



HARVARD Kennedy School

JOHN F. KENNEDY SCHOOL OF GOVERNMENT

'Guiding Principles' for the Business & Human Rights Treaty Negotiations: An Open Letter to the Intergovernmental Working Group

John G. Ruggie
9 October 2018

Kofi Annan surely was right when he stated, in a World Economic Forum speech nearly twenty years ago, that unless the social and environmental pillars of globalization were strengthened, globalization itself would be highly vulnerable – “vulnerable to backlash from all the ‘isms’ of our post-cold war world: protectionism; populism; nationalism; ethnic chauvinism; fanaticism; and terrorism.” A year later, in the same venue, he added: “My friends, the simple fact of the matter is this: if we cannot make globalization work for all, in the end it will work for none.”

Annan began a journey, and I had the honor to walk with him. In 2000 he launched the Global Compact and the Millennium Development Goals; in 2006 the Principles for Responsible Investment. He appointed me Secretary-General’s Special Representative for Business and Human Rights in 2005, under a mandate from the then Human Rights Commission to identify and clarify standards of responsibility and accountability for states and businesses in all regions of the world. That effort ultimately led to the UN Guiding Principles on Business and Human Rights.

When I presented the UNGPs to the Human Rights Council in 2011, I stated that their endorsement by the Council would not mark the end of business and human rights challenges; that it was not even the beginning of the end; but it was the end of the beginning because at last an authoritative foundation would exist.

I also stated that international human rights law, like any other body of law, would need to continue to evolve to reflect new realities. I did not then and do not now see any contradiction between the UNGPs and further international legal developments.

But of course I do believe that any treaty proposal that seeks to have a positive impact on real people in challenging contexts should meet certain requirements. I have commented on specific provisions of the current “zero draft” treaty elsewhere.¹ With intergovernmental deliberations to begin soon, allow me to suggest here some ‘guiding principles,’ as it were, which I hope might assist the overall process itself.

1. The Human Rights Council endorsed the UNGPs by consensus. This marked the first time that the Council (or Commission before it) adopted official guidance for business and human rights, despite several preceding efforts in this and other UN bodies to do so.

The core sponsors of the resolution recommending endorsement were Argentina, India, Nigeria, Norway, and the Russian Federation. Agreement among them, broad support from key constituencies across business and civil society, and subsequent consensus across the Council’s membership, help explain the widespread influence of the UNGPs. The initiative took six years and involved nearly 50 international consultations.

The UNGPs have been incorporated or otherwise referenced in the policies of governments, intergovernmental organizations, businesses, investors, workers’ organizations, NGOs, sports organizations, and law societies. While much remains to be done, great care must be taken that a treaty text does not lock in standards lower than those embodied in the UNGPs, and that the definition of terms in the treaty are consistent with the same terms used in the UNGPs. Otherwise the treaty risks sowing confusion and disillusionment among those already striving to implement the UNGPs, lowering expectations of those who have yet to step up to their responsibilities, and letting down the rights-holders who depend on today’s momentum being maintained and increased, not diluted or diverted.

2. To succeed in practice, a business and human rights treaty must strive for the same broad base of support that we saw for the UNGPs. This includes both home and host states to companies whose businesses affect people’s human rights. In this regard, the current treaty draft expects much in terms implementation and enforcement of the *home* countries of multinational

¹ (<https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights>).

corporations. That suggests, thereby, that it is particularly important for those states be part of any consensus.

In this context, it is also worth noting that, on current trends, by 2025 half of the Fortune Global 500 companies will be headquartered in so-called emerging market economies. 120 Chinese companies are already on that list. So today business and human rights can no longer be framed simply as an issue of North vs. South, as it was in the 1970s and early 1980s when the UN Code of Conduct on Transnational Corporations negotiations took place. The global economy has changed foundationally.

3. As a result of vast and complex global supply chains, roughly 80% of global trade today (in terms of gross exports) is linked to the production networks of multinational corporations, with trade in intermediate products greater than all other non-oil traded goods combined.

My iPhone was produced by 785 suppliers in 31 countries. None were Apple subsidiaries, and by current global standards that is a relatively small supply chain. A major consumer products company can have tens of thousands of *first-tier* suppliers, and through various layers of contractual arrangements procure the products of over one million smallholder farmers around the globe.

One out of seven jobs in the world is estimated to be directly global supply chain related (one out five in G-20 countries). This does not include “informal” and “non-standard” forms of work.

The current treaty draft’s focus on “business activities of a transnational character” neither limits the scope to transnational corporations, nor does it include all business enterprises. Given the scale of global supply chains, how to translate this formula into legal and operational meaning is a mystery. No effective treaty can hinge on a mystery as to the scope of its jurisdiction.

The UNGPs do not draw lines between companies that are part of global supply chains and those that are not. They apply to all enterprises regardless of their size, sector, location, and ownership structure. An effective treaty should do the same or risk creating yet another gap in human rights protection.

4. It is certainly no secret that access to judicial remedy remains the biggest challenge in the global business and human rights space. It is also the most

difficult to resolve. States already have the obligation to protect against human rights abuse within their jurisdiction by third parties, including business. No new treaty is needed to reinforce that.

The issue comes down to extra-territorial jurisdiction. There are and will remain deep doctrinal differences among states on this question. Their existence cannot be ignored; but nor are they insurmountable. Indeed, there is one critical step on which I believe states could and should find broad agreement: the provision of greater mutual legal assistance, to remove a range of structural, logistical, and capacity barriers to victims' access to judicial remedy.

Of course requiring greater mutual legal assistance raises its own challenges: it is costly and labor intensive. Systems could and would quickly become overwhelmed if they tried to address all types of impacts on human rights. Investigative and judicial entities would be more likely to contribute fully to the effort if it focused on cases that involve the most severe human rights abuses, such as crimes against humanity, forced labor, sexual violence, and the worst forms of child labor.

Therefore, in the interest of achieving broad support and ensuring effective implementation, it would be wise to define the jurisdictional scope of the treaty in these terms, as the first step in the international legalization of business and human rights standards.

To conclude, in this brief note I wanted to stress once again that the UNGPs are entirely compatible with further international legal developments. And I wanted to add my thoughts as to what an effective treaty initiative should involve.

The task before the Working Group is immense, and it is important. Success – not on paper but on the ground – demands deep reflection, good will, and a constructive process that searches for consensus in the knowledge that real change requires it.

John G. Ruggie is the Berthold Beitz Professor in Human Rights and International Affairs at Harvard's Kennedy School of Government and Affiliated Professor in International Legal Studies at Harvard Law. He has served as UN Assistant Secretary-General for Strategic Planning (1997-2001), Special Advisor to the SG for the Global Compact (2001-2005), and SRSG for business and human rights (2005-2011). He has won several awards from law societies for his contributions to the development and practice of international law.