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**The United Nations Guiding Principles
for
Business and Human Rights**

**The United Nations Guiding Principles
for Business and Human Rights**

A Commentary

By

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To Donna

乌江水亦鸣孤愤，蜀道山多带不平。

"Like the Wujiang river with very robust flow but isolated from other major bodies of waters; just as the ancient Shu Road that with all its vicissitudes passes through the most beautiful mountains."

DRAFT

In Memoriam¹

John Gerard Ruggie

(18 October 1944 – 16 September 2021)

The now iconic pictures of John Ruggie ((18 October 1944 – 16 September 2021) Berthold Beitz Research Professor in Human Rights and International Affairs at Harvard's Kennedy School of Government, Affiliated Professor in International Legal Studies at Harvard Law School, and best remembered as the UN Secretary-General's Special Representative for Business and Human Rights, sitting at any number of endless meetings mostly at the UN's offices in Geneva, is perhaps the way that John might have wanted to be remembered. It certainly is the way that many of us will freeze his image in our minds—thumbs up, empathically intense, and persuasively speaking at the highest levels of the United Nations in the service of what had once been dismissed as an unattainable goal—the development of a framework for managing the human rights impacts of economic activities by states and business, and the framework for the provision of remedies for those suffering human rights harms. His role as the great shepherd of that framework—what became the UN Guiding Principles for Business and Human Rights, which many believe now serves as the authoritative standard on human rights expectations in economic activity—cemented. It did more than that, it also opened a new way of approaching the embedding of human rights, and now sustainability norms, into the process of economic production by states and other actors.

We who knew him mourn his passing even as we celebrate a life well lived. John was able to do something quite remarkable—he made revolutionary transformations seem not just perfectly ordinary, but also rational and inevitable. Nonetheless, the process was not dictated from the top. John brought people and institutions together, toward compromise and convergence by a unique ability to practice engaged listening. He listened harder when what he was hearing took him outside his comfort zone. He had an exquisite sense of the politically possible. And he was able to reassure people; to make them feel comfortable and to trust his judgment even when it might have collided with their own presumptions. He had a great feel for the direction of trajectories of development of conceptions of trade, economic activity, and the core principles of human rights that had driven much of the work of public international institutions since 1945. I saw him work his magic often from the time I started working with him on this project in 2008. I enjoyed the humor and sense of irony that made our times together so delightful. And it was always a lesson learned to see how respectful John was, even to those who might not share his views. But mostly, for many of us, it was John's humanity that made possible the synergies of the efforts of countless people all of whose talents he was able to marshal in the accomplishments of the great tasks of changing the way in which important collectives now see and understand economic activity specifically, and the role of humanity on this planet more generally.

In retrospect, it was an almost seamless transition from the global compact and Millennium Development Goals to what became the three pillar framework of the UN Guiding Principles for Business and Human Rights and then the Sustainability Development Goals. But at the time connecting those dots would have been nothing short of miraculous. Both tracks—the one focusing on the human rights effects of economic activity, the other eventually

¹ Originally published as Coalition for Peace & Ethics, 'In Memoriam: John Gerard Ruggie (1944-2021)' (*Law at the End of the Day*, 21 September 2021) <<https://lbackerblog.blogspot.com/2021/09/in-memorium-john-gerard-ruggie-1944-2021.html>>, edited and reprinted with permission.

to provide a mechanism for reframing the way in which humanity related to the world around it as it fashions its collectives and seeks through them to provide people with better and more fulfilling lives (however that is measured)—eventually changed the direction and of and baseline for thinking about the human in economic activity, and the planet in human activity. Global collectives still fight (euphemistically engage in passionate debate about) what this means. Developing meaning and narratives around these baseline concepts and its foundational frameworks now occupy a lot of time; but all of that engagement is now undertaken within the meaning framework that John was instrumental in building and in getting critical actors to embrace (however grudgingly, for whatever ends, and for however short a time). For that alone, John secured his place as one of the great leaders of the transition of thinking about the organization and function of economic activity and about humanity's role as a tenant on this planet.

John distrusted rigidity; he was wary of empty legalism; and he saw through the inhibiting pantomime of replicating past practices onto current realities. He planned for the future, respectful of the past but unwilling to serve merely as the person who dressed the present in the increasingly ill-fitting corsets of (what for many were and for some still are) the comforting remembrances of the past. That fearlessness, that principled pragmatism as he liked to call it (the term was meant to give comfort to those who were more fearful of losing their mooring in the past even as they understood the transformations emerging in the present and looking forward to a changed future landscape), opened the door to several key innovations. These innovations, so radical just a short time ago, now appear increasingly ordinary in the political, legal, societal and economic fields. Among them was the decisive role of private law as the great engine for filling the governance gaps of transnational economic activity. With that came the acceptability (still contested to be sure) of the principle of polycentricity in governance and the recognition that plural sources of law, norms and expectations would have to be given effect, navigated, and could be used as the basis for prevention, mitigation and remedial strategies at the heart of the UNGP framework. Along with that came the acknowledgement of the power of markets (rather than, in tandem with, or without the apparatus of public law) to order behavior and to construct and manage expectations of positive behavior respecting human rights (and eventually sustainability). And lastly, and perhaps most remarkably, the recognition that states, non-state actors, and enterprises might each serve regulatory (and political) roles both in the construction of normative orders, its transposition into the working habits of economic actors, and in its enforcement. John understood that he gifted us the “end of the beginning” as he put it in his 2011 Report transmitting the text of what became the final version of the UNGPs. Wherever the transformations that follow will take us, John provided a strong foundation for the journey realistically ensconced between the primacies of either state or market and comfortable with the expectation of the utility of the UNGP as a platform where public and private, political, economic, and social might meet.

For all of this—for making respectable and ordinary what before 2005 would have seemed impossible—all of us ought to salute John; I do. He will be remembered and his spirit is deeply embedded within the text life force of the UNGPs. His example will serve as a guide for those of us who will come after. And lastly, his dedication to the preservation and enhancement of the dignity of individuals, of their collectives, and of the earth on which such activity is possible, ought to serve future generations as the baseline premise for continuing to develop the structures of human rights and sustainability respectful systems of collective human organization. To his family and friends, our deepest condolences. These commentaries are written in the spirit of the project that John brought to live and bequeathed to us. We honor him best by preserving that legacy and bringing it forward, more polished, for future generations. Rest in peace.

Preface

Not so long ago human rights and business existed in quite different places. These places did not really overlap. Human rights was focused on the great public spaces—the duties of states and the parameters for the organization of society sensitive to the way that society was evolving its principles about the relationship of individuals and groups to superior political institutions. Business was centered on the facilitation of activity in the great private spaces—the responsibilities of people and groups as they interacted with each other, mostly connected to the provision of goods or services, whether for profit or not. States protected people; business made things or provided services. It was as simple as that. As the superior public institution, states provided and enforced the rules and business conformed their private interactions to those rules. Those rules included the principles and constraints now understood as human rights but already long embedded within the constitutional tradition of many states. States were responsible for those within its territories or otherwise subject to its authority, though at the margins the quality and extent of that responsibility was quite contested. Business was responsible to its stakeholders. However, the extent of that responsibility varied widely from the fundamental responsibility to shareholders, to responsibilities bounded by private law arrangements with labor, lenders, suppliers, customers, and others. For business, the overlap was the traditional one—involving questions of ethics and equity (the limits of sharp practice within the rules), and of business and legal risk (a broad set of factors that touched on the consequences and effects of all business activity).

Indeed, what was known for a long time as the social responsibility of business (CSR) was deeply controversial. For some, business ought to be guided by and reflect the obligations of the state that regulated and facilitated their activities; business was merely a private manifestation of public duty. It followed that it was the duty of business to contribute to the social projects of the state. In its most advanced form, in Marxist Leninist states, public policy and the private ordering of economic activity effectively merged. In states with more markets oriented policies (so-called capitalist economic orders) such a connection could be managed administratively or legalized. For others, the manifestation of such an overt connection constituted a direct threat to the democratic foundations of the state and its political ordering. For them, the social responsibility of private activity was to develop productive forces under law. Activity beyond that would hijack political authority from the state (and the people), to those who controlled business activity and who were not directly accountable to the people through democratic elections, engagements and the like. For many systems, then, a compromise of sorts emerged—business could engage in “good works” to the extent it aligned with public policy and could be shown to also benefit the ability of the business to maintain or increase its own development in measurable ways. Beyond charity was politics and politics belonged to and in the state system.

But reality sometimes interferes in quite profound ways with the otherwise neat ordering of social life. Globalization and the revolution in the development of international human rights norms changed the fragile compromise that connected business to human rights and public policy. More than that, large collectives, and particularly economic organizations operating in corporate form, appeared increasingly to manage their global production chains the way that states managed their national territories. A series of scandals that suggested that the traditional hierarchy between superior political authority (in states) and inferior economic authority (in enterprises) was no longer working helped propel a new debate. If the largest corporate entities overseeing economic activity along global production chains could assert greater authority than some of the states through which they operated, then it might make sense to transpose the political and normative responsibilities of states to those entities. The idea,

at its simplest was quite appealing: to align the realities of political power with its responsibilities. But that set off a debate that lasted half a century and that ultimately produced the U.N. Guiding Principles for Business and Human Rights (the “UNGPs”). The great problem, one that took more than a generation to produce a first shot at resolution, was how to align and perhaps put together in more intimate ways the public policy expectations and sensibilities of human rights with the private hugely complex world of private economic activity.

I became involved in this process in late 2008, though only on its peripheries, with an e-mail from John Ruggie, the Special Representative of the UN Secretary General on human rights and transnational corporations and other business enterprises (SRSG). He had been reading some of my work and was generous enough to include me in some of the work in bringing the UNGP project to a successful conclusion. Our perspectives mostly aligned and his fundamental theory of principled pragmatism resonated with me (more on that in the body of the work that follows). Between 2008 and 2011 I observed at close range and sometimes was involved in bringing the project that produced the UNGPs to its conclusion. In the process I met or interacted with some of the great stakeholders in the process and sometimes saw the sausage making that shaped the final product. Indeed, one of the hallmarks of the process and likely one reason for its success, was the deep and patient engagement that John undertook from the very start of his tenure as SRSG. He certainly might not agree, but he always listened and invariably his reports and the final product were enriched in the process.

What was produced through this process was something of a curiosity. It is a set of principles that have no legal effect and yet which have served as the basis for the legalization of the human rights effects of economic activity within the private law frameworks of the governance of global production chains. It now serves as the template for national efforts to regulate business conduct through disclosure laws (e.g., the Modern Slavery Acts, and in emerging human rights supply chain due diligence legislation especially in Europe. It was meant to be descriptive and to rationalize the emerging approaches to the subject. Yet, the UNGPs have in the process begun to transform the way that business measures its productivity and calculates business and legal risk, It is transforming the regulatory environment and the role of states in the protection of human rights. It was focused originally on issues of human rights with people at the center. It has quickly become the template for developing frameworks for duties and responsibilities tied to principles of sustainability and climate change.

This extraordinary development all emerged from a set of principles that were at once broad enough to be useful even as the world and business-state practices and principles changed, and specific enough to provide a broad framework to guide implementation. The principles each also provided a substantial space for a range of approaches compatible with its core objectives and premises. There were no single “right” answers to the problems the UNGPs seek to address—there are instead a sometimes broad range of plausible approaches that are aligned with the core expectations built into the principles. The principles were themselves written to be simple enough for non-specialists to be able to read and understand, but also sophisticated enough to be useful in shaping the policy debates at the national and international levels.

The UNGP’s now famous “Three Pillar” structure has found its way into the center of political and policy discussion. That structure distinguishes and intertwines a state duty to protect human rights with a corporate responsibility to respect human rights. Both are then further intertwined with a remedial obligation that is itself articulated within a principle of prevention and mitigation. From the “inside” of the community of those who work in the field human rights in economic activity, the UNGP now defines the context in which the great debates within that conceptual ordering are framed. From the “outside” it defines the contemporary discussions of what human rights means, and its relationship to broader concepts of sustainability, including climate change related effects on humans. In both cases, the narratives of principled pragmatism now set the narrative stage; one that starts from contemporary norms and expectations, which when assessed against contemporary aspirations and objectives, provides the evidence based trajectories for change, one respectful of the different pathways toward those objectives that change must be permitted to take.

Even half a century after the start of process that in one of its eddies brought us from the Universal Declaration of Human Rights to the UNGPs, and a little more than a decade since its unanimous endorsement by the UN Human Rights Council in 2011, the UNGPs have matured enough, and have been embraced sufficiently, to suggest that they are, indeed, ripe for a rigorous glossing. Indeed, those efforts have already begun. Every Commentary, though, brings its own perspective. This one will be no different. Each commentary ought to bring something different to the great task of extracting meaning from the text which is the object of commentary, and its context, which gives form and limits to the plausible as a function of time, place, and perspective. It is my hope that this Commentary will serve a foundation for consideration of the UNGPs and as a resource for approaching application of the principles to the ever changing conditions of both business and of human rights expectations and principles. The resource value is embedded in its approach—to suggest the broad range of plausible meaning and to draw in the importance of context—historical, ideological, experiential, and otherwise, to the project of extracting meaning that is both enlightening and useful.

The Commentary follows the general approach taken by John Ruggie as he developed the UNGPs. It starts with the context in which it was possible to develop the UNGP, and then considers the UNGP as an idea/ideal. Only then it is possible to enter the heart of the commentary—consideration of the interpretive approach for each of the principles, the principles within their respective pillars, and the UNGPs as a whole, respectful of the reality that each interpretation actually ought to be considered as a sometimes broad range of plausible approaches. That approach, hopefully will distinguish this commentary from others. In place of using the form of commentary as a space for the elaboration of an ideology or approach that can be realized through the UNGPs, the commentary will extract the range of meaning that can plausibly be informed by the ideologies and agendas that a user would bring to the project of interpreting and applying the UNGP in specific context. Each principle, then, will be approached as text, then embedded in intent, and then explored in context. That context will suggest the range of possibility in good faith interpretation within a flexible and contextually based interpretive model. The Commentary, at its broadest, will provide a way to engage in this interpretive exercise in a rigorous and rational way with fidelity to the text and intent of the UNGPs.

The book will be divided into three parts. Part One (“On the Making of the UNGP”) includes the first five chapters of the Commentary. *Chapter 1* takes a deep dive into the nature and purpose of Commentary, and more specifically, the description of and the reasons for the approach taken in producing this UNGP Commentary. It introduces some of the more challenging elements of a commentary. Most are well known and touch on the three key issues of commentary—the role of text, the importance of intent, and the backwards reading of both through application of text and intent by the consumers of the UNGP. In this case, however, the additional challenge of commentary in a digital age is also suggested. This is built around the emerging problem of moving away from traditional linear reading of text in the face of the simultaneity permitted in an environment of hypertext, word search, and linkages to other sources and media.

Chapter 2 presents the key text that will be the primary subject of (or framing for) the commentary. These include the text of the instrument of endorsement by the UN Human Rights Council in 2011, John Ruggie’s Report presenting the final draft text of the UNGP to the UNHRC, and the definitive version of the UNGP text (and Official Commentary) endorsed. *Chapter 3* serves as a commentary on the travaux préparatoires for the UNGP. These include principally John Ruggie’s reports to the UNHRC of 2006-2011 and the UNHRC pre-endorsement resolutions. Other relevant documents are considered. These documents are important either for enriching the analysis of the meaning of the UNGP text, or of approaching their meaning more aligned with the intent of those who drafted and endorsed the instrument. *Chapter 4* then dives into a brief consideration of the historical foundations of the UNGP project. These are critically important as a basis for developing the contours of the range of plausible meaning one can give to the text. That range of plausibility is, in turn, shaped in part by the

operational premises that critical stakeholders brought to the process of drafting (and thereafter to the process of applying or investing that text with meaning). Lastly, *Chapter 5* (“From Governance Gaps to Interpretive Spaces in the UNGP: A Mapping Analysis for Commentary”) serves as a first or preliminary framing of the UNGP text, suggesting key areas of convergence and divergence of meaning possible in interpreting the UNGP text. Critical here is the effort to consider the interpretive challenges attaching to the “spirit” of the UNGPs from the issues of interpretation of its text.

Part Two (“The UNGPs: Section by Section Commentary”), then takes a deep dive into the UNGP text. It consists of four chapters reflecting the three Pillar structure of the UNGPs and its overarching Chapeau (general principles; state duty to protect; corporate responsibility to respect; and access to remedy). *Chapter 6* considers the General Principles of the UNGP. These are meant to provide the framework within which the substantive provisions of the UNGP ought to be read. They set the “tone at the top.” More importantly, they frame the approach for reading and applying the thirty one principles that follow and the three pillar, Protect-Respect-Remedy, framework they elaborate. *Chapter 7* then considers the state duty to protect human rights (UNGP ¶ 1-10). Like the UNGP themselves, the chapter is divided among the state duty foundational principles (UNGP ¶ 1-2), the state duty’s operational principles. These are then divided among general state regulatory and policy functions (UNGP ¶ 3); the state-business nexus (UNGP ¶¶ 4-6); conflict affected area rules (UNGP ¶ 7); and the provisions on policy coherence (UNGP ¶¶ 8-10). *Chapter 8* then turns to the corporate responsibility to respect human rights (UNGP ¶¶ 11-24). Again, following the structure of the UNGP, the chapter is divided among foundational principles (UNGP ¶ 11-15); and operational principles. The operational principles are themselves divided among principles on policy commitments (UNGP ¶ 16); Human right due diligence (UNGP ¶ 17-21); remediation (UNGP ¶ 22); and issues of context (UNGP ¶ 23-24). Lastly *Chapter 9* considers access to remedy. The chapter is divided among foundational principles (UNGP ¶ 25); and operational principles. These are the well-known state based judicial remedies (UNGP ¶ 26); state based non-judicial remedies (UNGP ¶ 27); non-state based grievance mechanisms (UNGP ¶¶ 28-30); and effectiveness criteria principles (UNGP ¶ 31).

Part Three (“The ‘Spirit’ of the UNGP”) then consists of forward looking commentary. *Chapter 10* considers the future of the UNGP through the lens of the work of the UN Working Group. *Chapter 11* examines the embedding of the UNGP in international soft law instruments—the OECD Guidelines, the standards in ISO 26,000, and the emerging GRI standards. The commentary ends with *Chapter 12’s* consideration of the ‘spirit’ of the UNGP as it has manifested itself in national law making and in the years long project of trying to craft an international instrument for business and human rights.

I am grateful to Natasha Fleming at Oxford University Press who first suggested the project to me in 2017, and then to Eleanor Capel-Smith, Jordan Burke, and Jack McNichol. I am especially grateful for the advice and support of Kim Vollrodt my project editor at OUP who saw the project to completion. Initially, I hesitated to undertake a commentary, in large part because of the enormity of the task, but also because I feared that its object was a too swiftly moving target. Like others faced with similar tasks, the drafting of this project took longer than expected. As it turned out that delay was fortuitous. The last several years—especially in the wake of the COVID-19 pandemic, has added a wealth of material and engagement that has immeasurably enriched the UNGPs and provided greater clarity as to its scope and interpretive potential.

This project could not have been attempted without the help of many. The global communality of people actively involved in this field, many passionately devoted to ideals that may never converge made the project infinitely more enjoyable—and challenging. That passionate, heterodox community, and its devotion to the issues curated through was ultimately made the project rewarding, and hopefully of some use to its readers. I am particularly grateful to my research assistants at Penn State faculties of International Affairs and Law. Principal among them are Miaoqiang Dai (Penn State SIA MIA 2019); Jonathan Kiwana (Penn State LLM 1029); Bethany Salgado (Penn State

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Corp. Resp. Interpretive Guide— Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (HR/PUB/12/02, New York & Geneva, United Nations, 2012).

IBHR—International Bill of Human Rights

ILO—International Labor Organization consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights)

HRDD—Human Rights Due Diligence as structured in UNGP Principles 17-21.

MNE—Multinational Enterprise (used interchangeably with the term TNC).

Norms— Sub-Commission on the Promotion and Protection of Human Rights, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) See, David Weissbrodt and Maria Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ *American Journal of International Law* 97 (2003) 901-922; available <https://scholarship.law.umn.edu/faculty_articles/243> accessed 15 February 2022.

OEIGWG— Open Ended Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights, established to elaborate a binding international instrument to regulate MNEs; UN Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights A/HRC/RES/26/9 (14 July 2014); available [https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9]; last accessed 15 March 2024.

SRSG—Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises

TNC—Transnational Enterprise (used interchangeably with the term MNE).

UN—United Nations

UN Working Group—United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises

UNGA—United Nations General Assembly

UNGP—United Nations Guiding Principles on Business and Human Rights

UNHRC--United Nations Human Rights Council

UNHRC 2011 UNGP Res--United Nations Human Rights Council, Resolution Adopted by the Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/RES/17/4 (6 July 2011))

UNOHCHR--United Nations High Commissioner for Human Rights

UNSG--United Nations Secretary General

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