

Waiting for the “follow-up”?

“Guiding Principles for the Implementation of the United Nations ‘Protect, Respect and Remedy’ Framework”¹

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Globalisation, business and human rights

Globalisation has turned transnational corporations into decisive and powerful global actors. Correspondingly, the legal and actual power of states to regulate corporate behaviour has declined. As a result, transnational corporations can profit from a general race to the bottom in social and labour standards. As is now widely perceived, the race does not stop short of international human rights guarantees, including ILO international labour standards.

The UN Mandate on “Business & Human Rights”

On 24 March 2011, the Special Representative of the UN Secretary General (SRSG), Prof John Ruggie, issued a report on “Guiding Principles on Business and Human Rights” (Principles). This report is the culmination of the SRSG’s work on the subject of “Business and Human Rights” for several years. His general task was to clarify the roles and responsibilities of states and corporations in the business and human rights sphere, and then to map the challenges and to recommend effective means to address them.

The project got started in 2005 with a mandate adopted by the then UN Commission on Human Rights (which was replaced by the Human Rights Council (HRC) in 2006, a subsidiary organ of the UN General Assembly). After three years of work, the SRSG delivered a report, usually referred to as “Protect, Respect, and Remedy” Framework. In 2008 the report was “welcomed” unanimously by the HRC.

The Principles are now meant to outline how governments and business “should implement” the Framework “in order to better manage business and human rights challenges”². The mandate has raised considerable attention. The SRSG was able to involve many stakeholders, such as governmental bodies, business enterprises and associations, trade unions, legal experts, law firms, human rights activists and international organisations³, and to focus their attention on the outcome of Ruggie’s work.

The Principles were presented to the HRC on 30 May 2011. It was no surprise that the Principles received great support by most Member States of the HRC. Yet, some criticism was put forward by NGOs and few Member States. On 16 June 2011 the HRC endorsed the Principles. However, it is all but clear what will come next. The SRSG has proposed some “Follow-up” measures⁴ like establishing a Voluntary Fund for “capacity building”, a practise of “annual stocktaking” and a mandate for an expert group which might also think about international legal instruments – all this remains rather vague in substance and in process.

Background

For a better understanding of the mandate, some remarks on its background seem helpful. The mandate of the SRSG was preceded by a draft project, “Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”⁵ (draft Norms), prepared in 2003 by the Working Group on Transnational Corporations of the Sub-Commission on the Promotion and Protection of Human Rights (a subsidiary body of the Commission on Human Rights). The project was buried by the Commission, partially due to fears spread in industrialised countries that the draft Norms might lead to obligations for transnational corporations binding under public international law.

As compensation, the Commission on Human Rights requested the Secretary General in 2004 to appoint a SRSG with the mandate to provide the Commission with “views and recommendations” on “the issue of human rights and transnational corporations and other business enterprises”⁶. Against this backdrop, it is clear that the whole process was neither meant to end up with legally binding acts on the subject nor with a non-binding resolution by the General Assembly.

The Principles in substance

What could one then have expected from the SRSG’s work? It is suggested that:

- The SRSG could have taken progressive views in public international law with regard to state obligations to act against corporate human rights violations;
- He could have lobbied for new international legal instruments clarifying corporate accountability;
- He could have provided a clear political reference point for measures to be taken by business to fulfil their “responsibility to respect” human rights.

Assessed against these standards, it is doubtful whether the recommendations promoted in the Principles are appropriate and sufficient in the context of international law in the 21st century and the current global economic system. In general the recommendations put forward are too cautious and imprecise. The Principles remain weak as they retreat to a position of mere encouragement. This is unfortunate as a core issue in the debate on human rights and business is the lack of clear obligations of both States and corporations and (where obligations exist) a lack of effective enforcement. On the whole, the Principles do not sufficiently address how to hold corporations accountable.

(1) The State duty to protect

Even though the Principles stress that “States must protect against human rights abuse within their territory and/or jurisdiction” (Principle 1) they fail to put forward a more progressive attitude towards State obligations.

While the Principles are supposed to be grounded in “recognition of States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms” (General principles), promising approaches concerning extraterritorial jurisdiction and transnational litigation are, in great parts, not fully developed. E.g. home State legislation regulating the parent corporation to respect and protect human rights within the group or even the supply chain could have been a starting point. The same is true for mandatory corporate reporting obligations.

The obstacles faced by host States are also not adequately addressed: The Principles do not deal with the causes of State’s incapacity nor do they provide suggestions how to effectively overcome this incapacity and how to empower the host State to govern in the public interest.

(2) The corporate responsibility to respect

The Principles avoid suggesting any binding corporate human rights obligations, e.g. to require corporations to ensure the freedom of association and the protection of the right to organise, although there is an emerging trend in international law to assign direct obligations to corporations. This is probably due to the rejection of the draft Norms in 2004. The Principles also do not recommend the incorporation of human rights into international trade and investment agreements. Being limited to corporate responsibility the Principles do not significantly improve corporate accountability. Instead, the Principles reiterate that corporate responsibility to respect human rights is distinct from issues of legal liability and enforcement (Principle 12 commentary). The Principles stress that corporations have a responsibility to undertake due diligence. However, even the low standard to undertake “due diligence” (i.e. a standard of care to be used throughout corporate activities) is devoid of content. Due to the view that “one size does not fit all” (Introduction to the Principles) the Principles remain silent on how to implement the process of due diligence, e.g. neither do they characterize or specify these responsibilities nor do they insist on external monitoring.

(3) Access to remedy

The Principles do not put forward effective recommendations on adequate sanctioning and reparation. Even though States must take appropriate steps to ensure access to effective remedy through judicial, administrative, legislative or other appropriate means (Principle 25), it remains unanswered how to make States take steps in this direction as well as what “appropriate steps” and “effective remedies” are meant to be. Host States will face difficulties such as the incapacity to regulate or the necessity to attract investment, and therefore they are less willing to provide access to remedy. Even though the Principles point to a number of “legal,

practical and other relevant barriers” (Principle 26), the suggestions on how to overcome these barriers are missing.

Conclusions

It is submitted that the SRSB failed in all three aspects outlined above: The Principles lack progressive views in public international law concerning state obligations, they avoid suggesting new legal instruments setting up corporate accountability, and they do not provide for clear blueprints for corporate behaviour with regard to human rights, which could have been used by trade unions and human rights activists.

It remains unclear why actors who have been passive so far should now change their behaviour. The SRSB avoids opening a general debate on the drawbacks of the global capitalist economy even though it is a crucial obstacle to human rights implementation and enforcement. In this way the Principles fail to provide a framework for avoiding a race to the bottom and creating conditions to strengthen international labour standards. While corporate interests are still pushed through by legally binding instruments provided by regimes like GATT, regional FTAs or BITs, the enforcement of social and labour standards is subject to the states’ and corporate goodwill.

Like other attempts such as the UN Global Compact and the inclusion of human rights standards in international trade law, the Principles represent another failure to meet the global pressure in social and labour standards. The only difference is that the SRSB has succeeded in engaging a number of stakeholders with a politics of persuasion which might minimise chances for progressive approaches to develop. All the more: Debates about how to improve the implementation of ILO labour standards remain essential⁷.

¹ Available at <http://www.business-humanrights.org/SpecialRepPortal/Home>

² Press release by the SRSB as of 24 March 2011, available at (<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-press-release-24-mar-2011.pdf>)

³ As such the Organisation for Economic Co-operation and Development (OECD), for instance, updated their (non-binding) OECD Guidelines for Multinational Enterprises, introducing a Human Rights chapter, see Chapter IV of the OECD Guidelines for Multinational Enterprises available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>

⁴ Recommendations available at (<http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>)

⁵ Available at ([http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En))

⁶ Commission on Human Rights, Human Rights Resolution 2005/69, available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc

⁷ For an innovative approach, see Frank Hoffer, International Labour Standards: an old instrument revisited, Global Labour Column at (<http://column.global-labour-university.org/2010/01/international-labour-standards-old.html>)

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