



# HARVARD Kennedy School

JOHN F. KENNEDY SCHOOL OF GOVERNMENT

## International Legalization in Business and Human Rights

*On 11 June 2014, Professor John Ruggie, former UN Special Representative for Business and Human Rights, received the annual Harry LeRoy Jones Award of the Washington Foreign Law Society, honoring “an individual who has made an outstanding contribution to the development and application of international law.” Previous recipients have included, among others, Supreme Court Justices Sandra Day O’Connor, Ruth Bader Ginsburg and Stephen Breyer, Member of the International Court of Justice Thomas Buergenthal, Secretary of State James Baker, Senator George Mitchell, Ambassador Thomas Pickering, IMF Managing Director Christine Lagarde, and Transparency International founder Peter Eigen. Professor Ruggie was introduced by Anne-Marie Slaughter, formerly Director of Policy Planning at the Department of State and Dean of Princeton University’s Woodrow Wilson School of Public and International Affairs, and currently President and CEO of the New America Foundation. The following are Professor Ruggie’s remarks at the award presentation, addressing international lawmaking in business and human rights.*

I am both honored and humbled to receive the Harry LeRoy Jones award. I am honored by your recognition of the UN Guiding Principles on Business and Human Rights, which I developed over the course of a six year mandate. Unanimously endorsed by the UN Human Rights Council, they now constitute the authoritative global baseline standard in this space. And I am humbled by the roster of individuals who have stood before you in previous years and by their extraordinary achievements.

Thank you, Anne-Marie, for your kind introduction. As the saying goes, had they been here my father would have felt proud and my mother might have believed you. For my part, I’m just plain thrilled to share this moment with you. In the interest of full disclosure, you all should know that Anne-Marie and I have been friends and co-conspirators for a long time. One of our ongoing conspiracies involves bridging the study and practice of international law on the one hand, and the political processes of global governance on the other. Neither by itself provides an adequate guide or basis for creating a rules-based international order. Yet that is what’s critically needed to deal with the exponential growth of what my favorite boss Kofi Annan called problems without passports, and to embed fundamental precepts of human dignity and justice in the full range of public and private institutions that shape our lives on this shrinking planet.

Permit me to take a few minutes this evening to share with you some reflections on international lawmaking in business and human rights – what works, what doesn’t, and why – drawing on the experience of developing the UN Guiding Principles. I begin with a brief summary.

The GPs seek to better align states, business and civil society behind a common normative and policy framework, in order to generate larger-scale effects and cumulative change. They rest on three pillars:

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

The GPs do not by themselves create legally binding obligations, but derive their normative force by elaborating upon existing human rights norms coupled with thick stakeholder consensus behind their provisions, including by business itself. They outline in general terms steps required for states and businesses to meet their respective obligations, stressing prevention as much as after-the-fact remedy. They reference all internationally recognized rights, they apply to all states and all business enterprises, and they encompass business conduct and relationships.

For states the GPs stress the legal obligations they have under the international human rights regime to protect against human rights abuses by business enterprises, as well as policy rationales consistent with, and supportive of, meeting those obligations. For businesses, beyond compliance with legal obligations, the GPs focus on the need to manage the risk of involvement in human rights abuses, which requires that companies act with due diligence to avoid harm and to address it where occurs. For affected individuals and communities, the GPs stipulate ways to further realize their right to remedy. I called this approach “principled pragmatism.”

In comparison with normative and policy developments in other difficult domains—climate change, for example—uptake of the GPs has been relatively swift and widespread: by other international standard setting bodies, states, companies, workers organizations, NGOs, and yes, even bar associations and law firms. Two provisions have enjoyed the most rapid uptake. One is human rights due diligence requirements for companies. The other is the greater use of operational-level grievance mechanisms by means of which companies can contribute directly to resolving a range of disputes with individuals and communities who may be adversely impacted. The reason is straightforward. Each of the three major stakeholder groups has an interest in making these provisions work, although their rationales for doing so may differ. For states, promoting or requiring human rights due diligence and grievance mechanisms serves the state duty to protect; for businesses, they are a means by which to manage stakeholder-related risk; and for affected individuals and communities, they offer the promise of reducing the overall incidence of corporate-related harm while also serving as one possible source of remedy. I expect this kind of dynamic interaction to continue driving change.

Of course, much more remains to be done. When I presented the GPs to the Human Rights Council, I closed my remarks with these words: "I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning." That is to say, for the first time we have an authoritative global foundation on which to build.

As the business and human rights agenda continues to evolve, further legalization is an inevitable and necessary component of future developments. But we need to ask ourselves what form it should take at the international level. What does experience tell us about the approach that would yield the most benefit for affected individuals and communities, and in the shortest possible period of time?

This is no mere academic question. A group of developing countries led by Ecuador has proposed that governments start a process within the UN Human Rights Council to negotiate "an international legally binding framework on the issue of human rights and transnational corporations and other business enterprises."

Two very different schools of thought are in play on what form possible future legalization should take. One school, to which I adhere, would build on the principled pragmatism that brought us the Guiding Principles. Implementing the GPs must remain the top priority because no treaty of any kind is likely to materialize anytime soon. In terms of further legalization, principled pragmatism views international law as a tool for collective problem solving, not an end in itself. It recognizes that the development of successful international legal instruments requires a certain degree of consensus among states. And it holds that before launching a treaty process its aims should be clear, there ought to be reasonable expectations that it can and will be enforced by the relevant parties, and that it will turn out to be effective in addressing the particular problem(s) at hand.

Therefore, an approach consistent with principled pragmatism favors narrowly crafted international legal instruments for business and human rights, focused on specific governance gaps that other means are not reaching. One possible candidate concerns the worst of the worst: business involvement in gross human rights abuses, including those that may rise to the level of international crimes, such as genocide, extrajudicial killings, and slavery as well as forced labor. Wide consensus exists on the underlying prohibitions, which generally enjoy greater extraterritorial application in practice than other human rights standards. But further specificity is required as to what steps states should take with regard to business enterprises, and about the role that international cooperation could play in helping states to take those steps. A legal instrument with this focus also would have the secondary effect of heightening state and corporate sensitivity to the need for businesses to avoid human rights harm more broadly, much as the Alien Tort Statute did before the U.S. Supreme Court restricted its extraterritorial applicability in the recent *Kiobel* case.

The other school of thought embodies a more traditional top-down approach to international lawmaking. It seeks to squeeze the entire bundle of business and human rights challenges into a single, all-encompassing treaty. One would think that this approach would have lost its appeal by now, given its repeated failure to produce meaningful results on issues ranging from climate change to past efforts at regulating multinationals—issues that are characterized by extensive problem diversity, significant institutional variations, and conflicting interests across and within states. But no: an alliance of 500+ NGOs have signed on to this idea for a business and human rights treaty, supported by some human rights law professors. To this school of thought I say: be careful what you wish for. Even if your campaign were to succeed in launching such a treaty process, it would likely end in largely symbolic gestures, of little practical use to real people in real places, and with high potential for generating serious backlash by undermining the credibility of further international legalization in any form. Why is this so? For at least six reasons.

First, given the disparity in needs and preferences that exists among states today, it is inconceivable that they could agree to meaningful legal liability standards for corporate abuse of every single internationally recognized human right. Likewise, whatever standards were incorporated into such a treaty would reflect a very low denominator, well short of the highest current voluntary standards. In the wake of a treaty with low standards, pressure on companies to perform at ever-higher levels—from NGO campaigns, socially responsible investments funds, consumers, and so on—would become less effective because companies could, and many would, respond that they are dutifully complying with newly adopted international law. Even worse, the inferior standards would remain locked in place unless and until the treaty was formally amended and the amendments ratified.

Second, an all-encompassing treaty negotiation would diminish the full range of related efforts. Business support would be lacking and polarization would ensue. While negotiations are ongoing, ideas for new policies and laws would be viewed through the lens of what they might mean for negotiating tactics and treaty commitments, thereby reducing the scope for experimentation and innovation—which is precisely what this policy domain needs. Moreover, states that are reluctant to do much can be expected to invoke the treaty negotiations as grounds for not taking other significant steps, including changing national laws under pressure from domestic groups, arguing that they would not wish to preempt the ultimate treaty outcome.

Third, the already limited civil society capacity in the business and human rights space risks being absorbed by a complex treaty negotiation that could go on for several decades—recall that the negotiations on the non-binding Declaration on the Rights of Indigenous Peoples took twenty-six years, and it only deals with one set of rights for one category of people, not with all rights, for all people, all states, and all business enterprises. This would divert indispensable civil society resources, energy and pressure

for more focused legal and policy improvements that are more readily achievable. The same is true for many small developing countries.

Fourth, to add appreciable value to the status quo, any new treaty enforcement provisions would have to involve extraterritorial jurisdiction. Some UN human rights treaty bodies have urged home states of multinational corporations to provide greater extraterritorial protection against human rights harm involving “their” multinationals, and research conducted under my mandate identified the grounds on which states have done so in a number of policy domains. But state conduct generally makes it clear that they do not regard extraterritorial jurisdiction to be an acceptable means to address violations of the entire array of internationally recognized human rights.

Fifth, major home countries of multinationals are likely to find requirements for across-the-board extraterritorial jurisdiction particularly problematic. This group increasingly includes emerging market countries, so multinationals are no longer simply a battle field of the rest against the West, as they were in the 1970s and 1980s. Is China more likely than the United States to impose standards on its multinationals that it has not accepted for itself as a state? And what happens when the countries that can make the biggest difference don’t join up? For an answer one needs only to look at the history of international lawmaking on climate change, which has made legalization at national levels harder, not easier.

Sixth and finally, even with the best of all possible “political will,” it is difficult to imagine, even in conceptual terms, how an all-encompassing treaty could be effectively implemented. The crux of the challenge is that the category of business and human rights is not so discrete an issue-area as to lend itself to a single set of detailed treaty obligations. It involves complex clusters of different bodies of national and international law – including human rights law, labor law, anti-discrimination law, health and safety law, privacy law, consumer protection law, environmental law, anti-corruption law, humanitarian law, criminal law, investment law, trade law, tax law, property law and, not least, corporate and securities law.

No single treaty could possibly resolve these complex interactions, so it would be left to each state to take its own approach to enforcement. But that would simply produce confusion and conflicting outcomes, not uniform practices. Yes, there is the category of *jus cogens*, the name given to norms of general international law that permit no derogation under any circumstances. But even leaving aside various doctrinal and practical issues, *jus cogens* norms do not encompass the broad spectrum of human rights harms with which businesses may be involved, and which an all-encompassing treaty presumably would be intended to cover.

Let there be no misunderstanding: this debate is not about legalization as such. Nor is it about the tired dichotomy between voluntary and mandatory measures.

Treaties, after all, are voluntary in that no state can be forced to adopt one, while the Guiding Principles, which are typically described as being voluntary, embody existing mandatory requirements and have given rise to new ones. The debate instead is about carefully weighing the extent to which different forms of legalization are capable of yielding practical results where it matters most: in the daily lives of people around the world—and in the here and now, not some far-off idealized state of being. From the vantage of victims, an all-encompassing business and human rights treaty negotiation is not only a bad idea; it is a profound deception. In contrast, international legal instruments as precision tools, reinforcing and building upon foundations that have been painstakingly established, offer far greater promise.

In concluding, my sincere thanks once again to the Washington Foreign Law Society for your interest, your engagement and your commitment—and most especially for the honor you have bestowed on the UN Guiding Principles for Business and Human Rights.

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