Introduction: A Dialogue Across Divides in the Business and Human Rights Field

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As business and human rights (BHR) has evolved into a global field of research and practice over the last two decades, it has tended to operate at two clearly recognizable levels. On the one hand, a wealth of international regulatory initiatives – from UN norms and guiding principles to industry-specific codes of conduct to regional standards – has produced a veritable global "regime complex,"[1] in which highly diverse regulations and institutions coexist without a coordinating node or an overarching set of principles. The regime complex includes a wide range of regulations and institutions, from the hard law global and regional organizations have adopted (such as the UN, the EU, and the WTO) to soft law initiatives groups of states (such as the OECD's guidelines on conflict minerals and human rights) and private bodies (such as the codes of conduct adopted by individual corporations or transnational business associations) have undertaken.

What they have in common is their location in the field. Whether "soft law" or "hard law," such top-down, norm-making, and norm-implementation processes have remained largely confined to traditional centers of power, from Geneva (as in the case of the UN standards), to Washington (as in the case of industry codes such as the Fair Labor Association), to Paris (as in the case of the OECD Guidelines for Multinational Enterprises). Mirroring its object of study, international law and global governance scholarship on BHR has focused on theoretical and legal arguments in defense of different global regulatory approaches.[2]

On the other hand, myriad communities along with local and national organizations around the world engage in campaigns, litigation, negotiations, and information politics aimed at preventing and redressing corporate violations of human rights. Whether efforts to regulate pharmaceutical companies' patent rights so as

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[1] Robert Keohane and David Victor, "The Regime Complex for Climate Change," *Perspectives on Politics* 9 (1) (2011).

[2] For useful examples of this approach, see Jena Martin and Karen Bravo (eds.), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge: Cambridge University Press, 2016); Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013).

to make essential medicines accessible, peoples' tribunals aimed at protecting indigenous peoples' lands in the face of extractive economies' expansion into their territories, or new waves of transnational antisweatshop campaigning, such bottom-up corporate accountability strategies rarely draw on the global standards that dominate the attention of global governance analysts and practitioners. Rather than legal analysis, empirical sociolegal research tends to dominate the scholarly literature on these bottom-up initiatives.[3]

The contrast between these two locations in the BHR field is clear to those who circulate between them, including several contributors to this volume.[4] It has certainly been patent in my experience as a scholar-practitioner. The dominant debates at the UN level – such as those on the implementation of the UN Guiding Principles on Business and Human Rights (GPs) and the future of the ongoing discussion within the intergovernmental working group tasked by the UN Council with developing a treaty on BHR – do feel oftentimes a world away from litigation, campaigning or fieldwork on human rights violations stemming from corporate practices in indigenous territories in Colombia, Central American sweatshops, Indian tea plantations, or policy debates regarding intellectual property rights and access to medicines in the Americas.[5]

Against this background, the idea behind this collective volume is threefold. First, participants and topics were chosen so as to foster dialogue, reflection, and circulation between the aforementioned two levels, in order to contribute to increasing the collective capacity of the BHR field to regulate, prevent, and effectively remedy human rights abuses related to corporate activity. Thus, contributors include scholars, practitioners, and scholar-practitioners who explicitly engaged with each other both in their chapters and the workshop that led to this volume. Second, given the intense (and sometimes acerbic) debates between different approaches within the field, the workshop and the book brought together analysts and practitioners espousing diverging views with regard to both theoretical issues – such as the conceptual underpinnings of the UN Guiding Principles and of proposals for a binding treaty – and practical trade-offs – such as which next international regulatory steps would be most effective for protecting human rights, as well as viable in light of current and

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[3] See, for instance, Boaventura de Sousa Santos and César Rodríguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

[4] See, for instance, Jochnik (Chapter 7), Kweitel (Chapter 10), and Mehra (Chapter 8).

[5] César Rodríguez-Garavito, "Ethnicity.gov: Global Governance, Indigenous Peoples and the Right to Prior Consultation in Social Minefields," *Indiana Journal of Global Legal Studies* (Winter, 2011); César Rodríguez-Garavito, "Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala," *Politics & Society* 33 (2005); César Rodríguez-Garavito, "Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication," in Katharine Young (ed.), *The Future of Economic and Social Rights* (Cambridge: Cambridge University Press, 2017); Rochelle Dreyfuss and César Rodríguez-Garavito (eds.), *Balancing Wealth and Health: Global Administrative Law and the Battle over Intellectual Property and Access to Medicines in Latin America* (Oxford: Oxford University Press, 2014).

foreseeable future geopolitical circumstances. As readers will note, contributors accepted this challenge by engaging each other – sometimes wholeheartedly agreeing, sometimes sharply disagreeing – and making an explicit effort to explain what they see as the right conceptual frames and regulatory strategies. Third, in order to counter the dominance of Global North voices in the scholarly debate on BHR, the discussion and the book include authors from or with a long experience of working in the Global South.

Given the wide diversity of regulations and institutions in the BHR field, this dialogue was possible only by narrowing down the focus of discussion. Interestingly for the theory and practice of human rights and global governance, BHR has been the subject of one of the most explicit efforts to restructure a regime complex in order to provide it with a focal point and "orchestration" mechanisms. As he explains in Chapter 2, John Ruggie led the development of the UN GPs with these purposes in mind. The GPs were explicitly inspired in models of polycentric and experimental global governance. The UN Human Rights Council endorsed them in 2011 at the end of Ruggie's mandate as the UN Secretary-General's Special Representative on Business and Human Rights (SRSG), and have since been gradually adopted by public and private regulatory institutions; from the OECD, to national governments and business associations.

In his final report to the Human Rights Council, the SRSG noted that the GPs were not intended to be the final word on the regulation of business, but rather "the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments." Keeping this in mind, I argue in Chapter 1 that scholars and practitioners should evaluate the conceptual and empirical achievements and limitations of the GPs not only in terms of their static dimension (such as the content of the standards they include), but also in terms of their dynamic dimension (such as their capacity to push the development of new norms and practices that might go beyond the initial content of the GPs and improve corporate compliance with human rights).

This book is a collective effort by BHR scholars and practitioners from different parts of the world to take stock of the static and dynamic dimensions of the GPs and the broader theoretical, legal, and policy debates and initiatives they have sparked. To that end, the book combines conceptual analysis and empirical work. From a conceptual standpoint, it brings to the surface the theoretical underpinnings of the heated debate around the GPs and other approaches to BHR. From an empirical standpoint, several contributions to the book examine whether, in practice, the GPs' orchestration mechanisms and regulatory incentives are taking the practice of BHR beyond the "end of the beginning," that is, whether there is early evidence of rule convergence and dissemination of better state and corporate practices with regard to human rights. Given that, by design, the GP framework is polycentric, contributors examine its implementation through multiple channels, from the practices of

individual businesses or sector-based business associations to the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, the official channel established by the UN for the specific purpose of disseminating and implementing the GPs.

THE STRUCTURE AND CONTENTS OF THE BOOK

This volume is the result of an organized collective effort, guided by a common set of questions. It stemmed from a conference coconvened by the Center for Law, Justice, and Society (Dejusticia, Colombia) and Brown University's Watson Institute for International Studies in March 2014. At the conference, held at Brown University, contributors presented the first drafts of their chapters, and engaged in a two-day discussion of their texts and broader debates on BHR. They subsequently revised the original papers in light of the workshop's discussions.

To strengthen the coherence of the volume and the focus of the discussion, the book's editor authored a chapter that served as the background paper of the workshop and the volume (Chapter 1). Contributors engage to different extents, from different angles, and with very diverse levels of agreement or disagreement with the background chapter and with each other.

The book has two organizing themes. Part One discusses the intersection between global governance and BHR. Chapters in this section explore the conceptual and legal underpinnings of global governance and human rights approaches to BHR, with an emphasis on the GPs, but also including the current efforts at the UN level to develop a binding treaty on the matter. Part Two provides more empirical and grounded accounts of how these different governance arrangements work in practice, again with an emphasis on the GPs: how their stakeholders can be spurred into action, which institutions can serve as orchestrators, and what sorts of initiatives can ensure transnational norm-uptaking and compliance.

Rodríguez-Garavito's Chapter 1 opens the first part of the book. He takes as his point of departure the analytical distinction between integrated and polycentric approaches to regulation, as developed by global governance theorists over the last two decades. While endorsing the GP's polycentric, experimentalist approach, he criticizes the weakness of civil society participation in the GP's design, as well as in its implementation by the WG. He proposes institutional mechanisms embodying an "empowered participatory" approach to the work of the WG, as well as a range of alternatives regarding the content and scope of the emerging binding treaty at the UN level that, while building on the GPs and being politically feasible, would go beyond and improve upon the GPs' normative content and actual impact on the ground.

In Chapter 2, John Ruggie's revisits the GPs and the logic behind them, with particular attention to the work of aligning distinct governance systems that influence corporate conduct, and providing the basis upon which these systems can play

a mutually reinforcing role and compensate for each other's weaknesses. He collects and explains the significance of some of the most salient examples of the GPs being taken up at all levels, showing, by example, how implementation through distributed networks has begun to bear tangible fruit. He then turns to two concerns regarding the GPs that must be addressed in order to push forward implementation: civil society participation, and the push for international legalization of the business and human rights agenda. He addresses the treaty process and the obstacles it faces, and makes the case for principled pragmatism and redoubling efforts to implement the GPs regardless of the outcome of the treaty process in the long term.

Surya Deva (Chapter 3) questions the line of division between the dynamic and static dimensions of the background chapter and argues that the static dimension frames (and potentially limits) the reach of the dynamic dimension of the GPs. It also suggests that an "either or" view of the treaty and the GPs is not characteristic of keen observers of the BHR arena, who favor both sets of tools. The chapter analyzes what ought to be the role of international law in addressing governance gaps and considers the friction between core corporate principles and fundamental requirements for the protection of human rights, arguing that companies should have the duty to respect, protect and fulfill human rights. Deva's chapter argues for a move away from overly state-centric answers and which will be undermined by states' failures to enforce human rights norms. He closes by proposing the adoption of a Declaration on the Human Rights Obligations of Business that would provide normative basis for why companies have such rights obligations and clarify their extent and implementation mechanism.

In Chapter 4, Tara Melish argues for a reframing of the GPs debate, moving away from ordering competing visions along an experimentalist versus command-and-control spectrum and toward a discussion of competing theories of how social change or system transformation can best be achieved. Melish argues that, from a human rights viewpoint, approaches underlying initiatives such as the GPs reveal a top-down structure in decision-making, and argues that they contemplate no power shift. She views efforts toward the adoption of a treaty as calls to remedy these weaknesses and to reinforce global expressive commitments to human rights in the context of corporate activities. Melish proposes the inclusion of a fourth "participate" pillar into the GPs, as well as a simultaneous push for a treaty in the model of the UN Convention on the Rights of Persons with Disabilities, for this treaty is flexible, but has expressive commitments, embeds participants' rights, and specifies states' obligations.

From a viewpoint that stands in contrast with those of Deva and Melish, Larry Catá Backer (Chapter 5) argues that a call for a binding treaty must be resisted; instead, the polycentric character of the BHR field must be reinforced and deepened. In order for polycentric governance to work, he argues, there is a need for a central orchestration mechanism that interprets transnational normative governance instruments, including the GPs, and further argues that representative civil

society organizations must have the ability to bring cases and advocate before such an interpretive body. Backer justifies his proposal historically first, outlining the evolution of a trend toward building integrated metagovernance orders (the GPs being a prime example of such an order) and the trend toward the abstraction of the individual, the rise of mass movements, and the rise of civil society as the figure that protects individual dignity. The chapter points to recent lost opportunities by the WG to take on the role of a quasi-judicial body empowered to interpret the GPs and proposes a path to move in that direction.

In the closing chapter of Part One, Claret Vargas inquires into the central concerns that animate civil society and communities' support for a binding treaty on BHR and considers whether and how binding human rights treaties have been found to address similar concerns in other contexts. She examines the work that a treaty can do to reduce the implementation gap, as compared to a nonbinding instrument, and identifies factors that tend to improve the implementation of human rights treaties. Vargas considers whether those factors exist or can be activated in the GPs implementation processes and concludes that it may be less helpful to think of these agreements as part of a binary of hard and soft law instruments. Instead, she argues that it is more helpful to view these two types of instruments as located in a continuum of agreements, with those with the most access to tools that facilitate implementation on one end, and those with the least at the other end. She presents some case studies and makes recommendations for more effective implementation of BHR norms, whether in the treaty context or in the GPs implementation context.

Switching to a focus on BHR practice, in Chapter 7, Chris Jochnik focuses on the issue of shifting power and uses a specific measuring stick for progress: does it affect the day-to-day circumstances and capacities of people on the ground? The chapter distinguishes two sectors and approaches within the BHR field: Human Rights (top-down, engaging the global human rights architecture) and human rights (bottom-up, seeking to empower local stakeholders and movements). While acknowledging that this framework simplifies several issues, Jochnik uses it to illustrate the reasons for the pushback and disappointment in all top-down regulatory processes on the part of civil society organizations and communities and to look at the tensions through the lens of power. While questioning the capacity of the GPs to address power differentials, this chapter places similar doubt on the capacity of a treaty, ensconced in the UN system as it is, to address issues of power any more effectively. Jochnick concludes by exploring the spaces where progress can be made, including grassroots mobilization, empowering advocates, and strengthening institutional support for corporate accountability at the national level.

In Chapter 8, Amol Mehra recognizes the layered complexity and diversity of business enterprises, and argues that advocates must be creative and systematic: creative in developing models that push businesses to respect human rights, and systematic in the use of the full panoply of avenues and tools that are currently

available to advocates. He highlights tools and levers beyond sanctioning harmful behavior. Mehra begins by emphasizing the nature of the GPs as a floor upon which stakeholders must build up and proposes to look beyond the WG to address implementation gaps. He highlights the wide range of international, regional, and national standards that can be used to embed respect for human rights in the practices of businesses. He also argues for developing preventative measures along-side remedial measures, and for a better understanding of the particular challenges of litigating against corporations in specific contexts. Mehra's chapter concludes by arguing for an "always in all ways" approach to implementing human rights norms in the business context.

In Chapter 9, Louis Bickford's considers how the field of BHR will move to its next level of impact. Drawing on social movement literature, the chapter argues that international norms and standards that undergird the field of business and human rights, including the GPs, have generated a coherent set of "external symbols" that can serve human rights advocates in the work of developing a global frame. Indeed, while advocates have already begun using the external symbols to demand better accountability of corporate actors, Bickford argues that a wider swath of civil society organizations – from NGOs to universities – can contribute to legitimize and give heft to the standards that the GPs capture and contribute to the work of framing. The chapter then presents two additional angles to engage the GPs and their implementation: political opportunity structures, as well as organized action and how NGOs can help build frame resonance globally and in specific societies.

In Chapter 10, Juana Kweitel considers the avenues currently available to advocate for a more effective regulatory environment on business and human rights. Kweitel reviews the treaty proposal, and, in particular, the participation of organizations and "nontraditional players" in processes in Geneva for the first time and provides an assessment of both the potential and risks that the process carries. The chapter offers a similarly exacting analysis of the GPs and the performance of the WG in its early work, and turns to outline the ways in which human rights organizations should re-engage in monitoring the WG, and underscores five priorities for CSOs' work in business and human rights: documenting violations, campaigning, litigation, new tools for GP enforcement at the national level, and new coalitions.

Bonita Meyersfeld opens Chapter 11 with an analysis of structural flaws in the architecture of the GPs. It compares the ideal implementation of the GPs with the realities on the ground, for example, the vulnerabilities of states with high levels of poverty and incentives to lower regulatory protections in order to attract investment. Meyersfeld also examines the design flaws in the construction of the GPs, and the multiple forms of exclusion during consultations, brought on by practical reasons, but resulting in the lack of consultation of people living in poverty. She argues that, in order to address structural flaws, the players must be disaggregated and the diagnosis of the harms to be addressed must be more accurate. Symptoms of

the harm, such as the Bhopal gas leak case in India, are more visible, but the harm, as Meyersfield argues, is one of economic hegemony where poverty is not viewed as a human rights violation. The chapter then proposes two specific approaches to address the BHR problem successfully: regional alliances and a reassessment of the value of human labor.

The book closes with a concluding, prospective commentary by César Rodríguez-Garavito about BHR as a field of research and practice. From an external point of view, that of observers interested in a sociological understanding of a field, he begins by characterizing BHR in terms of the conceptual, normative, and strategic positions that are at play in it. He conceives BHR as an emerging field whose analytical and practical boundaries are still being actively contested, with different actors offering contrasting frames to understand and influence regulatory frameworks such as GPs and a potential binding treaty. Rodríguez-Garavito further argues that BHR can be viewed as an illustration of broader discussions about transformation of human rights at large. He closes by proposing an ecosystemic conception of BHR, one that embraces the rich diversity of strategies and frames within the field, and that strives to create synergies among them and with other social justice fields concerned with corporate accountability.