3 The Development of the ‘UN Framework’: A Pragmatic Process Towards a Pragmatic Output

Karin Buhmann*

1. Introduction

Prodded in part by the resolutions that created his first mandate (2005–2008) and extended it for a second term (2008–2011), the Special Representative of the Secretary-General (SRSG) has adopted a broad consultative process, including not only those governmental, intergovernmental and non-governmental actors who are conventionally consulted in international law-making on human rights and related ‘global concerns’, but also the private sector, that is, private non-state actors that are prospective duty-bearers. Due to the state-centrist structure of international law and politics, the private sector has previously been excluded from international law-making, at least formally. The Guiding Principles that are the main topic of this book were developed as an ‘operationalisation’ of the Protect, Respect, Remedy report presented by SRSG John Ruggie in 2008.

This chapter discusses the development of the SRSG’s ‘UN Framework’, focusing on the consultative approach adopted during the SRSG’s 2005–2008 mandate and the difference to the development of the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (‘the Norms’) and the reception that the Norms met in the Commission on Human Rights. The chapter considers the process leading to the UN Framework and the ‘unanimous welcoming’ that the Framework was given by the Human Rights Council. Discussion of the substantive contents and qualities of the UN Framework and the Guiding Principles or their possible status as soft or hard international law is beyond the focus of the chapter.

* Associate Professor of Law, Institute of Food and Resource Economics, University of Copenhagen.
The course of the mandate that led to the UN Framework has been described by the SRSG as “principled pragmatism”.¹ For a UN human rights special procedure, the SRSG process was unusual in its approach to stakeholder consultation. Consulting with stakeholders is not by itself unusual for a human rights special procedure. But consulting with prospective duty-holders that do not have direct access to the conventional process of international law-making is. Under international law, states are both primary duty-holders and by default participants in the law-making process. Companies, by contrast, are neither typical duty-holders under international law, nor typically involved in international law-making.

Much as the prospective duty-holding role for companies is an effect of the general corporate social responsibility (CSR) paradigm, the SRSG’s approach did set the process apart from previous UN efforts to develop business responsibilities for human rights. This chapter argues that although the UN Framework is not as comprehensive or detailed as some might like, its significance is in simply having become accepted by the Human Rights Council and having been prepared through a process that allowed diverging interests to be presented, tested and addressed in the process. Acceptance by the Human Rights Council does not make for formal international law by itself, but it paves the way for further efforts that may eventually reach the UN General Assembly for formal adoption. By being accepted by the Human Rights Council, the UN Framework paved the way for what has become the Guiding Principles. That may in turn lead to further detailed guidance on human rights responsibilities for the business sector, both through the work of UN human rights bodies and perhaps through formal international hard or soft law.

The perspective taken in this chapter is that the broad consultative process provided the UN Framework with an element of process legitimacy that led to output effectiveness in terms of the broad acceptance of the Framework. This provided the normative as well as politically accepted background for the Guiding Principles.

2. The Background for the ‘UN Framework’: Windy Course Towards UN Regulation of Business Social and Human Rights Responsibilities

Defining human rights duties for multinational enterprises (or as these are generally referred to in UN contexts, ‘transnational companies’ (TNCs)) has been on the agenda of international organisations for decades. The results have been varied, but so far have at most led to relatively open-ended recommendations rather than specific obligations. The first major attempt by the UN to formulate a code of conduct for transnational corporations was initiated in the 1970s by the Commission on Transnational Corporations.²

¹ Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. E/CN.4/2006/97, 22 February 2006, see especially section B.
² Established by the Economic and Social Council under resolution 1913 (LVII), 5 December 1974.