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Edited by Surya Deva and David Bilchitz

Excerpt

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The human rights obligations of business: a critical framework for the future

DAVID BILCHITZ AND SURYA DEVA

Business and human rights: four key questions

In the last decade or so, significant developments have taken place at the international level in articulating the human rights responsibilities of business and devising a regulatory framework which can provide effective remedies to victims of corporate human rights violations. One development that stands out is the work done by Professor John Ruggie, who was appointed in July 2005 as the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG). After submitting two reports to the United Nations Human Rights Council (HRC), in 2006 and 2007, the SRSG proposed the ‘Protect, Respect and Remedy’ Framework (Framework) in the 2008 report to provide ‘a common conceptual and policy framework, a foundation on which thinking and action can build’.¹ After the Framework was accepted by the HRC and his mandate renewed for another three years, the SRSG focused upon ‘operationalising’ the Framework. This work culminated in the Guiding Principles on Business and Human Rights (GPs), which were submitted to the HRC in March 2011² and endorsed on 16 June 2011.³

¹ Human Rights Council, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’, A/HRC/8/5 (7 April 2008), para. 8 (SRSG, ‘2008 Framework’).

² Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011) (SRSG, ‘Guiding Principles’).

³ Human Rights Council, ‘New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council’ (16 June 2011), www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E (last accessed 14 January 2013).

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The GPs have generally received a positive reception by the international community and have become a sort of common reference point in the area of business and human rights. States, national human rights institutions, multi-stakeholder initiatives, companies, non-governmental organisations (NGOs) and academics have invoked them in diverse ways.⁴ However, do the Framework and the GPs adequately address the challenges that arise in considering the relationship between business and human rights? Barring a few exceptions,⁵ both these documents have not received a detailed or systematic critical evaluation. This book seeks to fill this gap.

It does so by subjecting the Framework and the GPs to rigorous scrutiny against four key questions that arise in the area of business and human rights.⁶ The first question relates to the process undertaken and the methodology adopted by the SRSG that led to the final products: the Framework and the GPs. What did the SRSG do differently to achieve the unanimous endorsement of the GPs by the HRC, a feat that no previous UN-led initiative could accomplish? What is the nature and extent of the 'consensus' that the GPs are said to represent? Were the deeply divisive and contested issues surrounding business and human rights intentionally bypassed to sustain the project of building the consensus? Did the goal of achieving a consensus and securing the support of the business community override the goal of developing a robust regulatory framework of corporate accountability for human rights violations? In other words, did 'principled pragmatism' undermine the cause of subjecting business to the mandate of international human rights law?

The second key question concerns the normative grounding of the Framework and the GPs. This question has two components: what is the source of bindingness of corporate obligations; and why ought businesses to have human rights obligations? In relation to the first component, we are concerned with the question of whether these obligations are merely

⁴ See Business and Human Rights Resource Centre, 'Implementation and Uses of Guiding Principles', www.business-humanrights.org/Documents/UNGuidingPrinciples (last accessed 24 January 2013).

⁵ See R. Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff, 2012). A few journal articles have also critiqued the Framework and GPs. See, for example, P. Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3:1 *Journal of Human Rights and the Environment* 5.

⁶ These four questions are an extension of the three-fold challenges (the *why*, *what* and *how*) in obligating companies to observe human rights norms, developed elsewhere by one of the editors. S. Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London/New York: Routledge, 2012).

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voluntary and should be rooted in 'social expectations'. Moreover, can human rights norms be 'binding' other than in a legal sense? The second component requires us to develop a reasoned account of why corporations ought to have obligations for the realisation of human rights. This is a question of political philosophy and requires engagement with the moral bases for corporations to be bound by particular obligations.

The third question relates to the actual content of the obligations that corporations have in relation to human rights. In other words, what is (or ought to be) the extent of corporate human rights obligations? This is a complex area to navigate and raises several sub-questions. What is the justifiable division of responsibility between the state and corporations? Do corporations merely have the responsibility to respect human rights or do they also have positive obligations to protect and fulfil human rights? What are the responsibilities of corporations for the actions of third parties – from state agencies to subsidiaries and suppliers – with whom they are connected? The issue of complicity, especially for companies operating in conflict zones or where repressive and authoritarian regimes are in power, poses a number of conundrums which require systematic attention.

The fourth and final question concerns how to make companies accountable for human rights violations. How could the obstacles that victims experience in access to justice be overcome? Is it adequate to rely primarily on states or the 'courts of public opinion' to hold corporations accountable for violations of human rights? What forms of alternative remedies are likely to provide effective relief for victims of human rights abuses? More importantly, do the measures proposed by the GPs empower victims adequately to take on the mighty multinational corporations (MNCs)? How does one deal with companies that fail to live up to the 'due diligence' recommendations outlined in the GPs?

We organise the discussion in this introductory chapter as well as the parts of the book around these four questions. In the second section of this chapter, we consider briefly the historical backdrop of the UN's engagement with the issue of business and human rights. This should help readers to contextualise the SRSG's mandate. The third section then offers a critical introduction to the key features of the Framework and the GPs. The fourth section provides a brief outline of the chapters in this volume and their authors' views about the adequacy of the responses of the Framework and the GPs to the four questions identified above. Finally, we conclude by briefly considering some of the outstanding issues and a possible way forward for developing further the human rights obligations of business.

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The book does not claim that the Framework and the GPs are devoid of any merit. Nevertheless, we believe that critical insights will be vital to further the cause of putting in place a robust framework regarding the human rights obligations of companies. While a book of this length cannot possibly cover all aspects of the Framework and the GPs, it covers a range of issues in a systematic way. We do hope that more such critical inquiries will follow. These critical engagements should help, amongst others, the UN Working Group on Business and Human Rights ‘to explore options and make recommendations . . . for enhancing access to effective remedies available to those whose human rights are affected by corporate activities’.⁷

A few signposts are necessary regarding the terminology used in this book. Although the debate at times was personified by John Ruggie, we have generally used the term ‘SRSG’ to indicate that the recommendations emerged from a UN mandate and to ensure that any critiques should not be taken in an ad hominem manner. Also, the contributors to this volume have not generally maintained as sharp a distinction between ‘responsibility’ and ‘duty/obligation’ as was done by the SRSG. And we use the terms ‘corporation’ and ‘company’ interchangeably to refer to all forms of business entities that have human rights obligations.

The UN’s engagement with business and human rights: a historical context

It might be useful to review at the outset the history and context⁸ in which the SRSG was invited to break the stalemate in the UN’s quest to establish a regulatory framework concerning the human rights responsibilities of business.⁹ The UN’s direct engagement with MNCs¹⁰ and the

⁷ Human Rights Council, ‘Human Rights and Transnational Corporations and Other Business Enterprises’, A/HRC/17/L.17/Rev.1 (15 July 2011), para. 6(e).

⁸ This section draws on S. Deva, “Protect, Respect and Remedy”, but Why, What and How?: A Critique of the SRSG’s Framework for Business and Human Rights’, paper presented at a conference on ‘Corporate Social Responsibility, Business Responsibilities for Human Rights and International Law’, held in Copenhagen on 6–7 November 2008.

⁹ Even the SRSG considered ‘the history that preceded its creation’ an important variable: see Commission on Human Rights, ‘Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, E/CN.4/2006/97 (22 February 2006), para. 3 (SRSG, ‘2006 Interim Report’).

¹⁰ Transnational corporations (TNCs) is the UN’s preferred terminology. But we use the term ‘MNCs’ here for the sake of consistency in this book.

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impact of their activities on society (which was the initial focus of the UN in this area) can, broadly, be divided into three phases. Apart from the timespan, the three phases differ from each other in terms of the focus of engagement, the key participating actors, and the driving force for such an engagement.

The first phase: MNCs' rights versus responsibilities

The first phase can be traced back to the early 1970s when the UN's Economic and Social Council requested the Secretary-General to constitute a Group of Eminent Persons to study the impact of MNCs on the development process (especially in developing countries) and international relations.¹¹ The Group recommended that the UN establish a Commission on MNCs, which, amongst other things, should formulate a code of conduct for them.¹² The quest to establish an agreeable code under the aegis of the Commission continued for more than a decade, but the Draft Code of 1990 could not be adopted due to various disagreements between developed and developing countries.¹³ It is arguable that the first phase ended in the early 1990s with the suspension of negotiations on the Code and the renaming of the Commission on MNCs as the Commission on International Investment and Transnational Corporations.¹⁴

During the first phase, the proposed code sought to deal with *both* responsibilities (linked to MNCs' activities) and rights (linked to MNCs' treatment by host states). For obvious reasons, whereas developing countries were more interested in solidifying their right to regulate MNCs and outlining the responsibilities of MNCs, developed countries were keener to secure a level playing field for their MNCs operating in emerging markets. Consistent with the then prevailing view of international law, states were the principal actors which pushed for such a code and negotiated its content.

Writing in 2007, the SRSG asserted that '[h]uman rights did not feature' in the code formulation initiative of this phase.¹⁵ This assertion

¹¹ P. Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell Publishing, 1999), 593.

¹² *Ibid.* ¹³ *Ibid.*, 593–97.

¹⁴ Economic and Social Council, 'Integration of the Commission on Transnational Corporations into the Institutional Machinery of the United Nations Conference on Trade and Development', Resolution 1994/1 (14 July 1994).

¹⁵ J. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819.

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does not seem to be correct, because paragraph 14 of the Draft Code of 1990 had stated that MNCs ‘*shall respect human rights and fundamental rights and fundamental freedoms in the countries in which they operate*’.¹⁶ The SRSG was probably misled by the fact that the Draft Code, unlike the similar instruments drafted in the next two phases, did not focus exclusively on the human rights responsibilities of MNCs. But this does not mean that human rights issues were not on the discussion table during the first phase.

The second phase: between voluntarism and binding obligations

The second phase of the UN’s engagement with MNCs’ activities began at the end of the twentieth century when the UN became concerned with the impact of globalisation as well as of MNCs on the realisation of human rights. Taking leads from the paper submitted by Mr El-Hadji Guisse on the impact of MNCs on the realisation of economic, social and cultural rights,¹⁷ in August 1998 the Sub-Commission on the Promotion and Protection of Human Rights decided to establish a five-member Working Group on the Working Methods and Activities of Transnational Corporations.¹⁸

While the Working Group was still mapping its future course, on 31 January 1999, at the World Economic Forum in Davos, the then UN Secretary-General, Kofi Annan, proposed the Global Compact originally consisting of nine principles in the areas of human rights, labour, and the environment.¹⁹ This was a clear attempt on the part of the UN to re-engage with non-state actors and push for a ‘public-private’ partnership to make globalisation more inclusive and equitable.²⁰ The Global Compact, which was officially launched in 2000 and became popular with corporations, received significant criticism from human rights

¹⁶ ‘Draft Code on Transnational Corporations’ in UNCTC, *Transnational Corporations, Services and the Uruguay Round* (1990), Annex IV, p. 231 at 234, para. 14 (emphasis added). See also paras. 25, 37 and 41–43.

¹⁷ Sub-Commission on Human Rights, ‘Working Document on the Impact of the Activities of Transnational Corporations on the Realisation of Economic, Social and Cultural Rights’, E/CN.4/Sub.2/1998/6 (10 June 1998).

¹⁸ D. Weissbrodt and M. Kruger, ‘Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 *American Journal of International Law* 901, at 903–04.

¹⁹ The tenth principle (anti-corruption) was added to the Global Compact in 2004.

²⁰ S. Deva, ‘Global Compact: A Critique of UN’s “Public-Private” Partnership for Promoting Corporate Citizenship’ (2006) 34 *Syracuse Journal of International Law and Commerce* 107.

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advocates for being too vague and providing nothing more than voluntary moral guidance to companies.²¹

Against the backdrop of these criticisms, the Working Group drafted detailed substantive provisions as to the human rights responsibilities of MNCs and other business enterprises and also incorporated provisions for the implementation of these responsibilities.²² In mid-2003, it presented to the Sub-Commission the final draft of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms).²³ The UN Norms unsurprisingly attracted criticism from several leading MNCs and business organisations. Although the Sub-Commission approved the UN Norms,²⁴ the Commission on Human Rights in its 2004 session resolved, much to the satisfaction of the business community, that the UN Norms have ‘no legal standing’.²⁵ The Commission then, in its 2005 session, requested the UN Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations.²⁶ This resolution effectively drew the curtain on the second phase in that it did not even refer to the UN Norms.²⁷

In comparison with the first phase, the primary focus of the second phase – which lasted for a much shorter period than the first phase – was on cataloguing the human rights responsibilities of MNCs and other business enterprises. The omission of MNCs’ rights from the drafting debate during this period could be explained by the proliferation of bilateral investment treaties since the 1990s,²⁸ and the establishment of

²¹ J. Nolan, ‘The United Nations’ Compact with Business: Hindering or Helping the Protection of Human rights?’ (2005) 24 *University of Queensland Law Journal* 445; Deva, ‘A Critique of UN’s “Public-Private” Partnership’, n. 20.

²² See Weissbrodt and Kruger, n. 18, 903–07.

²³ 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 (13 August 2003) (UN Norms).

²⁴ Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2003/16 (13 August 2003), E/CN.4/Sub.2/2003/L.11, 52–55.

²⁵ Commission on Human Rights, Agenda Item 16, E/CN.4/2004/L.73/Rev.1 (16 April 2004), para. (c).

²⁶ Commission on Human Rights, ‘Promotion and Protection of Human Rights’, E/CN.4/2005/L.87 (15 April 2005).

²⁷ See D. Kinley and R. Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) 6 *Human Rights Law Review* 447, at 459–60.

²⁸ See D. Bishop, J. Crawford and M. Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (The Hague: Kluwer Law International, 2005), 1–10.

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the World Trade Organisation in 1995. These two developments allowed MNCs to demand, in various forums, directly or through their home states, fair and equal treatment from host states. It did not, therefore, remain equally critical to catalogue the rights of MNCs. Another notable difference between the first two phases was that, unlike in the first phase, MNCs, business organisations and NGOs played an active role in the second phase in mobilising opinion for or against the UN Norms. This provided good evidence of the emerging importance of non-state actors in moulding the contours of international law.

*The third phase: principled pragmatism or business
in the driving seat?*

The third phase began in July 2005 with the appointment of John Ruggie as the SRSG and is ongoing, with the constitution of the Working Group tasked with the responsibility to disseminate and implement the GPs still underway. During the six years of his mandate, the SRSG conducted wide-ranging consultations, participated in meetings with diverse organisations, gave numerous speeches, prepared several reports, proposed the Framework and drafted the GPs.

While it will not be possible to review all the SRSG reports here, we highlight how this phase differed from the previous two phases. Firstly, extensive consultation with a wide range of stakeholders (perhaps with the exception of victims of human rights abuses) was a defining feature of this phase. In fact, this phase illustrated how non-state actors such as MNCs, NGOs and individual scholars could play an even more vital role than states in developing international law norms from the 'bottom up'.²⁹

Secondly, this 'bottom-up' approach of international law-making allowed MNCs and business organisations to play an unprecedented role in defining the contours of rules that were to apply to them. The business sector not only enjoyed proximity to the SRSG,³⁰ but its voices

²⁹ See S. Deva, 'Multinationals, Human Rights and International Law: How to Deal with the Elephant in the Room?', Keynote Address at the 'GLOTHRO Workshop on the Direct Human Rights Obligations of Companies in International Law', held in Bled, Slovenia, on 17–19 January 2013.

³⁰ For example, out of the fifteen-member Leadership Group constituted in September 2008 to advise the SRSG, six members came from the corporate world, while there was no representative from prominent human rights NGOs such as Amnesty International and Human Rights Watch. 'Global Leadership Group to Advise on Business and Human Rights', www.

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also seemingly had more influence on the text of the Framework and the GPs as compared to the voices of NGOs. Human rights in the context of business thus hardly remained as ‘trumps’,³¹ because the business sector was able to negotiate narrow and non-binding human rights standards applicable to itself.

Thirdly, the SRSG’s work was underpinned by the notion of ‘principled pragmatism’, that is, ‘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’.³² Although this notion rightly received criticism from human rights scholars and NGOs,³³ it also allowed the SRSG to achieve consensus and secure unanimous support at the UN level. At the same time, this approach enabled the SRSG to bypass smartly, as we show below, many contentious issues in the area of business and human rights.

The appointment of Ruggie as the SRSG was perhaps a recognition of the reality that in the third phase of the UN’s engagement with MNCs, business would play a dominant role in setting the human rights agenda affecting itself. It is not without significance that Ruggie was ‘the principal drafter of the UN Global Compact’.³⁴ One should not, therefore, be too surprised if his past publicly-stated views were reflected in how he discharged his mandate as the SRSG. For example, writing in 2002 in defence of the voluntary character of his brain-child (i.e. the Global Compact), Ruggie had observed that the ‘probability of the General Assembly’s adopting a meaningful code anytime soon approximates zero. . . . any UN attempt to impose a code of conduct not only would

reports-and-materials.org/Leadership-group-22-Sep-2008.pdf (last accessed 26 January 2013).

³¹ R. Dworkin, *Taking Rights Seriously*, 2nd Indian repr. (New Delhi: Universal Law Publishing, 1999), xi. See also F. J. Garcia, ‘The Global Market and Human Rights: Trading Away the Human Rights Principle’ (1999) 25 *Brooklyn Journal of International Law* 51, 75; J. Donnelly, *Universal Human Rights: In Theory and Practice* (Ithaca: Cornell University Press, 1989), 9–10.

³² SRSG, ‘2006 Interim Report’, n. 9, para. 81.

³³ See, for example, D. Weissbrodt, ‘International Standard-Setting on the Human Rights Responsibilities of Business’ (2008) 26 *Berkeley Journal of International Law* 373; Misereor & Global Policy Forum Europe, ‘Problematic Pragmatism: The Ruggie Report 2008: Background, Analysis and Perspectives’ (June 2008); FIDH, ‘Comments to the Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 22 February 2006’ (442/2, 15 March 2006).

³⁴ Weissbrodt, ‘International Standard-Setting’, n. 33, 383.

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be opposed by the business community, but also would drive progressive business leaders, who are willing to engage with the Compact, into a more uniform anti-code coalition'.³⁵ In short, the approach adopted by the SRSG in the third phase has undone the contribution that the UN Norms sought to make in marking a clear departure from merely voluntary regulation and the over-reliance on the states' role in regulating MNCs.

Key features of the Framework and the GPs

This section outlines some of the key elements that defined the work and output of the SRSG's mandate, in particular the Framework and the GPs. We engage with these key features in a critical manner, seeking to show both a number of shortcomings and omissions in the work of the SRSG.

Process: consensus without content?

One distinguishing feature of the SRSG's mandate was the process adopted by him. The first important element of this process was the adoption of an explicitly consultative approach. The SRSG perhaps learned a lesson from the failure of the UN Norms, which had been criticised for failing to engage with a wide range of stakeholders. The wide-ranging consultations conducted by the SRSG undoubtedly enhanced the legitimacy of the mandate to set norms and outline expectations that society has from both states and companies. Even if not all stakeholders had the same kind of impact on the text of the Framework and the GPs, they at least had a sense of participation in what was unfolding. A black spot in relation to this legitimacy, however, was the SRSG's reluctance to engage in any direct consultation with victims of corporate human rights abuses. Despite many calls by civil society for him to meet victims, the SRSG took a strategic decision at the outset to keep a distance from the victims of corporate human rights abuses. This allowed him to avoid the process becoming an adversarial battle between NGOs and MNCs.

Consultations were not carried out merely to acquire legitimacy. They were also employed to build consensus – the second key aspect of the process. The SRSG did not try to impose on companies human rights

³⁵ J. Ruggie, 'Trade, Sustainability and Global Governance: Keynote Address' (2002) 27 *Columbia Journal of Environmental Law* 297, at 303.