

GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Nicolas Bueno and Christine Kaufmann

I. Introduction and Drafting History

[1] The United Nations Guiding Principles on Business and Human Rights (UNGPs) are a document endorsed by the United Nations Human Rights Council (UNHRC) in Resolution 17/4 of 16 June 2011. They mark a major milestone in the role of the United Nations (UN) to adopt rules on transnational corporations and human rights.

[2] Historically, the first phase of the United Nations' engagement with standard setting in business and human rights ended with the United Nations in 1992 suspending two decades of negotiations on the proposed Code of Conduct for Transnational Corporations. In a second phase starting from 1998, the UN Sub-Commission on Human Rights established a working group on the activities of transnational corporations, which formulated the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (the UN Norms). The UN Norms intended to establish binding human rights obligations for business enterprises directly under international law, which triggered too much opposition. Although they were considered by the UN Commission on Human Rights in April 2004 and again in 2005, the UN Commission did neither adopt nor expressly reject them (Ruggie [2020]; see also Deva [2020]; Nolan [2013]).

[3] The UN Secretary-General appointed John Ruggie as Special Representative on the issue of business and human rights in 2005. As a result of a participative, multi-stakeholder process including governments, civil society and business, the Special Representative presented the report *Protect, Respect and Remedy: a Framework for Business and Human Rights* (the Framework) to the United Nations Human Rights Council in 2008 (UNHRC [2008]). With the aim of overcoming the conceptual obstacles which had dominated the debate for decades, the Framework builds on existing state obligations and complements them with business responsibilities. It contains three core pillars: the state duty to protect against human rights abuses by non-state actors, including business (respect – protect – fulfil); the corporate responsibility to respect human rights; and the need for more effective access to remedies.

[4] These three pillars were then further elaborated and structured in thirty-one principles in the UNGPs, which aim to implement the Framework. Finally, in Resolution 17/4 of 16 June 2011 endorsing the UNGPs, the Human Rights Council also established a Working Group on the issue of human rights and transnational corporations and other business enterprises (the UN Working Group on business and human rights) consisting of five independent experts of balanced geographical representation (para 6). It also created an annual Forum on Business and Human Rights to discuss trends and challenges in the implementation of the Guiding Principles (para 12).

II. The UNGPs' Protect-Respect-Remedy Pillars

[5] The UNGPs are a legally non-binding document which reflects existing state obligations in international law in relation to business activities and the general consensus on corresponding responsibilities of business. They are therefore considered as a soft law instrument. As the

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UNGPs state, they should not be read as creating new international legal obligations (sources of international law). The following three sections outline the content of these obligations and responsibilities by following the UNGPs' three pillar structure: the state duty to protect, the corporate responsibility to respect and access to remedy.

1. The State Duty to Protect

[6] The first pillar of the UNGPs delineates the state duty to protect against human rights abuses by business enterprises. According to principle 1, one of the two foundational principles of the first pillar, states must protect against human rights abuse by business enterprises within their territory or jurisdiction (jurisdiction of states). The state duty to protect is a standard of conduct. It reflects the well-established obligation of states to prevent, punish, investigate and redress the harm caused by private entities (HRCtee, *GC No 31: Nature of Obligations* [2004] para 8). As part of this duty, states must also take appropriate steps to ensure that when such abuses occur within their territory or jurisdiction those affected have access to an effective remedy. The UN Committee on the Rights of the Child (CRC Committee) and the UN Committee on Economic, Social and Cultural Rights (CESCR) subsequently specified the content of this obligation with regard to the Convention on the Rights of the Child (CRC) and the International Covenant on Social, Economic and Cultural Rights (ICESCR) in the context of business activities in two General Comments (GC; General Comments and Recommendations). According to these general comments, the duty to protect in the context of business activities encompasses an obligation to take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses. This includes the obligation to adopt a legal framework requiring business entities to exercise human rights due diligence. In addition, states must investigate, adjudicate and redress violations caused or contributed to by a business enterprise and provide victims of corporate abuses with access to effective remedies (CRC Committee, *GC No 16: State Obligations Regarding Business* [2013]; CESCR, *GC No 24: State Obligations in the Context of Business* [2017]; access to justice; see also at paras).

[7] The extent to which the state obligation to protect against human rights by business enterprises applies extraterritorially is addressed in principle 2 of the UNGPs, which is the second foundational principle of the first pillar. It stipulates 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.' Hence, the text of principle 2 does not go as far as defining or prescribing extraterritorial human rights obligations, which has been critically addressed in the literature (Augenstein and Kinley [2013] 291-2; Bernaz [2013] 510). The commentary to principle 2 nevertheless recognizes that some human rights treaty bodies *recommend* that home states take steps to prevent abuse abroad by business enterprises within their jurisdiction.

[8] In the context of economic, social, and cultural rights, the CESCR has subsequently specified that the extraterritorial state obligation to protect against economic social, and cultural rights abuses by business enterprises extends to any business entities over which states parties may exercise control (CESCR, *GC No 24: State Obligations in the Context of Business* [2017] para 10). As a result, these business entities should be required to act with due diligence to identify, prevent and address abuses by subsidiaries and business partners, wherever they may be located (CESCR, *GC No 24: State Obligations in the Context of Business* [2017] paras 31 and 33). There is a debate on whether the control of the state over a business entity alone,

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is sufficient to trigger its extraterritorial human rights obligations to protect against human rights abuses by business enterprises or whether the affected human rights holders need to be under the jurisdiction of the respective state (see Besson [2020]; De Schutter *et al* [2012]).

2. The Corporate Responsibility to Respect

[9] The second pillar of the UNGPs is addressed to business enterprises. It defines the content of their responsibility to respect human rights and it is accompanied by an Interpretative Guide (OHCHR [2012]). According to principle 13, the responsibility to respect human rights requires that business enterprises avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. In addition, business enterprises should prevent or mitigate impacts that are directly linked to their operation, products, or services by their business relationships. Business relationships refer to those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services (OHCHR [2012] 5). In contrast to the state 'duty' to protect in the first pillar, business enterprises have 'responsibilities' under the second pillar of the Guiding Principles. This weaker language was deliberately chosen for two reasons: First, it reflects the fact that in the absence of a binding obligation in international law, there was nevertheless a clear societal expectation on business to respect human rights and that business would not oppose human rights. Second, it facilitated a consensus on the Guiding Principles after the failed attempt in the UN Norms to design a respective binding corporate 'obligation' (Ruggie [2020]; see also Nolan [2013] for a discussion).

[10] Within their responsibility to respect human rights, business enterprises should first express their commitment to respect human rights through a statement of policy as required in principle 16. As the central means to respect human rights, business enterprises should then carry out a due diligence assessment. The concept of human rights due diligence is outlined in principles 17-21 and the Organisation for Economic Co-operation and Development (OECD) subsequently adopted the Due Diligence Guidance for Responsible Business Conduct that has been endorsed by the United Nations (OECD [2018]). Due diligence is also the object of several sectoral guidance adopted by international organizations and endorsed by stakeholders such as for example the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and the ILO-IOE International Child Labour Guidance for Business. Other initiatives include the Oil and Gas Sector Guide commissioned by the European Commission and the Commodity Trading Sector Guide commissioned by Switzerland. Finally, some industries-led initiatives have also adopted their guidance as it is the case, for example, in the banking sector.

[11] Human rights due diligence in the UNGPs is described as the ongoing process through which business enterprises can identify, prevent, mitigate and account for how they address their adverse human rights impacts. First, business enterprises should identify and assess the actual and potential adverse human rights impacts. Second, they should act upon these findings by taking appropriate action to prevent potential adverse human rights impacts or to end actual ones. As principle 19 further elaborates, appropriate action varies according to whether the business enterprise causes or contributes to the adverse impact or is involved solely because the impact is directly linked to its operations, products or services by a business relationship. Third, business enterprises should account for how they address their actual and

potential adverse impacts. Finally, where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for remediation (Bonnitcha and McCorquodale [2017]; McCorquodale *et al* [2017]; Ruggie [2017]; Taylor [2020], for the content of human rights due diligence).

[12] A debated question in the literature on human rights due diligence regards its scope and the legal consequences of failing to carry it out. Despite the fact that principle 17 introduces human rights due diligence as a multi-step 'process', the UN High Commissioner for Human Rights clarified that 'simple, compliance-focused "check box" approaches to human rights due diligence, whereby a company engages in procedural steps without meaningfully focusing on outcomes, would not meet this standard' (UNHRC [2018] para 13). The commentary to principle 17 sustains this view by stating that business enterprises conducting due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses. Some suggest therefore that human rights due diligence should be understood as both a process as well as a standard of conduct aiming at avoiding the infringement on the human rights of others (Bonnitcha and McCorquodale [2017]; Fasterling and G Demuijnck [2013]).

[13] Within their responsibility to respect human rights, business enterprises should finally provide for remediation where they identify that they have caused or contributed to adverse impacts, according to principle 22. This aspect of their corporate responsibility to respect human rights is further elaborated in the following section on access to remedy.

3. Access to Remedy

[14] Unlike previous concepts, the UNGPs do not stop at stating substantive obligations and responsibilities for states and companies but complement them with a chapter on access to remedy. Framed as a joint responsibility of states and business, principles 25-31 address the fact that various obstacles prevent effective access to remedy for victims of business-related adverse human rights impacts and that such impacts will continue to occur (Ruggie [2013] at 102).

[15] International human rights law requires that states provide access to remedy as part of their obligation to protect human rights. States are therefore required to investigate, punish and redress business-related human rights harms within their jurisdiction. State-based access to remedy includes judicial and non-judicial mechanisms. In international human rights law, the emphasis has been on judicial mechanisms and on the obligation of states to provide recourse to courts. However, as indicated in the commentary to principle 26 on state-based judicial mechanisms and confirmed in recent research and practice, the effectiveness of judicial mechanisms for victims of business-related human rights harms is limited (UNHCR [2016] paras 21-30; Kaufmann and Heckendorn [2018] paras 33-40).

[16] Apart from practical obstacles such as financial constraints or access to legal advice, transnational business activities raise complex questions of legal liability of parent companies for the operations of their foreign subsidiaries and of legal liability of companies for the operations of suppliers abroad. The commentary to principle 26 only provides a limited answer to the question of parent company liability by stating that 'the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws should not facilitate the avoidance of appropriate accountability'. While legal liability in transnational matters may become the subject of a future binding treaty on business and

human rights (HRC, *Res 26/9* [2014]), an increasing number of courts has started filling the judicial remedy gap by discussing the extent to which existing duties of care in corporate law apply to parent companies (see, e.g., Bueno [2017]; Bueno and Bright [2020]; Croser *et al* [2020]). In addition, some countries combine binding due diligence laws with the option of taking non-complying companies to court (see below para).

[17] The potential of state-based non-judicial mechanisms such as Ombudspersons, OECD National Contact Points (NCPs) and National Human Rights Institutions (NHRIs) has not yet been fully explored (UNHCR [2018]). Such mechanisms can go beyond adjudicating cases and for example offer a forum for reconciliation and or mediation, support companies in the implementation of the UNGPs, issue recommendations for follow-up actions and monitor the progress of achieved results. For the grievance mechanism of the OECD Guidelines for Multinational Enterprises, the NCPs, the majority of cases received since 2011 refers to alleged corporate human rights abuses (OECD [2020] at para 27). In addition, NHRIs could play an important role in this regard provided they are independent according to the Paris Principles (UNGA, *Res 48/134* [1993]) and vested with a respective mandate.

[18] From a victim's perspective, human-rights related impacts of business activities should be addressed at an early stage. This can be achieved with non-state-based grievance mechanisms at the operational level as stated in principle 29, and includes mechanisms established and run by businesses either alone or in collaboration with other businesses and stakeholders. A recent example is the Australian commercial bank Westpac which strengthened its grievance mechanism to include a particular focus on vulnerable consumers (International Commission of Jurists, [2019] at 61).

[19] Given the plethora of non-judicial grievance mechanisms, both state-based and non-state-based, clear criteria for providing effective remedy to victims are essential. According to principle 31, non-judicial grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, serve as a source of continuous learning and be based on engagement and dialogue with relevant stakeholders. However, access to remedy remains the least developed of the three pillars, leaving many victims without remedies (see Ramasastry [2015] at 248). New initiatives to overcome these hurdles include the introduction of specific legal actions for corporate human rights abuses and options for collective redress and the strengthening of non-judicial remedies such as NCPs and NHRIs. Whether such initiatives succeed in providing effective remedies to those affected on the ground to a large extent depends on clearly defined corporate responsibilities and duties of care.

III. International Regulatory Uptake and Domestic Implementation

1. International Regulatory Uptake

[20] The UNGPs were taken up in international instruments at unprecedented speed. A few weeks before their adoption by the Human Rights Council, the OECD revised its Guidelines for Multinational Enterprises and incorporated the UNGPs in a new fully fledged human rights chapter and in its grievance mechanism. Unlike the UNGPs, the OECD Guidelines contain a unique grievance mechanism, the abovementioned NCPs, which is currently the only broadly accepted international, state-based non-judicial mechanism for corporate human rights abuses. In this regard, the OECD Guidelines complement the substantial human rights provisions of the UNGPs with the possibility to file a complaint before one of the NCPs (Kaufmann [2018] at 181). So far, these NCPs handled cases taking place in over 100

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jurisdictions. From a legal perspective, it is important to note that while the OECD Guidelines, like the UNGPs, are a non-binding instrument, the establishment of a functioning NCP is a binding obligation for adherents. Adherents decide on the organisation of the NCP, for instance whether it is an independent body or based within one or several ministries.

[21] Apart from the UN Agenda for Sustainable Development 2030, which refers to the UNGPs in the text of General Assembly Resolution 70/1 (para 67) but not in the Sustainable Development Goals themselves, several other UN organisations align with the UNGPs more specifically. The International Finance Corporation (IFC), a member of the World Bank Group with a mandate to support private sector engagement in developing countries, included key principles of the UNGPs in its 2012 Sustainability Framework and thereby paved the way for integrating human rights considerations in investment decisions. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was revised in 2017. It now reflects the UNGPs and the update of the OECD Guidelines. As a result, these three key instruments for responsible business conduct are now aligned and coherent (ILO, OECD, EU, UN OHCHR, 2019).

[22] At the European level, the European Union (EU) endorsed the UNGPs in 2011 with the European Commission's Renewed Strategy for Corporate Social Responsibility 2011-14, which abandoned previous concepts of voluntary Corporate Social Responsibility (CSR) and incorporated the holistic approach pursued by the UNGPs by defining CSR as 'the responsibility of enterprises for their impacts on society' (EU Commission [2011]). Accordingly, the strategy includes a chapter on the implementation of the UNGPs, which calls on member states to develop National Action Plans. In line with this strategy, several new binding legal instruments refer to the UNGPs. The most prominent examples are the EU Directive 2014/95 on mandatory non-financial reporting and the Regulation 2017/821 on due diligence requirements for conflict minerals.

[23] Finally, the Council of Europe adopted a Recommendation on Human Rights and Business in 2016 for the implementation of the UNGPs by member states. The Recommendation led to the establishment of an Online Platform for Human Rights and Business in 2019 to facilitate the sharing of National Action Plans and activities to implement the UNGPs among member states.

2. Domestic Implementation

[24] In its report to the twenty-third session of the Human Rights Council, the UN Working Group on business and human rights called upon states to 'consider elaborating a national plan of action' to implement the UNGPs (domestic enforcement of human rights). In 2016, it then issued a Guidance on National Action Plans on Business and Human Rights. National Action Plans reflect the evolving policy strategy developed by a state to protect against adverse human rights impacts by business enterprises in conformity with the UNGPs (see Cantú Rivera [2019]).

[25] Several states report in their National Action Plans about domestic laws aiming at implementing the UNGPs or at least certain aspects of them. This emerging legislation is sometimes referred to in literature as mandatory human rights due diligence laws. These laws have in common that they impose certain human rights obligations on corporations operating transnationally. As the literature suggests, however, they also greatly vary in scope and in their enforcement mechanism (Bueno [2019]; Macchi and Bright [2020]; Bueno and Bright [2020]).

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Apart from the French Duty of Vigilance Law 2017 and the currently discussed Swiss Responsible Business Initiative that cover all human rights, other laws cover only specific sectors or specific human rights issues. This is the case, for example, with the UK Modern Slavery Act 2015, the Australian Modern Slavery Act 2018 or the Dutch Child Labour Due Diligence Law 2019.

[26] Mandatory due diligence laws also differ regarding their enforcement mechanism. The UK Modern Slavery Act 2015 and the Australian Modern Slavery Act 2018, for example, only require that companies report on their human rights impacts, while other laws aim at enforcing due diligence requirements through legal liability provisions. In this regard, the French Duty of Vigilance Law is the most comprehensive example so far. It contains an obligation to conduct human rights due diligence, which reflects the Guiding Principles. Companies subject to the law are required to establish and effectively implement a vigilance plan. In addition, affected parties can file civil proceedings under French tort law whenever a company's failure to comply with the obligation to establish and effectively implement the vigilance plan gives rise to a damage (Cossart *et al* [2017]). A similar approach is currently discussed in Switzerland under the Swiss Responsible Business Initiative (Bueno [2019]).

IV. Trends and Challenges

[27] The UNGPs mark a twofold change in paradigm. Their focus on the impacts for the rights-holders results first in joint responsibilities of states and business. Second, they expand the established business concept of risk to include not only financial, reputational, legal and business risks but also the risks for rights-holders. In order to become operational, the UNGPs need to be implemented and to some extent 'translated' particularly for business. The rapid international uptake of the UNGPs and emerging domestic laws aiming at implementing them are positive trends towards this goal. However, the implementation of the UNGPs also faces challenges, particularly in terms of policy coherence at the international and domestic level, which will need to be more thoroughly addressed in the future.

[28] At the international level, a milestone was reached in terms of coherent standards after the alignment of the OECD Guidelines and the ILO MNE Declaration with the UNGPs. In contrast, initial efforts for a legally binding instrument on business and human rights have been criticized for not clearly aligning with the UNGPs (UNHRC [2019] para 11). Another current challenge to international coherence exists regarding the relationship between the UNGPs and the Sustainable Development Goals. Unlike the UNGPs, this agenda does not adopt a rights-based approach and it does not elaborate on what it means for businesses to contribute to sustainable development. More coherence in this respect would contribute to both instruments mutually reinforcing each other and avoid the risk of undermining the rights-based approach of the UNGPs.

[29] Moreover, the trend towards binding rules on due diligence at the domestic level brings about new challenges. Given that business operations extend beyond national borders, harmonized legislation. In this regard, principles 8-10 call on states to ensure horizontal and vertical policy coherence, which means to align their policies in areas such as trade or investment with the UNGPs and to mainstream the business and human rights agenda in relevant policies. However, domestic laws that have been adopted in this respect greatly vary in scope and they do not necessarily align with the UNGPs. Domestic laws covering only specific human rights risks, such as child labour or modern slavery, or that only impose mere reporting obligations do not reflect the UNGPs. They may in fact have the effect to hinder the

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adoption of more comprehensive due diligence laws. Finally, by providing guidance only on human rights, the UNGPs contribute themselves to a certain fragmentation of standards of responsible business conduct. It remains therefore to be seen whether and how the UNGPs will serve or rather hinder the protection of other legitimate societal interests, such as the protection of the environment, the fight against climate change or corruption.

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