermore, private companies' enhanced impact on the international human rights system has motivated the development of the Guiding Principles as a first step toward harnessing their potential to increase human rights protections.

Genesis

The topics of corporate social responsibility, companies as part of society, labor rights, the impact of companies on the environment, and business ethics were already discussed in the early 20th century.¹ The discourse on business and human rights was kick-started in the 1990s, when civil society organizations began to focus on human rights violations by transnational companies. The most renowned cases were campaigns against Nike for breaches of labor rights in Indonesia; against Shell for oil pollution, complicity with a repressive regime, and the suppression of the Ogoni people in Nigeria; and against Yahoo for providing data that were used to persecute dissidents in China. These cases were brought to international attention by nongovernmental organizations (NGOs) and civil society, through both campaigning and lawsuits. They contributed to a heightened understanding of the business impacts on human rights within the UN and other international organizations, and encouraged companies to codify their respect for human rights in codes of conduct and voluntary agreements. Civil society organizations in turn used such statements to strengthen their demands.

Partly in reaction to these civil society demands, Kofi Annan launched the UN Global Compact in January 1999 as part of his reform agenda. The Global Compact, a voluntary initiative that provides companies with non-binding norms and a learning platform, has been criticized for lacking sufficient enforcement mechanisms.² Nevertheless, it was the

first cornerstone in the development of an international business and human rights agenda.

For a few years, it looked like the Global Compact was soon to be followed by a second cornerstone. The UN Sub-Commission on the Promotion and Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms) in August 2003. The Draft Norms were the result of years of deliberation of a sessional working group of the Sub-Commission, composed of five of its members. The drafting process was open to participation and comments from civil society, states, unions, and business actors alike. The draft was publicly supported by many NGOs such as Amnesty International and Oxfam. The document set out binding, explicitly non-voluntary business duties for human rights on the international level. Yet, the process ended unsuccessfully in 2004, when the UN Commission on Human Rights decided, without a vote, to acknowledge the work and the topic, but to not approve of the Draft Norms, stating that they had “no legal standing” and have “not been requested by the Commission.”³ The main objection to the Draft Norms involves their blending of state and business responsibilities, particularly their demand for extensive binding duties for companies. Even though it ultimately failed, the drafting process helped further the agenda. Yet, today it is rarely appreciated for addressing the very same questions that still are relevant to the current debates, including how to define transnational companies, how to distinguish between smaller and larger companies, whether to include domestic businesses, and which human rights concepts to address.⁴

In April 2005, the UN Commission on Human Rights requested the appointment of a Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations and Other Business Enterprises with the mandate to “identify and clarify standards of corporate responsibility and accountability”, and to research and clarify some of the concepts that were a matter of dispute in the Draft Norms.⁵ John Ruggie was appointed SRSG in July 2005. Ruggie, a professor of Human Rights and International Affairs, was one of the major architects of the Global Compact and part of the team of Kofi Annan since 1997. He concluded his first mandate as SRSG with the “Protect, Respect and Remedy” Framework (2008) which laid the groundwork for the Guiding Principles. In June 2008, Ruggie’s mandate was renewed in order to implement the Framework, and to further consult with multiple stakeholders. This work resulted in the Guiding Principles, which were unanimously endorsed by the Human Rights Council with resolution 17/4 of June 2011. This resolution adopted the Guiding Principles as the first global standard on business responsibilities for human rights and established the Working Group on Business and Human Rights. This group of five independent experts has the mandate to promote the Guiding Principles and their implementation, to support capacity building, conduct country visits, and explore further options and recommendations, among others. The Working Group also guides, and since 2017 chairs the Forum on Business and Human Rights, an annual conference on business and human rights launched by Resolution 17/4. Hence the Human Rights Council Resolution 17/4 marks the second cornerstone in the development of business and human rights as a global issue, with the Guiding Principles incarnating its very heart.

Content

Ruggie's first mandate as SRSG was conducted in the context of the failed Draft Norms. Aspirations were high to develop a broad consensus among the stakeholders, especially the business world. Considerable effort was put into research and consultation, "including in-depth research; extensive consultations with businesses, Governments, civil society, affected individuals and communities, lawyers, investors and other stakeholders; and the practical road-testing of proposals."⁶

The Guiding Principles do indeed enjoy broad acceptance from different stakeholders. It is due to that consensus that the Guiding Principles, alongside with the 2008 Framework and the Interpretative Guide (2012), represent a very important normative benchmark. They address all human rights in their universality and indivisibility, and all business enterprises, "both transnational and others, regardless of their size, sector, location, ownership and structure."⁷

Yet this consensus and the broad nature of the Guiding Principles came at the price of their non-binding character. They are not an international treaty, but soft law designed to create norms and guidance for behavior and implementation. Still, the Guiding Principles are an international landmark document that cannot simply be ignored. As such, they contribute to two developments, if not transformations in the international human rights system.

The first development is the concept of complementary responsibility. Adopting the structure of the 2008 Framework, the Guiding Principles rest on three pillars: 1) the state duty to respect, protect and fulfill human rights, 2) the corporate responsibility to respect human rights, 3) access to remedy for those affected by human rights violations, including formal, judicial, legislative, administrative, as well as non-judicial grievance mechanisms.

The three pillars are closely interconnected: each actor's responsibilities are embedded with and/or enhanced by those of the other actor. The state duties, for example, include the possibility to "foster corporate cultures in which respecting rights is an integral part of doing business."⁸ The pillar on access to remedy entails measures by states, business actors and civil society actors. Furthermore, the Guiding Principles emphasize that neither actor should undermine or infringe on the other actor's responsibility for human rights.

Overall, the responsibilities of states and companies complement each other. The Guiding Principles do not entail a shift of responsibility from states to businesses (or vice versa); nor does one actor's responsibility replace or substitute for the other actor's responsibility. The opposite is true: each actor's responsibility is (supposed to be) strengthened by the other actor's responsibility.⁹ While this frame prevents a sheer transfer of human rights responsibility from state to business actors, it leaves room for gaps and loopholes.

The second major element of the Guiding Principles is their contribution to the transformation of the dichotomy between public and private roles of state and non-state actors. While this element is less explicitly addressed than the complementary responsibility, it still creates a tone in the scope, content and aspiration of the Guiding Principles that future developments can build on.

The second as well as the third pillar of the Guiding Principles denote the "role of business

enterprises as specialized organs of society performing specialized functions.”¹⁰ The 2008 Framework provides context for this aspect: “While corporations may be considered ‘organs of society’, they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States.”¹¹ The Guiding Principles honor the principle of international law that acknowledges states as public actors, and therefore as the primary subjects of international law (i.e. public law). According to this traditional view, states must respect, protect and fulfill human rights, whereas companies, just as any other private actor, are asked to respect human rights. The principles state: “The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.”¹² Generally, the private respect of human rights is accomplished by following the law, and refraining from violating others’ rights – a common requirement that is not confined to the area of human rights.

At the same time, the Guiding Principles have contributed to a slow shift in human rights law because they treat businesses as “organs of society,” acknowledging that their role in politics and society transcends that of private actors. The 2008 Framework addresses further possible public functions and additional voluntary commitments of companies that entail additional responsibilities.¹³ Thus the business responsibility to respect human rights rises to a new level that is manifest in three dimensions.

First, the responsibility transcends mere compliance with national laws and regulations; it is a “global standard of expected conduct for all business enterprises wherever they operate”¹⁴ that is clearly situated within international human rights law. This demand responds to the gaps in the implementation and enforcement of human rights in national law.

Second, the business responsibility to respect human rights transcends the negative private duty not to infringe on the rights of others. Pillars two and three of the Guiding Principles stipulate a quantitatively and qualitatively ambitious number of active measures for business companies to implement in order to prevent, mitigate, and remedy their adverse human rights impact. These include the institutionalization of grievance mechanisms, and the principle of due diligence. The process of due diligence “should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”¹⁵ Businesses are also asked to actively implement positive contributions to human rights: “‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps – for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes.”¹⁶

Third, the responsibility to respect human rights extends to third-party actors to which companies are linked. The concept of complicity addresses situations in which companies do not cause, but directly or indirectly contribute to or profit from, human rights violations by others (e.g. repressive states, security forces or other companies). While complicity is judiciable in many jurisdictions, the Guiding Principles suggest that companies additionally address linkages to third-party actors that violate human rights if the violation is “caused

by an entity with which it has a business relationship and is linked to its own operations, products or services.”¹⁷ While an enterprise is not legally responsible or liable for human rights violations by others to which it is linked, the enterprise “has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence.”¹⁸

Ultimately, treating companies as organs of society and endowing their responsibility to respect human rights with active and positive dimensions, the Guiding Principles contribute to a discussion that situates companies beyond the dichotomy between public and private. While companies do not simply resemble state actors, their actions and effects on others – and on society as a whole – transcend that of private actors.¹⁹

Impact

There is disagreement regarding the extent to which the Guiding Principles have produced a visible impact. On the one hand, studies invoke the Guiding Principles’ strong influence on a myriad of subsequent steps and developments, including the 2011 revision of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the ISO26000 norm on social responsibility, the performance standards of the International Finance Corporation (the private sector arm of the World Bank), the European Union’s definition of corporate social responsibility (CSR), as well as codes of conduct of transnational enterprises. In addition, the work of the Working Group is ongoing, as is the development and implementation of National Action Plans (NAPs) in numerous states, and a number of new national laws and regulations have been passed. The Guiding Principles have also contributed to further developments in international jurisprudence.²⁰

On the other hand, critics say that the Guiding Principles will only have a sustainable effect if they are legally and politically enforced through subsequent measures.²¹ They explain that the non-binding character of the Guiding Principles has little impact on actual behavior. At the same time, they acknowledge the Guiding Principles’ significant meaning for the development of the business and human rights agenda. They see the Guiding Principles as one important step that needs to be followed up by hard law. Ruggie, however, ascribes the success of the Guiding Principles precisely to their non-binding character, which allows for consensus-based fora, polycentric and informal mechanisms, networks and cascades, while preventing polarization and dissent.²²

Further cause for critique of the Guiding Principles’ impact concerns their orientation towards incentivizing the business community. Surya Deva, a member of the Working Group on Business and Human Rights, criticizes that their consensus comes at the price of minimalism, pragmatism, the marginalization of contradictions, and the focus on cooperation with business actors rather than NGOs or even those affected by business behavior. The risk is that norms communicated in language that is non-threatening to businesses weakens the human rights rhetoric. This includes the reference to ‘responsibility’ instead of ‘duty,’ and ‘human rights impact’ rather than ‘violation’ – i.e. broader, less rigorous terminology.²³ The mixture of business and human rights language would also lead to confusion about the concept of due diligence, which has different

meanings in the two realms.²⁴ Others criticize the language of the Guiding Principles for its managerial character – i.e. terminology that is measurable, predictable, governable, and operationalized by experts rather than subject to social and political struggles.²⁵ The Interpretative Guide to the Guiding Principles provides a reason for this aspect beyond the aspiration for consensus. It underlines the necessity of measuring the human rights impact (both quantitatively and qualitatively) in order to change it.²⁶

By and large, the Guiding Principles provide a polycentric framework that is implemented in very different ways, at different levels and by different actors. They provide a significant framework for outlining the role of business actors in respecting human rights.²⁷

However, their non-binding character continues to raise concerns. Civil society organizations continue to campaign for binding laws and regulations. At the national level, NGOs advocate the development and proper implementation of National Action Plans and other laws. In Switzerland and France, binding regulations are on their way. Germany, by contrast, has just been criticized by the UN Economic and Social Council (ECOSOC) for the overwhelmingly non-binding character of its National Action Plan.

At the global level, dozens of civil society organizations, NGOs and individuals have formed the Treaty Alliance, which advocates introducing binding regulation into international law. The so-called Treaty Process is one such initiative. Initiated by Ecuador and South Africa, and supported by other states from the global South and the Treaty Alliance, this is a working group under the auspices of the Human Rights Council that has a mandate to draft a binding instrument on business and human rights.²⁸ Some, including states from the global North, a variety of business actors and John Ruggie, fear the treaty process undermines the consensus generated by the Guiding Principles. Others see the future treaty as the next step in the development of the business and human rights agenda. From this perspective, the Treaty Process and other struggles to develop binding law would not serve as a substitute for the Guiding Principles but take them at their word: “Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.”²⁹

Annotated Bibliography

OHCHR: The Corporate Responsibility to Respect Human Rights. An Interpretive Guide. HR/PUB/12/02. Geneva/New York 2012.

This UN document provides context on how to read, understand and implement the articles in the Guiding Principles that relate to business behavior. It is structured in the form of questions and answers, and strives for clarity and enhanced understanding.

HRC: Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie. A/HRC/8/5 2008.

This UN document contains the framework that builds on the preliminary results of John Ruggie's work in his function as the SRSG on Human Rights and Transnational Corporations and Other Business Enterprises, and serves as the foundation of the Guiding Principles.

Deva, Surya/Bilchitz, David (eds.): Human Rights Obligations of Business. Beyond the Corporate Responsibility to Respect? Cambridge 2013.

This comprehensive volume collects perspectives on the Guiding Principles' procedural, legal, conceptual, and normative impact and implications. Subsequently, it pursues further options, recommendations and possible developments for the business and human rights agenda. Deva is a member of the UN Working Group on Business and Human Rights. Bilchitz is currently Secretary-General of the International Association of Constitutional Law.

Ramasastri, Anita: Corporate Social Responsibility Versus Business and Human Rights. Bridging the Gap Between Responsibility and Accountability, in: Journal of Human Rights 14:2 (2015), pp. 237-259.

The article traces the recent developments related to corporate social responsibility. On the one hand, it focuses on voluntary measures and companies' positive impact on human rights; on the other hand, it discusses the business and human rights agenda, including binding principles, remedy, accountability, and companies' negative impact on human rights. Both strands of discussion can contribute to each other – and to a comprehensive implementation and further development of the Guiding Principles. The author is member of the UN Working Group on Business and Human Rights.

Meyersfeld, Bonita: Business, Human Rights and Gender. A Legal Approach to External and Internal Considerations, in: Surya Deva, David Bilchitz, (eds.): Human Rights Obligations of Business. Beyond the Corporate Responsibility to Respect? Cambridge 2013, pp. 193-217.

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Prügl, Elisabeth/True, Jacqui: Equality Means Business? Governing Gender Through Transnational Public-Private Partnerships, in: Review of International Political Economy 21:6 (2014), pp. 1137-1169.

These studies address the impact of business behavior on women, gender relations and gender-related issues. Meyersfeld analyzes the gender-specific effects of the Guiding Principles. Götzmann/Wrzoncki provide an overview of how states can act on gender-sensitive issues when implementing the Guiding Principles. Prügl/True trace the positive as well as the negative effects of transnational companies engaging with gender-related issues

more generally.

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Fußnoten

1. Cf. Bowen: Social responsibilities of the businessman.
2. For an overview, cf. Rasche/Kell The United Nations Global Compact.
3. OHCHR Decision 2004/116; and ECOSOC Decision 2004/279.
4. On the process and content of the Draft Norms, cf. Weissbrodt/Kruger: Norms on the Responsibilities. Weissbrodt was one of the experts in the sessional working group. For a critical view of the Draft Norms, cf. Ruggie: Just business, pp. 46ff.
5. Resolution E/CN.4/RES/2005/69.
6. OHCHR: The corporate responsibility to respect human rights, p. 1.
7. UN: Guiding Principles, p. 1.
8. HRC: Protect, respect and remedy, §29.
9. Cf. Mende: Privatisierung oder Diffusion.
10. UN: Guiding Principles, p. 1.
11. HRC: Protect, respect and remedy, §53.
12. UN: Guiding Principles, p. 14.
13. HRC: Protect, respect and remedy, §24.
14. UN: Guiding Principles, p. 13.
15. Ibid., p. 17.
16. HRC: Protect, respect and remedy, § 55. The Interpretative Guide to the Guiding Principles even mentions the possibility of voluntary business initiatives that actively promote and protect human rights (OHCHR: The corporate responsibility to respect human rights, Q8). But it refrains from formulating or even demanding such business responsibilities. Cf. Wettstein: CSR and the debate; Bradford: Beyond good and evil, p. 271f.
17. OHCHR: The corporate responsibility to respect human rights, Q9.
18. Ibid., Q11, cf. Guiding Principle no. 19.
19. This makes business companies a kind of hybrid actor. Cf. Mende: The Public, the private, and the business-societal; Mende: Unternehmen als gesellschaftliche Akteure; Scherer/Palazzo: The new political role; Scherer/Palazzo: Globalization and corporate social responsibility; Cutler: Transnational business civilization.
20. Ruggie: The social construction; Addo: The reality of the United Nations Guiding Principles; Buhmann: Business and Human Rights.

21. Hamm: Die UN-Leitprinzipien; Aaronson/Higham: "Re-righting business"; Cragg: Ethics, enlightened self-interest; Muchlinski: Implementing the new UN; Deva: Treating human rights lightly; La Vega/Mehra: International legal accountability; Buhmann: Business and Human Rights.
22. Ruggie: The social construction.
23. Deva: Treating human rights lightly, pp. 91ff. Also cf. Baxi: Towards socially sustainable globalization.
24. Bonnitcha/McCorquodale: The concept of 'due diligence'. Also cf. Ruggie/Sherman: The concept of 'due diligence'.
25. Scheper: 'From naming and shaming'.
26. OHCHR: The corporate responsibility to respect human rights, Q48, 51.
27. Cf. Wettstein: Normativity, p. 163: "One may be critical or sympathetic toward the 'Ruggie' process and its results, but one cannot but acknowledge the tremendous transformation the debate has undergone since John Ruggie took over."
28. The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIWG) took up its work in 2014 and presented a first draft of the treaty in June 2018. On the possibilities of compatibility between the Guiding Principles and the treaty, cf. Backer: Moving forward; Tuttle: Human Rights Council resolutions; Blackwell/Vander Meulen: Two roads converged.
29. HRC: Report of the Special Representative, §13.

Zitation

Janne Mende: The United Nations Guiding Principles on Business and Human Rights (2011), in: Quellen zur Geschichte der Menschenrechte, ed by Arbeitskreis Menschenrechte im 20. Jahrhundert, November 2018, URL: www.geschichte-menschenrechte.de/business-human-rights/