

**Response of Surya Deva and David Bilchitz to Comments of Professor John Ruggie on
“Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?”
(Cambridge University Press, 2013)**

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We read with interest the [comments](#) of Prof John Ruggie, the former Special Representative of the Secretary General on Business and Human Rights (SRSG), on our new co-edited book entitled, [Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?](#), which were posted on the website of the Business and Human Rights Resource Centre.

Prof Ruggie recognises that the “contributing authors address both the strengths and weaknesses of the GPs”. He, however, has “real problems” with the Introduction (which was jointly written by us) and our individual chapters in the book. He thus saw it necessary to respond to our work and, in the spirit of robust discussion and debate, we wish to respond and engage with some of the key points made by Prof Ruggie. Clearly, this document cannot be exhaustive or comprehensive – it simply outlines, in brief, our lines of response.

At the outset, we highlight (for those unfamiliar with the book) that it centres around four key issues relating to the “Protect, Respect and Remedy” Framework and the Guiding Principles on Business and Human Rights (GPs): 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. Whilst many authors are critical of certain elements of the Framework and the GPs, others defend the choices made by the SRSG and seek to consider the possibilities for their effective implementation and development. As editors, we sought to ensure that the book canvasses a wide range of views amongst leading academics working in the field of business and human rights.

Although we have been critical of various features of the approach adopted by the SRSG in the Framework and the GPs, our motivation is not, as Prof Ruggie in his response seems to imply, to destroy the progress that has undoubtedly been made at the United Nations concerning business and human rights. It is rather to question whether the Framework and the GPs are adequate to address all the pressing challenges that arise in defining and enforcing the obligations that business has with respect to human rights. We recognise certain positive features of the Framework and GPs, but also find them to be a weak regime that suffers from serious deficiencies. Consequently, in our Introduction, we noted that “this volume will hopefully stimulate debate and discussion about the trajectory that should be followed in taking the business and human rights debate ‘beyond’ the conceptual contours set by the SRSG” (p. 26).

We reject any suggestion that the editors “resort to *ad hominem* remarks”. Indeed, as we indicate in the book, we made a conscious decision to direct our critique at the SRSG’s work and specifically used the term SRSG partly “to ensure that any critiques should not be taken in an *ad hominem* manner” (p. 4). Readers of the book should be able to see that we stick to this approach throughout the book.

We also believe that the Framework and the GPs are the result of a UN sanctioned multi-stakeholder consultative process led by the SRSG and that it should, therefore, not be

regarded as the personal output of one person. Nor is it appropriate for any one person to perceive all criticisms made of these documents as personal attacks. Open debates and criticisms are part of an evolutionary process in this field. Therefore, sincere attempts should be made to accord equal respect and space to a wide range of diverse views.

Legal Formalism

Although the editors have never met or interacted with Prof Ruggie in person, the latter has labelled us as “legal formalists” without explaining how and why he has reached such a conclusion. We are human rights scholars who do not easily fall into any of the “isms”. Indeed, the human rights focus in our work means that we are often highly critical of formal legal structures and reasoning that fail substantively to achieve adequate protection for the fundamental interests of individuals (see, for instance, Bilchitz ‘Is the Constitutional Court Wasting Away the Rights of the Poor?’, *South African Law Journal* (2010) 591). What is fundamentally critical for us is the premise that human rights ought to bind all centres of power in society. Achieving this goal might require having recourse to multiple means in diverse circumstances. In fact, one of us has articulated the value of *informality* as part of an integrated theory of regulation (Deva, [*Regulating Corporate Human Rights Violations: Humanizing Business*](#), 2012). We also reject the simplistic dichotomy between top-down and bottom-up approaches and recognise that both have value in achieving the fundamental goal of protecting human rights.

The contrast Prof Ruggie makes is between ourselves as “legal formalists” and his own experience which lies “in figuring out how to make actual global governance processes work”. We are concerned not simply that governance processes work, but that they do so in a normatively desirable way, that is, in accordance with the values and principles underlying international human rights. In many ways, thus, the contrast is between those of us who remain strongly devoted to human rights as the principle underlying normative foundation of the international order and those prepared to compromise on principle, claiming it is necessary to do so to make “global governance processes work”. We do not deny that pragmatic considerations are important at the international level (see page 12 of our Introduction). Nevertheless, we are not convinced that some of the compromises made by the SRSG were necessary.

Does Business have Legally Binding Human Rights Obligations?

As Bilchitz (and others) show, the SRSG has consistently taken the position that international human rights law does not impose any direct obligations on business, except perhaps for egregious human rights violations that amount to international crimes (see, for instance, 2006 Interim Report, para 60; 2007 Report, para 44). In addressing the relationship between international human rights instruments and the corporate responsibility to respect, the Commentary to Principle 12 contains the following: “these are benchmarks against which other social actors assess the human rights impact of business enterprises. The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions”.

Bilchitz in his chapter in the book took issue with these views and sought to provide several arguments as to why existing human rights treaties and customary international law should be understood to bind corporations legally, rather than merely serving as reference points for

social expectations. Bilchitz expressly acknowledged (on page 116 and in footnote 32) that the SRSG considered that there may be corporate liability under international law for gross human rights abuses. Without engaging with Bilchitz's core arguments as to why businesses are legally bound by existing international human rights law, Prof Ruggie instead re-iterates the position he has taken in relation to corporate liability for international crimes. We thus find ourselves rather perplexed at Prof Ruggie's response, unless of course he is re-visiting his views on the matter (which we would welcome).

One further point should be made in this regard. Prof Ruggie writes that international legal instruments "must and will play a role in the continued evolution of the business and human rights regime, but 'as carefully constructed precision tools' closing specific governance gaps that other means cannot reach". We reject this rather limited and instrumentalist conception of international human rights law: it is not simply a tool to be used for other purposes. International human rights law rather defines the very ends that must be achieved through holding business to account in this field, namely, ensuring that the most fundamental interests of individuals are protected and realised.

Engagement with Victims

Prof Ruggie states that we "create [our] own facts", for example, by suggesting that we claim that the SRSG "refused throughout the six years of [his] mandate to meet with victims". We did not, however, claim that the SRSG "refused" to meet with victims "throughout the six years"; rather we speak of his "reluctance" to do so. What we emphasised is that meetings with victims did not occupy as central a role in the SRSG's consultations as, for instance, did meetings with business representatives, the potential violators of human rights (see page 8).

We acknowledge why the SRSG took a strategic decision to keep distance from victims (see pp. 10, 83-84). But we find it problematic that the experiences and expectations of victims, as the bearers of human rights, did not translate into adequate and robust responses under the GPs. Merely having a grasp of victims' problems (*Just Business*, p. 146) is not enough. Taking victims' sufferings seriously should have entailed, for example, recommending concrete ways to overcome barriers experienced by victims in access to justice, or in providing for inclusion of indigenous peoples' rights or environmental rights in the "minimum" list under Principle 12 rather than under "additional standards". However, as we show in *Human Rights Obligations of Business*, the GPs fall short in both articulating human rights obligations of business and in providing robust redress avenues to victims of human rights violations.

Other Unfounded Observations and Claims

In his comments, Prof Ruggie makes several further observations or claims which are unfounded. Some examples follow. He claims that we have determined him to be "morally obtuse and unworthy of carrying the human rights torch". It is factually incorrect to suggest that we made any such determination. What we rather do is to detail our areas of disagreement, and argue that human rights law (and its underlying assumptions and philosophy) should have played a greater role in the SRSG's mandate. Moreover, we have acknowledged in the book – wherever necessary – the positive contributions made by the SRSG.

Prof Ruggie further claims that we have used words like "blind" and "obsessive" to describe *him*. This is again a totally baseless charge. While noting the limitations of the consensus model in negotiating a human rights instrument, Deva writes, for instance, on page 91: "As

illustrated in the next section, ... the blind obsession with achieving consensus has resulted in the adoption of weak language [in the GPs] concerning the human rights responsibilities of business.” The wording in this passage is clearly not personal. It is rather critical of the excessive focus in the mandate on achieving consensus resulting in serious compromises in the formulation of corporate human rights obligations under the GPs. How such a consensus was built is also no secret: Prof Ruggie himself documents in *Just Business* strategies employed and choices made to build the consensus.

Lastly, it is inaccurate to suggest us saying that “other approaches got locked in a ‘cage’.” We have used the “cage” terminology in a different sense. Deva in his chapter argues that the “protect” and “respect” cages created by the SRSG do not adequately capture the human rights obligations of either states or business (pp. 95-96). For example, the state’s “respect” and “fulfil” obligations are also relevant in the context of business. Similarly, the business sector should not have merely a “*responsibility to respect*” human rights (as Bilchitz also argues in his chapter). In the Introduction too, we refer to the Working Group as not wishing to “break the cage of the GPs, even in those cases where doing so might be desirable to strengthen human rights protection” (p. 11). Since we clearly believe that the GPs are not a fully adequate response to the challenges present in the field of business and human rights, we are concerned that the ongoing alignment with the GPs will prevent creative developments beyond the conceptual and practical framework set by the GPs.

Conclusion

If the GPs *endorsed* by the UN Human Rights Council provide an “authoritative global normative platform”, we find it puzzling that a critique by two academics could shake up such a platform built on the bedrock of consensus. Either the former SRSG should concede to the fragility inherent in the projected global authoritative normativity of the GPs or stop worrying about our critique leading to “adverse consequences for the ... further uptake of the GPs”. The reality is that many of those who take positions motivated by human rights concerns are not satisfied with the GPs and future years are likely to witness further advocacy and efforts to achieve a stronger regime.

In short, our critique of the Framework and the GPs does not aim to “turn the clock back to the discord and conflict” of the past forty years or “derail” the process, as the fear expressed by Prof Ruggie. Rather it seeks to make a strong case that what develops in the future should provide more robust protection of human rights which often suffer at the hands of corporate power. Much more needs to be done both normatively and practically to ensure that the business sector complies with its legitimate human rights obligations, that these are defined with greater clarity, and that those who fail to walk the talk are made accountable.

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