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OF HUMAN RIGHTS AND HUMANITARIAN LAW

BUSINESS AND HUMAN RIGHTS

Three baselines for business and human rights

BRIEF 1/2017

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After endorsing the UN Guiding Principles on business and human rights (UNGPs) in 2011, the UN set up in 2014 an intergovernmental working group with a mandate to examine a treaty on business and human rights. A first draft for discussion will be issued in late 2017. The intention has been to supplement the UNGPs – an authoritative policy instrument seen as ‘soft law’ – with a legally binding instrument.

This brief explains the progression of legal reasoning around corporate human rights responsibilities during the last two decades. One can identify three stages, or “baselines”, that were drawn in the mid-2000s, in 2011, and post-2014 on how to regulate the activities of multinational enterprises (MNEs).

The first baseline is the result of the classical international human rights law tradition exposed in the UN Norms the Responsibilities of Transnational Corporations with Regard to Human Rights (UN Norms), which were developed in the early 2000s and shelved in 2004 after encountering fatal opposition from states and businesses.

The second baseline consists of the UNGPs, adopted in 2011, following the UN mandate of John Ruggie, who came with a different take on global governance – and the role of international law therein – and how to shape business conduct.

The third baseline is currently being drawn as the UN began in 2014 exploring an international legal instrument on corporate accountability through the work of the UN inter-governmental working group.

Is the third baseline predisposed to revert to the first baseline? Is that desirable and what would be the alternative to this reversal? How does one ensure that the emerging third legalization baseline is complementary with the second baseline? This brief identifies characteristics of the three baselines to stimulate evaluation of the past developments and encourage reflections on the way forward for regulatory thinking on MNE accountability.

THE FIRST BASELINE: THE LEGALISTIC APPROACH BEHIND THE UN NORMS (1998-2003)

The UN Norms (2003) proposed that business have an obligation to respect and ensure human rights within their ‘sphere of activity and influence’ and that the UN and national legal regimes should evolve to monitor and enforce this corporate obligation. The UN Norms captured the Zeitgeist of the early 2000s when human rights lawyers were driving the standard-setting efforts of the UN on corporate human rights responsibilities. The concerns at the time revolved around whether globalization led to the demise of the state and whether market freedom, privatization, and deregulation were acquiring the status of sacrosanct values. This was a struggle to preserve and enhance the human rights gains of the last half-century in the face of increased economic interdependencies managed by powerful economic international organizations (the World Trade Organization, the World Bank, the International Monetary Fund) and spearheaded by MNEs. A UN instrument on corporate responsibilities was seen as necessary to counterbalance unrestrained economic globalization and fill an international legal void regarding MNE operations. What were the

Note: This brief draws on R. Mares, ‘A rejoinder to G. Skinner’s Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law’, *Washington and Lee Law Review Online* 73:1 (2016) pp. 117-158, available at <http://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss1/2/>

distinguishing features of the legalization project behind the UN Norms? Five traits could be highlighted to facilitate comparison among the three baselines.

The first trait was to take the established categories of obligations under international law – to respect-protect-fulfill human rights – falling on states and to apply them to business. By deliberately using a symmetrical, identical formulation of state and corporate responsibilities, this was an effort to ‘develop’ international human rights law (IHRL) so that all actors – state and non-state – were bound by human rights obligations.

The second trait was the idea of pushing liability up to parent companies as a way to achieve respect for human rights throughout MNE operations. The thinking was that the parent company (lead firm) decided to enter new markets, or to outsource production, so it should bear the risks of those decisions. Such lead firms had the ability to control or influence subsidiaries and even some suppliers – anyway they had the resources to implement protective measures. Naturally, the buck should stop with such lead firms seen as contributors or beneficiaries of abuses in their overseas operations. The overall thrust was pushing liability upwards by constantly gravitating to holding the lead firm liable, more or less by default, when affiliate operations infringed on human rights.

The third trait was emphasizing complicity. This notion would be used to frame, justify and expand a company’s responsibility when its affiliates infringed rights. This concept was stretched beyond legal notions of aiding the perpetrator (legal complicity) to cover various degrees of association with the wrongdoer (“beneficial” and “silent” complicity). Complicity became an accordion concept.

The fourth trait was reliance on law as the way to drive change in the area of business and human rights (BHR). Legalization of corporate responsibilities was meant to signify a break with ‘voluntarism’. That voluntarism consisted of soft law adopted by states and international organizations (e.g. the UN Global Compact), and of codes of conduct adopted by businesses (self-regulation). Hard law also meant coercive law which was uniquely able to act as a deterrent and offer remediation for victims. There was no place for illusions: MNEs – profit-making, wealthy, and powerful entities – could only be subject to harder versions of legalization in order to counterbalance strong incentives flowing from their profit-making nature and competitive market environments. Any “weaker” instruments, including less coercive forms of hard law such as reporting regulations, would be unfit for the job. They would either appear as inherently inadequate to stamp out MNE impunity or valued as a mere stepping stone towards coercive regulatory frameworks. From this came a lasting difficulty for human rights lawyers to valorize less coercive legal strategies and non-legal strategies into a coherent system for MNE accountability.

The fifth trait was putting faith in the traditional international rule-making process. Historically that process would often start with states endorsing a “soft law” instrument (e.g. the Universal Declaration of Human Rights) expected to subsequently harden into a treaty and

national laws. The UN Norms were meant as such a declaratory instrument. The supporters of the UN Norms had in mind this evolution from soft to hard law, and a progression from general principles to specific standards and rules, in a process in which legal experts interpret and apply human rights norms.

Clapham wrote that human rights lawyers would rather “put faith in the current state centered system than in a new, unknown, and necessarily diffuse accountability arrangement”. It is preferable to preserve the current state focus of international human rights law and augment it with a state duty to protect and citizen participation, than “move to law as a multiplicity of communicative processes, or accept arguments about world law, or multilevel governance...” (Andrew Clapham, *Human Rights Obligations of Non-State Actors*, OUP, 2006, pp. 25-27)

Three reductionist biases came to characterize the first legalization baseline. The project of holding MNEs accountable under international law became tightly entangled with a) moving accountability upwards towards the parent company, b) with striving for coercive legal strategies indispensable to outdo the profit motive and market pressures, and c) placing faith in states as leading actors in setting up the corporate accountability global architecture. The UN Norms were not endorsed in the UN Commission and discontinued in 2004. The project, with its traits and reductionisms, has not succeeded; a first legalization baseline was drawn.

Table 1: First baseline

<i>Traits</i>	<i>Reductionisms</i>
Respect-protect-fulfill	Parent company
Pushing liability upwards	Legal coercion
Complicity	State-driven architecture
Law (coerciveness)	
Traditional international rule-making	

THE SECOND BASELINE: The Polycentric Approach behind the UNGPs (2005-2011)

The UN Guiding Principles propose that business should respect human rights, meaning to not infringe them, while states should respect, protect and fulfill human rights. Far from having treaty ambitions, Ruggie presented the UNGPs as ‘a common global platform for action’ to secure human rights in the global economy. In 2005, Ruggie began his mandate by dismissing the UN Norms as conceptually misconceived and strategically inadequate. He saw the Norms as symptomatic of a misguided mindset. His project would not be a legalization project, but one characterized by “principled pragmatism” and “polycentric governance”, in his own words.

In “polycentric governance” Ruggie saw the way forward to systemically advance the cause of human rights in the global economy. He explained there were three systems that developed CSR standards and required their observance: “public governance” encompassing

² J. Ruggie, *Just business: Multinational corporations and human rights* (Norton, 2013), p. Xlii.

³ Interim Report E/CN.4/2006/97 (2006), para. 81.

⁴ J. Ruggie, *Just business: Multinational corporations and human rights* (Norton, 2013), p. xliv.

law and policy, “corporate governance” reflecting risk management, and “civil governance” reflecting social expectations of stakeholders. Ruggie said, “The successful expansion of the international human rights regime to encompass multinational corporations must activate and mobilize all of the rationalities and organizational means that can affect corporate conduct.”

Early in his mandate, Ruggie committed to a “principled form of pragmatism” explained as “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.”

Overall Ruggie’s orientation was: “In order to achieve better protection for individuals and communities against corporate-related human rights harm, each of these governance systems needs to be mobilized and pull in compatible directions.” His rearrangement of the corporate accountability scene was influenced by a view of human rights not reducible to legal rights.

Ruggie: “[H]uman rights are much more than laws antecedents or progeny. Indeed, [Amartya Sen] states, such a view threatens to ‘incarcerate’ the social logics and processes other than law that drive public recognition of rights. My work, including the Guiding Principles, has sought to contribute to the freeing of human rights discourse and practice from these conceptual shackles, by drawing on the interests, capacities and engagement of states, market actors, civil society, and the intrinsic power of ideational and normative factors.” (J. Ruggie, *Life In The Global Public Domain*, 2015)

The second baseline meant a paradigmatic shift that can be traced to three traits. The first trait was a narrower corporate responsibility to respect human rights. Ruggie went for “respect” only as he sought a concept of responsibility that was more attuned to the functional role of business in society. This was a break with the respect-protect-fulfill responsibility of the first baseline. Furthermore, gone was the reliance on elastic notions of complicity to be replaced by the notion of “human rights due diligence”. The latter reduced the overtones of blameworthiness that complicity carried and focused attention instead on actionable steps businesses should take. At the same time, Ruggie’s responsibility to respect human rights was still rather broad as it included a responsibility to exercise “leverage” over business partners. To human rights lawyers this appeared as a responsibility to protect. A responsibility to exercise leverage in global value chains opened the way for expanding the field of vision: leverage on what actors (i.e. directly on the business partner or indirectly on actors within the environment of the partner) and leverage together with other actors (e.g. host and home states, IGOs, NGOs, market participants). With these recalibrations Ruggie eliminated one reductionism inherent in the first baseline, namely the pushing of responsibility upward to parent companies for abuses of human rights throughout value chains.

The second trait was the expansion of governance beyond law achieved through the polycentric governance approach. For Ruggie, the decades of states unsuccessfully negotiating an instrument on MNE responsibilities offered enough empirical evidence and motivation to break with state-centered modalities of rule-making and rule-enforcement. Polycentrism was the way forward to bypass state paralysis. At once he eliminated two reductionisms

that came to haunt the first baseline: the reliance on state action and hard law to kick-start and fuel the evolution towards corporate accountability. Ruggie eliminated overdependence on state action and on coercive legalization. States and law would remain an important element and be covered in Pillar 1 of the UNGPs, but placed in a broader framework where progressive change accumulates in three Pillars, hopefully reinforcing each other.

The third trait was the wrapping of the above elements into a credible narrative of human rights in the global economy. This would be a multifaceted narrative that accounted for both risks and opportunities created as the world integrated economically. It was a break with the narrative of the previous baseline that appeared predisposed through its three reductionisms to lean against markets, globalization, home states, MNEs, and corporate power and size. The result was a unidimensional view of the global economy and its relation to the protection of human rights. In contrast, Ruggie's project would be a "leverage project", one of mobilizing more sources of leverage and directing it through old and new pathways across borders to protect human rights transnationally.

Ruggie's correction to the BHR field eliminated the three reductionisms of the first baseline. Ruggie's polycentric approach was not an alternative to legalization favoring corporate voluntarism; it was an alternative to the legalistic project of the first baseline. By framing the BHR field in a sufficiently broad and evolutionary way, Ruggie's approach left space for further legalization. However, the UNGPs could only go as far as mapping in Pillar 1 relevant policy fields where legal development and state action would be necessary. How such diverse policies and the UNGPs' three Pillars would evolve into an interlocking governance regime was left largely unanswered. A second governance baseline in BHR was drawn.

Ruggie on legalization: "As the business and human rights agenda continues to evolve, further legalization is an inevitable and necessary component of future developments. But in light of the failure of past treaty efforts in this domain, we need to ask ourselves what form legalization should take at the international level." (2014)
"[I]f there is to be any hope of further international legalization in the business and human rights domain, civil society needs to help by advancing workable proposals that states cannot ignore or dismiss out of hand." ... "Such demands are so far removed from reality that they become playthings for some states, and reasons for others to ignore the process. To avoid being instrumentalized in this fashion and to provide the needed leadership, NGOs would serve the business and human rights agenda well by re-examining and refining their platform." (2015)

Table 2: Second baseline

Traits	Refocus
Respect	Beyond parent company liability
Polycentric governance	Beyond legal coercion (multiple rationalities)
Narrative on global economy	Beyond states (interacting governance systems)

THE THIRD BASELINE: The Two-Track, Multi-Channel Legalization Perspective

The UNGPs, widely acclaimed and offering a foundational treatment of BHR, have not plugged the global regulatory gap. The interest in progressing towards a hard law framework persisted and materialized in 2014 into a UN mandate ‘to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of Transnational Corporations...’. So there is an unabated interest today in a constructing a legal human rights framework for global business operations and effective remedies for victims.

As the third legalization baseline is being drawn, the danger for the legally inclined is to uncritically revert to the first baseline drawn in the early 2000s. For some, the Ruggie mandate was a misguided ‘deregulation’ bracket in the struggle to expand and consolidate the international law regime to hold MNEs legally accountable. In brief, the legalization project of the early 2000s was merely suspended during the Ruggie mandate (2005-11), and after the 2014 UN mandate the project is to be resumed and continued along the old lines.

Such reversion would result in uncritically embracing the reductionisms of the first baseline. It would therefore create incompatibilities with the second baseline. Currently such incompatibilities are merely glossed over: some treaty proponents maintain there is a ‘complementarity’ between UNGPs (soft law) and the comprehensive treaty NGOs promote in the UN (hard law). There is a rhetoric of ‘just legalize human rights due diligence (HRDD)’ appealing in its simplicity: the task is simply to turn soft into hard law. After all, the argument goes, if HRDD and the UNGPs are such a breakthrough after all the acclaim that Ruggie’s mandate has received, what is more natural than making HRDD mandatory? Did not international law actually do this many times before, with non-binding declarations solidifying into treaties?

However, this view of regulation can be challenged as misleading and simplistic. First, misleading due to its undertones of coerciveness and defaulting against parent companies; just as the first baseline. Herein, weak (non-coercive) regulations are only stepping stones towards coercive solutions. The direction of allocating responsibility is upwards the value chain. To prevent a mislead charge, such proposals would have to be more carefully circumscribed than tends to be the case nowadays. Such silence on the need to circumscribe carefully and on complex regulatory regimes reveal a tendency to revert to the first baseline with its reductionisms. Second, simplistic because the operation of law in transnational contexts can only in limited contexts achieve that level of coerciveness; outside such contexts, complex regulatory mixes will be needed to navigate foundational principles in the cross-border context of BHR (Brief 2/2017). A differentiated legalization perspective is needed, such as the “two-track, multi-channel perspective” on legalization

⁵Human Rights Council, *A/HRC/26/L.22/Rev.1* (24 June 2014), art. 1.

in BHR (Brief 4/2017).

Therefore, the complementarity between the UNGPs and some treaty proposals is not genuine. Using the wide support for the notion of HRDD to merely gloss over the incompatibilities and tensions between the first two baselines does not facilitate regulatory thinking able to propel forward Ruggie's leverage project. To prevent uncritical reversal to the first baseline, there are several aspects that the third legalization baseline needs to remain mindful of.

First, some structural changes in the global economy have occurred that defy the simplicity of older views on MNEs as hierarchical organizations headquartered in the West. As Ruggie wrote, MNEs "are no longer the entities they once were: vertically integrated, multidivisional organizations structured in the form of a pyramid. The 21st century transnational corporation is a far more complex economic entity" through outsourcing to many layers of global value chains through non-equity relationships. Furthermore, "one of the most profound global geo-economic shifts today is the rapid increase of transnational corporations based in so-called emerging markets." Essentially, the legalization project has just increased in complexity compared with the first baseline.

Second, a range of openings in several policy channels have appeared. There are transnational policy streams with a bearing on the governance of global value chains: international trade law, development aid, international human rights law, home state laws with extraterritorial effects, and corporate social responsibility. New openings are appearing in the BHR landscape as some experiments come to maturity (e.g., in CSR) and new policies that were almost inconceivable years ago have become now a reality (e.g., labor clauses in trade agreements, and home states' regulations of MNEs) (for such developments, see Brief 4/2017). They carry leverage to shape MNE operations and offer new opportunities and pathways to promote human rights across borders (territorial and organizational). Therefore the narrative around BHR discussions is important: it can skew evaluations of significant developments and blind rather than reveal a changing context.

Third, the second baseline occurred after the first baseline. It generated an alternative conceptual framework and made the weaknesses of the first baseline more evident. Fundamentally it rejected the entire project of moving liability upward toward the parent company that the first baseline embraced. Also the UNGPs adopted the polycentric governance outlook because regulating companies transnationally raised specific challenges that discourage a single-minded reliance on coercive law. These difficulties can be explained by reference to three foundational principles of international law, business law, and human rights law (Brief 2/2017). The third legalization baseline should build on the analytical strengths and momentum generated by the second baseline.

The third legalization baseline should resist reverting uncritically to the first baseline drawn in the mid-2000s that has been overtaken both conceptually and by the realities of the global economy. The failure of the first baseline cannot be attributed exclusively to lack of political will due to state and businesses resistance. Instead, the challenge now is to design a third baseline that builds on the strengths of the second baseline by creating carefully designed

⁶ John Ruggie, *Closing Plenary Remarks*, 3rd UN Forum on Business and Human Rights, Dec. 3 2014.

legal incentives. One can be animated by the aspirations of the first line – a rule of law approach to corporate accountability and to economic globalization – without purchasing wholesale the entire project exposed there. The challenge for the third baseline is about how to add a legalization layer to the UNGPs in a way that avoids replicating the reductionisms of the first baseline. It is about imagining a regulatory model that complements and builds on the UNGPs and thus support Ruggie’s project of harvesting leverage for human rights in an interconnected global economy.

Table 3: Third baseline

<i>Traits</i>	<i>Strengthened focus</i>
No reversal to first baseline	Regulatory mixes
Complementarity with 2nd baseline	Compliance
Two-track	Remedies
Multi-channel	

Implication 1: Against relapsing into the first legalization baseline. The first baseline had problems beyond lack of political will of home states and resistance from deregulation-seeking businesses.

Implication 2: Against superficial complementary between 2nd and 3rd baselines. Turning soft law (UNGPs) into hard law (treaty) is not as straightforward as proponents to make HRDD mandatory make it seem.

Implication 3: Against false analogies and slippery slope argumentation. The corporate direct and indirect involvement in abuses should be kept distinct (two-track perspective). The national and transnational settings of BHR raise different challenges. Important consequences for legalization options follow from these differences.

Implication 4: Against a unitary legalization perspective but a differentiated one (Brief 4/2017). There is place for hard law and legal coercion. However the third legalization baseline needs to make sense of less coercive legalization and other non-legal strategies. It cannot see them as mere stepping stones towards a coercive transnational law.

The brief argued that the third legalization baseline should not instinctively revert to the first legalization baseline. Instead, it is imperative for the third legalization baseline to reflect a more complex regulatory understanding of legalizing the BHR field and use the leverage of multiple transnational policy channels to find new protective pathways. The result would be a legalization baseline that is better attuned to the transnational BHR context, that avoids relapsing in the weaknesses of the first baseline, and that reinforces the strengths of the second baseline (UNGPs).

