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978-1-107-03687-1 - Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?

Edited by Surya Deva and David Bilchitz

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HUMAN RIGHTS OBLIGATIONS OF BUSINESS

In recent years, the UN Human Rights Council has approved the 'Respect, Protect and Remedy' Framework and endorsed the Guiding Principles on Business and Human Rights. These developments have been welcomed widely, but do they adequately address the challenges concerning the human rights obligations of business?

This multi-author volume engages critically with these important developments. The chapters revolve around four key issues: the process and methodology adopted; the source and justification of corporate human rights obligations; the nature and extent of such obligations; and the implementation and enforcement thereof. In addition to highlighting several shortcomings of the Framework and the Guiding Principles, the contributing authors also outline a vision for the twenty-first century in which companies have obligations to society that go beyond the responsibility to respect human rights.

SURYA DEVA is an associate professor at the School of Law, City University of Hong Kong. His primary research interests include business and human rights, constitutional law, globalisation and sustainable development.

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PRINCIPLES

When, on 20 April 2005, the United Nations Commission on Human Rights adopted a resolution requesting that the UN Secretary-General appoint a Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG),¹ the field was a deeply divided one. After a wide consultation of all relevant stakeholders including in particular the business community, the UN Sub-Commission for the Promotion and Protection of Human Rights – made up of independent experts appointed by the Commission on Human Rights to provide expert advice in support of its work – had approved in August 2003 a set of Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (Norms).² The draft Norms presented themselves as a restatement of the human rights obligations imposed on companies under international law. They were based on the idea that ‘even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also

¹ Commission on Human Rights, ‘Human Rights and Transnational Corporations and Other Business Enterprises’, Res. 2005/69 adopted on 20 April 2005 by a recorded vote of forty-nine votes to three, with one abstention (Ch. XVII, E/CN.4/2005/L.10/Add.17).

² Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (Norms), UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). For the Commentary on the Norms, which the Preamble of the Norms states is ‘a useful interpretation and elaboration of the standards contained in the Norms’, see UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003). On the drafting process of these Norms and a comparison with previous attempts of a similar nature, see D. Weissbrodt and M. Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 *American Journal of International Law* 901; D. Weissbrodt and M. Kruger, ‘Human Rights Responsibilities of Businesses as Non-State Actors’ in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press, 2005), 315.

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responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights', and therefore 'transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments'.³

However, as documented in a report prepared in 2004–05 by the Office of the High Commissioner for Human Rights, the Norms were deeply contentious.⁴ Some stakeholders challenged the very idea that international human rights law was relevant to corporations: they asserted that international law could not impose direct obligations on companies, who are not subjects of international law. Others questioned the choice of the experts of the Sub-Commission on Human Rights to base the Norms they were proposing on a range of instruments that were not necessarily ratified by the countries in which the corporations operate, thus in fact imposing on business actors obligations that went beyond the duty to comply with the legal framework applicable to their activities. Moreover, it was said, the Norms were inapplicable, due to the ambiguities of the standards guiding certain key questions, such as the definition of the situations which corporations had a duty to influence. Principle I of the Norms referred in this regard to the notion of 'sphere of influence' to provide such a definition,⁵ but that was considered exceedingly vague and the source of legal insecurity for both the victims of human rights abuses of corporations and for these corporations themselves.

Not only were the Norms highly contentious due to the prescriptions they contained, they also were seen as objectively competing with the flagship initiative of the United Nations in promoting corporate social responsibility, the Global Compact. The Global Compact was first proposed by the United Nations Secretary-General Kofi Annan at the 1999 Davos World Economic Forum. It was conceived as a voluntary process,

³ Norms, n. 2, Preamble, 3rd and 4th Recitals.

⁴ Commission on Human Rights, 'Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights' (15 February 2005), UN doc. E/CN.4/2005/91.

⁵ 'Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.' Norms, n. 2, para. 1.

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meant to reward good corporate practices by publicising them, and to promote mutual learning among businesses. The companies joining the process pledge to support a set of values in the areas of human rights, labour and the environment, to which anti-corruption was added in 2004. They report annually on initiatives that contribute to the fulfilment of these values in their business practices, through a 'Communication on Progress'. By 2011, more than 2,000 participating companies had been 'de-listed' from the Compact website for failure to comply with the reporting requirement.⁶

Six years later, in June 2011, the Human Rights Council – which had by then succeeded the Commission on Human Rights – adopted a set of Guiding Principles on Business and Human Rights (Guiding Principles) that are now seen as the most authoritative statement of the human rights duties or responsibilities of states and corporations adopted at the UN level.⁷ These Guiding Principles go beyond the plethora of voluntary initiatives, often sector-specific, that existed hitherto. They have been widely endorsed by business organisations and in inter-governmental settings, including, notably, by the Organisation for Economic Co-operation and Development (OECD) when it revised its Guidelines on Multinational Enterprises in 2011.⁸ They have also been invoked, albeit at times grudgingly, by civil society. And they are now subject to a follow-up mechanism within the United Nations system, through the Working Group on Business and Human Rights and an annual forum to be held on this issue.⁹

This is not a meagre achievement. It required from Professor John Ruggie, appointed the SRSG in July 2005, considerable talent in building bridges across various constituencies, and in seeking to build consensus across governments. His former affiliation to the Global Compact process, of which he was the main architect, undoubtedly made his task easier, reducing the perception of a competition between the two

⁶ 'Number of Expelled Companies Reaches 2,000 as Global Compact Strengthens Disclosure Framework', Press Release of the Global Compact Office (20 January 2011), www.unglobalcompact.org/news/95-01-20-2011 (last accessed 17 April 2013).

⁷ Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/Res./17/4 (16 June 2011).

⁸ The new version of the OECD Guidelines on Multinational Enterprises includes a Chapter IV on human rights, that is based on the 'Protect, Respect and Remedy' Framework.

⁹ The Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises was established by Resolution 17/4 of the Human Rights Council, at the same time that the Council endorsed the Guiding Principles.

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processes – one focused on human rights compliance and developed under the supervision of an inter-governmental body (i.e. the Human Rights Council), and another addressing broader areas of corporate social responsibility, led by the private sector and facilitated by the United Nations Secretariat but without any direct role for governments.

But the achievement owes less to where John Ruggie came from than to his tactical sense: when, in early 2008, he presented an initial framework (the ‘Protect, Respect and Remedy’ Framework), the skeleton proposed was so lean that hardly any stakeholder could see a reason to challenge it, though some did express the concern that the Framework lacked ambition. However, when, in 2011, the flesh was put on the bones, the trap had closed on the governments and the business community: since they had accepted the Framework three years earlier, how could they refuse its implications, which the final report of John Ruggie was now setting out in the form of the Guiding Principles? In addition, as Karin Buhmann rightly notes in her contribution, the SRSG sought to build a consensus by using language that sought to appeal to the business community – referring, for example, to ‘responsibilities’ rather than to ‘duties’ – and emphasising the business case for good corporate behaviour. This too was a tactic, and it paid off. However, as Surya Deva notes, substantive choices may hide behind terminological matters. For instance, mentioning ‘impacts’ rather than ‘violations’ reveals a shift from a legal to a managerial conception of the responsibility of business that human rights lawyers may see as a step backwards.

This important volume takes stock of this achievement. It asks what made it possible, providing a uniquely well-informed insight into the decision-making processes within the United Nations. But it also asks whether the price for consensus was too high: as Surya Deva and David Bilchitz aptly put it in their introduction, if John Ruggie was inspired by an idea of ‘principled pragmatism’, has pragmatism – the need to achieve consensus across a wide range of often conflicting interests – led to a sacrifice of principles? If consensus was achieved, is it ‘consensus without content’? Far from sharing the enthusiasm of most governments and of the business community, most of the contributions collected here adopt a rather sceptical stance.

This diversity of views is entirely understandable. The Guiding Principles are not a blueprint, and they are not the final word. They are a step in a process that is still unfolding. They contain certain formulations that will require more elaboration in the future. The concept of ‘due diligence’, discussed in the chapter by Sabine Michalowski, is

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illustrative in this regard. The SRSG wanted to avoid the pitfalls associated with the notion of ‘sphere of influence’ and sought to refrain from imposing on corporations certain responsibilities – to protect, promote and fulfil human rights – that would overlap with the duties of the state. But he did realise, at the same time, that defining for corporations responsibilities of a purely ‘negative’ nature was insufficient: would not corporations be tempted to adopt a ‘hands-off’ approach even in situations they were in a position to influence, if their only responsibility was to abstain from being involved in abuses?

The concept of ‘due diligence’, which was included as part of the definition of the requirement that business enterprises respect human rights – the second component of the Framework – was seen as a way out of this apparent dilemma. The Guiding Principles provide that corporations should ‘act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved’.¹⁰ Principles 15 and 17 further describe the notion, and the OECD Guidelines on Multinational Enterprises, as revised in 2011, replicate this. These instruments define the human rights due diligence responsibility of corporations as having three key components: to identify impacts; to prevent and mitigate impacts thus identified; and to account for impacts and establish grievance mechanisms. But, as the Guiding Principles themselves acknowledge, it is a notion that must be interpreted according to context, and that will vary, for instance, ‘with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations’.¹¹

We should avoid confusing ambiguities with gaps. The relative vagueness of ‘due diligence’ may in fact be seen as an opportunity, as the various business sectors, civil society groups and courts will gradually both clarify the expectations it conveys and build the notion – not top-down and by decree, but bottom-up and incrementally. Thus, in 2012, non-governmental organisations commissioned a study on the various meanings of due diligence in different contexts, and on what states could do to encourage companies to be proactive in this regard.¹² In 2013, the

¹⁰ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Respect, Protect and Remedy” Framework’, A/HRC/17/31 (21 March 2011), para. 6 (‘Guiding Principles’).

¹¹ *Ibid.*, Principle 15(b).

¹² O. De Schutter, A. Ramasastry, M. B. Taylor and R. C. Thompson, *Human Rights Due Diligence: The Role of States* (International Corporate Accountability Roundtable, the

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High Court in Kampala found a German coffee-producing company liable for compensation to people evicted from their lands in order for the coffee plantation to be established: although the evictions took place prior to the arrival of the investor, the court stated that the company concerned should have acted with due diligence and actively sought information about the conditions under which the land was being made available to them.¹³ Due diligence shall continue to live on. It is a welcome fact that the Guiding Principles, far from foreclosing the discussion on its significance and relevance in different contexts, encourages this conversation.

That is not to say, of course, that the Guiding Principles are beyond reproach. There is one area in particular where they do seem to set the bar below the current state of international human rights law: that concerns the extraterritorial human rights obligations of states, including, in particular, the duty of states to control the corporations they are in a position to influence, even outside the national territory. Augenstein and Kinley offer a comprehensive discussion of this issue. The Guiding Principles provide that ‘States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations’.¹⁴ This includes operations abroad. As the Commentary to the Guiding Principles affirms: ‘There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses.’¹⁵

However, the United Nations treaty bodies have gone beyond that cautious, almost subliminal reference to the extraterritorial obligations of states. They have repeatedly expressed the view that states should take steps to prevent human rights contraventions abroad by business enterprises that are incorporated under their laws, or have their main seat or main place of business under their jurisdiction. The Committee on Economic, Social and Cultural Rights in particular affirms that states parties should ‘prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural

European Coalition for Corporate Justice, the Canadian Network on Corporate Accountability, 2012).

¹³ See FIAN, ‘Ugandan Court Orders Compensation be Paid to Evictees of the Kaweri-Coffee-Plantation’, Press Release (11 April 2013), www.fian.org/news/article/detail/ugandan-court-orders-compensation-be-paid-to-evictees-of-the-kaweri-coffee-plantation/ (last accessed 17 April 2013).

¹⁴ Guiding Principles, n. 10, Principle 2. ¹⁵ *Ibid.*

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Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law'.¹⁶ Specifically in regard to corporations, this Committee has further stated that: 'States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant.'¹⁷ Similar views have been expressed by other human rights treaty bodies. The Committee on the Elimination of Racial Discrimination (CERD) considers that states parties should also protect human rights by preventing their own citizens and companies, or national entities, from violating rights in other countries.¹⁸ Under the International Covenant on Civil and Political Rights, the Human Rights Committee noted in 2012 in a concluding observation relating to Germany:

The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.¹⁹

It is noteworthy that these statements, while they confirm the views of the human rights treaty bodies that these bodies had expressed in the past, were reiterated after the endorsement of the Guiding Principles by the Human Rights Council. The Guiding Principles are not a restatement of international law: they are a tool, meant to provide practical guidance both to states and to companies, in order to ensure that all the

¹⁶ Committee on Economic, Social and Cultural Rights, 'General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/2000/4 (2000), para. 39; Committee on Economic, Social and Cultural Rights, 'General Comment No. 15 (2002), The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/2002/11 (26 November 2002), para. 31.

¹⁷ Committee on Economic, Social and Cultural Rights, 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights', E/C.12/2011/1 (20 May 2011), para. 5.

¹⁸ See CERD, 'Concluding Observations for Canada', CERD/C/CAN/CO/18, para. 17; CERD, 'Concluding Observations for the United States', CERD/C/USA/CO/6, para. 30.

¹⁹ Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Germany', CCPR/C/DEU/CO/6, para. 16.

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instruments at the disposal of both shall be used to improve compliance with human rights in the activities of business. Nor are the Guiding Principles intended to freeze the development of international law: they allow, and to a certain extent encourage, the further clarification by human rights bodies of the implications of the duties of states and, indirectly, of corporations. I am convinced that the gradual strengthening of the extraterritorial duties of states in the area of human rights, including their duties to regulate the activities of corporations whose conduct they can influence, constitutes the next frontier in this regard: the endorsement by a range of experts and organisations of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural rights is a first and important step in this regard.²⁰

This book makes a highly valuable, and timely, contribution to this discussion. The authors identify the choices that were made in the Guiding Principles. They do not only highlight certain insufficiencies; they also identify ways forward. I have no doubt that it shall remain for many years an essential reference for all those who work on corporate responsibility and human rights. And it is my hope that it shall influence the next steps on the long road towards humanising globalisation.

Olivier De Schutter*

²⁰ The text of the Maastricht Principles is reproduced with a commentary in (2012) 34 *Human Rights Quarterly* 1084–1171 (commentary authored by O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman). See also M. Langford, W. Vandehole, M. Scheinin and W. an Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013). As regards the duty of the state to regulate corporations, see in particular the chapter by Smita Narula.

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PREFACE

This book stems from an international conference that took place in Johannesburg in late January 2012. The conference was organised by the two editors under the auspices of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a Centre of the University of Johannesburg, and the School of Law of City University of Hong Kong with the financial support of the Konrad Adenauer Stiftung. The conference – which attracted several leading scholars, practitioners and civil society representatives working in the area of business and human rights in different parts of the world – sought to engage critically with the ‘Protect, Respect and Remedy’ Framework (Framework) and the Guiding Principles on Business and Human Rights (GPs). This edited collection contains some of the most thought-provoking and original papers that were presented at the said conference. It represents one of the first scholarly works that offer a systematic critique of the Framework as well as the GPs. In many areas, it also suggests future directions that should be pursued in this important, cutting-edge area of scholarship in relation to the human rights responsibilities of business.

The conference was held at Constitution Hill, the historic site in South Africa where both Gandhi and Mandela – two of the foremost defenders of the ethos underlying human rights – were imprisoned. The site, where the new Constitutional Court of South Africa was built, also represents the triumph of the values for which they fought and the importance of institutions being set up to protect the human rights of all in society. The challenges faced by human rights defenders often change over time: whereas the focus of the struggles led by Gandhi and Mandela was on fighting colonisation and apartheid, one of the key challenges today is to harness the economic power of corporations in the quest to realise human rights and to revisit the ways in which their responsibilities are conceived. Just as a historic transformation occurred in South Africa, so too do we hope that the international community will see the importance of developing a more robust framework for regulating the activities of business in relation to human rights.

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This book hopes to make an important intellectual and conceptual contribution to what the relationship between business and human rights should look like. A project of the magnitude of the conference and resulting book could not be accomplished without the support of many people. In bringing the conference together, we would like to thank the Konrad Adenauer Stiftung for their valuable support – financial and otherwise. Dolores Joseph provided superb assistance in co-ordinating the conference and Vusi Ncube also helped ensure its smooth running from a logistical point of view.

In putting the book together, the editors would like to thank the entire team at Cambridge University Press in rendering professional and efficient service. Kim Hughes, the Senior Commissioning Editor, deserves special mention and gratitude for being very supportive of this project throughout the process. We are also grateful to the anonymous reviewers who provided timely and valuable suggestions to us. Last but not least, all the contributing authors – who worked during weekends and Christmas/New Year holidays to meet our demands – deserve our sincere thanks for their co-operation and patience. We could not have accomplished this project without the unflinching commitment of each contributor to strive towards the goal of making companies accountable for human rights violations.

We are also grateful to Professor Olivier De Schutter for agreeing to write a foreword for this book, despite his extremely busy schedule. During the editing process, Anita Jay, Ngwako Raboshakga, Warren Bowles and Michael Dafel provided us with valuable help in verifying sources and revising the footnote style. We thank them all.

Surya Deva would like to thank the City University of Hong Kong Law School for providing the vital financial resources to hire a research assistant in finalising the manuscript. Surya is also grateful to Swati, Vyom and Varun for offering all the support, care and love one could hope for during the entire project, and generally. Without the best wishes of parents and other family members, I could not have come this far. Each one of them deserves special thanks for believing in me and letting me do what I wanted to do.

David Bilchitz would like to extend thanks to the Faculty of Law, University of Johannesburg for their support of the conference and the book project. I also deeply appreciate the support of all the staff at SAIFAC, which provided the institutional setting for the conference. On a personal level, I would like to thank Jeffrey Davis for being my wonderful life partner, a true companion who has deeply enriched my life on multiple levels since

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our first meeting almost four years ago. My parents – Reuven and Cynthia Bilchitz – have always provided me with the background and unstinting support that has enabled me to flourish academically and in many other ways. My gratitude to them knows no bounds. In recent years, Lennie and Lara – my brother and his wife – have had a child, Gavriel, who is a wonderful new addition to the family. I hope that when Gavriel grows up, he will inherit a fairer world, where business plays its role in contributing towards the realisation of human rights and some of the ideas canvassed in this book become a concrete reality.