

Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the ‘*Protect, Respect, Remedy* UN Framework’

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Received: September 26, 2012 Accepted: October 9, 2012 Online Published: October 26, 2012

doi:10.5539/ilr.v1n1p88

URL: <http://dx.doi.org/10.5539/ilr.v1n1p88>

Abstract

The 2008 United Nations (UN) Framework ‘*Protect, Respect, Remedy*’ broke ground by being accepted by the UN’s main human rights body, the Human Rights Council, as a first ever authoritative clarification of human rights responsibilities of business enterprises as well as States’ duties to protect against human rights violations caused by business organisations. The Human Rights Council’s acceptance of the UN Framework stands out because previous efforts to reach agreement on norms for business responsibilities for human rights within a comparable UN setting had failed. As a UN initiative aimed at developing norms that may eventually become international law, the process, which was undertaken by the Special Representative of the Secretary-General (‘SRSG’), Professor John Ruggie, also stood out because it applied a multi-stakeholder approach involving representatives of business organisations as potential duty-bearers. Through a discourse analysis this article explores how and why the SRSG process delivered broad-based acceptance of the UN Framework not only with the UN but also with non-state actors. It concludes that consensus came about as a result of strategic usage of language, which addressed the specific interests of particular stakeholders in ways that induced acceptance of emerging normative expectations that business organisations take responsibility for human rights. In combination with the multi-stakeholder approach, which allowed for direct participation of business organisations as prospective duty-holders, consensus emerged leading to institutionalisation of norms on business responsibilities for human rights for States as well as business organisations.

Keywords: business and human rights, CSR normativity, discourse analysis, public-private regulation, ‘UN Framework’ on business and human rights, UN Secretary-General’s Special Representative for Business and Human Rights (SRSG John Ruggie)

1. Introduction

Conventionally, Corporate Social Responsibility (CSR) has been considered to be voluntary and for many practical purposes distinct from law. However, in later years the distinction between CSR and law has become blurred. CSR normativity increasingly draws on international law, particularly on human rights, labour rights, environment and anti-corruption. In addition to business or sector guidelines, law-makers at national and international level have taken to regulate company conduct through hard or soft measures, which concomitantly provide guidance for companies of what is expected of them by society in terms of social responsibility.

In June 2011 the United Nations (UN) Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights, which build on the three-pillared *Protect, Respect, Remedy* UN Framework that was developed for the Human Rights Council between 2005 and 2008. Clarifying the actions which business organisations as well as governments (States) should undertake to avoid business related human rights violations, the UN Framework broke ground in several ways. Perhaps most importantly, it brought clarity to a topic which had been the subject of heated and sometimes antagonistic debate between civil society and business organisations in favour of as well as opposed to the idea that businesses take responsibility for human rights, and even between governments which also harboured widely diverging views on not only the idea of business responsibilities for human rights but the entire idea of formalising corporate social responsibilities. The background to the UN Framework, which was received with a unanimous welcome by the UN Human Rights

Council, was a set of draft UN Norms on Business and Human Rights. The ‘draft Norms’ had been developed by an expert working group under the Council’s predecessor, the UN Commission on Human Rights but were eventually rejected by the Council due to political reasons. A previous effort to develop a UN Code of Conduct for Multinational Enterprises (MNEs), initiated in the 1970s, had finally faltered in the early 1990s. The UN Framework broke new ground in being the result of an inter-governmentally initiated process to define a specific topic of business responsibilities related to business impact on society. The UN Framework has already formed the foundation of further intergovernmental efforts to define corporate social responsibilities. In particular, the UN Framework forms the basis of the UN Guiding Principles and has influenced the 2011 revision of the Organisation on Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises. The UN Framework has also influenced the ISO 26000 Social Responsibility Guidance Standard and the EU’s 2011 CSR Communication as well as firms’ CSR strategies and actions. Thus, although not an established form of international law, the UN Framework has already proven its normative influence and significance.

The broad agreement generated by the process of developing the UN Framework stands in stark contrast not only to past UN efforts in the human rights field, but also to the meagreness of recent years’ UN efforts to agree on responsibilities of governments and non-state actors with regard to climate change. Understanding the process that led to agreement on the UN Framework may hold important insights for future intergovernmental as well as public-private efforts to address global sustainability concerns beyond the field of human rights. To bring out that understanding, this article applies a discourse analysis, which approaches the process from the socio-legal perspective of reflexive law and brings forth negotiation dynamics in a context marked by competing interests between participants and constraints of international law and politics.

The article proceeds as follows: First the background to the UN Framework is set forth, followed by an elaboration of the interests at stake in construction of norms on corporate social responsibilities (including human rights responsibilities) under the auspices of an intergovernmental organisation like the UN. Next, the value of discourse analysis in the development of such normativity is explained. This is followed by a case study applying discourse analysis to the development of the UN Framework, considering the process as a reflexive law process and stakeholders as representing particular system-specific interests. Due to space limitations, the analysis mainly considers statements by the individual in charge of the process, Professor John Ruggie who was charged with the mandate as the UN Secretary General’s Special Representative (‘SRSG’) on business and human rights. Finally, the article concludes that consensus on the UN Framework came about as a result of a strategic usage of language that addressed the specific interests of particular stakeholders in ways that induced acceptance of emerging normative expectations that business take responsibility for human rights. In combination with the multi-stakeholder approach that allowed for direct participation of business organisations as prospective duty-holders, consensus emerged leading to institutionalisation in the form of the UN Framework.

2. Background

2.1 Political and International Law Context for the Development of the UN Framework

Much of recent years’ theorizing on Corporate Social Responsibilities (CSR) had grappled with what to make of the increasing role which public authorities at national and international level have assumed in the CSR field (Walsh, 2005; Matten and Moon, 2008; Margula and Steurer, 2009; Gjørlberg, 2010; Scherer and Palazzo, 2011). Legal scholars have been discussing a number of related developments, which combine public and private law and other modes of regulation across national and national levels (Picciotto, 2008; Buhmann, 2007, 2009; McBarnet, 2007; Backer, 2006; Zerk, 2006). Muchlinski (2012) has suggested that the UN framework’s notion of human rights due diligence may lead to the creation of binding legal duties.

The last decade of the 20th century and the first of the 21st century have witnessed an emergence of concern on human rights duties and accountability of transnational corporations and other business enterprises. This has combined with concern with the effectiveness of international human rights law to curtail adverse human rights impact resulting from economic activities and recent decades’ development of investment and trade law. While the home state of a corporation has the legal power to regulate the corporation extraterritorially, so far international human rights law has not been generally seen to entail an obligation for States to do so. And although international human rights law recognises limited international legal personality for some non-state actors, especially in terms of rights for individuals, its recognition of obligations for non-state actors is still limited. That is particularly so with regard to legal persons and even more particularly for private non-state actors, such as companies.

Despite – or perhaps because of – this doctrinal state of the art as regards companies’ obligations under international human rights law, later years have seen efforts by international organisations, especially the UN,

the International Labour Organisation (ILO) and OECD to introduce social responsibilities for companies through or related to the concept of CSR. Established in 1999-2000 as an initiative of (then) UN Secretary-General Kofi Annan, the UN Global Compact, comprising ten principles on human rights, labour standards, environment and anti-corruption to which business organisations may commit on a voluntary basis. ILO, drawing on its tri-partite structure comprising states, employers' and workers' organisations, has adopted Declarations encouraging Multinational and other companies to observe core labour standards. OECD's Guidelines for Multinational Enterprises are a set of non-binding normative directives on anti-corruption, taxation, competition, environmental sustainability, labour standards and human rights that OECD Member States undertake to recommend to corporations based in those States.

Preceding the SRSR's first mandate, the UN Human Rights Commission had given a 'thumbs down' to a set of draft Norms on Human Rights Responsibilities of Transnational and other Business Enterprises. The draft Norms had been developed between 1998 and 2003 by an expert group under the Human Rights Commission. The Commission (which was in 2006 superseded by the UN Human Rights Council) was a political body within the UN. Composed of government representatives, some of whom had been lobbied by business who saw the draft Norms as a first step towards binding international requirements on business with regard to human rights, the Commission decided not to proceed with the draft Norms (Knox, 2012, Buhmann, 2012, Kinley and Nolan, 2007). As an alternative, the Commission in 2005 drafted the mandate upon which the UN Secretary General later that year appointed John Ruggie as SRSR (Commission on Human Rights, 2005).

The SRSR mandate encompassed the identification and clarification of standards of corporate responsibility and accountability for business with regard to human rights; the elaboration of the role of States in effectively regulating and adjudicating the role of business with regard to human rights, including through international cooperation; research and clarification of the implications for business of concepts such as 'complicity' and 'sphere of influence'; development of materials and methodologies for undertaking human rights impact assessments of the activities of business; and compilation of a compendium of best practices of States and business. Specific instructions from the Commission to the mandate-holder suggest that inclusion of a wide group of stakeholders was hoped to be a way towards an output that could be widely accepted. The resolution requested the mandate-holder "to consult on an ongoing basis with all stakeholders". It listed not only States and intergovernmental organisations but also "transnational corporations and other business enterprises, and civil society, including employers' organizations, workers' organisations, indigenous and other affected communities and non-governmental organizations" among organisations to be consulted (Commission on Human Rights, 2005).

During the 2005-2008 mandate the SRSR met with a number of stakeholders, including human rights NGOs, businesses, academics and other specialists on CSR. By the end of the mandate in June 2008, the SRSR had conducted more than 15 consultations. The recommendations of the SRSR were presented in 2008 in the form of the three-pillared '*Protect, Respect, Remedy*' framework, now referred to as the UN Framework. It set out a normative framework for states to protect against human rights violations by companies, for companies to respect human rights, and for states and companies to provide judicial as well as non-judicial remedies to (alleged) victims of human rights violations by companies.

The UN Framework differs from the other main UN initiative in the field of CSR, such as the Global Compact, by developing quite clear normative guidance for companies and establishing that business responsibilities for human rights encompass both an element of complying with relevant national law and an element of internalising social expectations, including to ensure respect for international human rights law even if the pertinent standards directly address states. The impact of the UN Framework is already significant: In June 2008 the Human Rights Council renewed the mandate of the SRSR for another three years until 2011 in order to allow the SRSR to "operationalise" the recommendations made in his final report from his first mandate 2005-2008 (Human Rights Council, 2008). This led to the UN Guiding Principles, which was endorsed by the Human Rights Council in June 2011. The UN Framework played a major role for the 2011 revision of the OECD Guidelines, including the inclusion of full new human rights chapter and revision of the complaints handling National Contact Points to ensure human rights compatibility. The EU's third and most recent CSR Communication, a type of EU soft law (Senden, 2005), changed the definition of CSR from that which had prevailed since 2002, partly in order to ensure realignment with the UN Framework and the revision of the OECD Guidelines (European Commission, 2011).

2.2 The Construction of CSR Normativity: Interests at Stake

When the SRSG process was launched it was unclear whether it would lead to a conventional international law instrument, such as a treaty, that might set out binding obligations for business with regard to human rights. Some expected the process to lead to simply a reaffirmation of the Global Compact as *the* UN instrument on human rights responsibilities for business as well as other CSR issues. Differences such as these were quite significant for companies, civil society as well as the UN and its member governments. To the extent that development of norms on CSR or its human rights elements were to lead to an institutionalisation of businesses' responsibilities under international law, the implications for companies are potentially very large. Much is also at stake for governments, involved intergovernmental organisations, NGOs, labour organisations and business organisations. Depending on the outcome, we may distinguish between three scenarios: First, a *'hard' institutionalisation* which leads to the formulation of duties for businesses in international law, i.e. for businesses to become duty-bearing subjects under international law. A hard institutionalisation could also result in the establishment of duties for businesses in regional (e.g. EU) law and national law in addition to those that they already have. Second, a *'soft' institutionalisation* in terms of a clearer definition and (a degree of but not necessarily global) consensus on what is understood by business responsibilities for human rights and general social responsibility of businesses. This could also entail a clearer delimitation of the boundaries between state duties and business responsibilities, and a clearer understanding and a measure of consensus on disputed terms (such as became the case with 'spheres of influence' and 'complicity' during the SRSG's 2005-2008 mandate). A soft institutionalisation would mean that businesses are seen to have some social responsibility and responsibility for human rights, but without being subjected to legally binding requirements. Third, *status quo* would mean that processes of attempting to reach either a hard or a soft institutionalisation were unsuccessful. Under *status quo*, companies would be subjected mainly to their own norms and disparate economic and related sanctions, especially from investors and consumers. Of course, nation states may introduce specific legal requirements to be complied with. For reasons of economic competition between states, such measures are, however, likely to be limited.

A 'hard' institutionalisation will mean considerable restrictions in terms of permissible conduct and resource priorities for many businesses around the globe. Consequently it will have potentially severe economic effects on many actors in the private sector, be they TNCs, suppliers or even buyers. As a hard institutionalisation will affect the economies of many companies, at least in the short term and especially for companies that do not engage in strategic CSR (Porter and Kramer, 2006), there may be considerable economic power related to CSR being 'voluntary'. For companies that prefer minimal legal constraints, a construction of international law as not creating obligations for companies is therefore paramount. This also applies to many companies who draw on CSR presented as 'voluntary' action as a business strategy to signal that they go out of their way (of abiding by law) to be good corporate citizens without being legally compelled to do so. Those companies may therefore prefer a construction (and preservation) of international law as not creating obligations for companies. Many such companies will also have interest in connections between CSR normativity and international law norms being limited. That would reduce expectations of companies to respect, for example, labour conditions which correspond to international labour law conventions in countries where national law provides less effective protection for workers than the salient international standard.

From a different perspective, the international labour movement may also see an interest to avoid a specific institutionalisation of CSR under international law as establishment of new legal obligations for businesses in a form other than developed and organised under national or international labour organisations may be a loss of power.

A hard institutionalisation could also advance the interests of some stakeholders. For companies that have already established themselves as socially responsible and as companies which respect human rights, a legal construction of a 'level playing field' in terms of specific standards of conduct may lead to economic benefits, at least in the short to medium term until other businesses catch up with the new legal requirements. Such an institutionalisation may also, arguably, ease the resource burden on many governments with regard to realisation on positive human rights and lead to better conditions for many individuals. In terms of societal economics, these positive pay-offs may be large, for many socially, environmentally and human rights concerned NGOs, there will be an important political message in their being able to demonstrate success of years of claims for businesses to be made to take more responsibility. Through this, NGOs will also be able to make a claim to power to be taken seriously in other future regulatory efforts in relation to globalisation and its effects.

A softer institutionalisation of current social expectations towards more specific expectations of businesses in the form of 'soft', i.e. non-binding responsibilities, would still have significant implications for a large number of

companies globally, be they TNCs, suppliers or even buyers. For companies that are not already socially responsible or live up to human rights expectations, voluntary expectations could be much easier to handle in terms of resources and economic effects than legally binding requirements. A soft institutionalisation would still have the potential of benefiting societies at large, but most likely less than if requirements on companies are made mandatory. For NGOs that have been fighting for a hard institutionalisation of social responsibilities for companies, not being able to demonstrate the political power to successfully influence and take part in inducing a change at the level of international law as well as in some regional and national legal contexts would be considerable.

A status quo situation, assessed from the situation at the time when the SRSG assumed his mandate would mean results somewhat along the lines of the soft institutionalisation scenario but with effects stronger for most stakeholder types. The effects on perceptions of the intergovernmental organisations like the UN as being unable to adapt to changed circumstances and requirements, such as globalisation and its effects on trade, human rights and social conditions in many states, could be considerable. This could significantly affect global confidence in the UN and therefore its political and legal power.

In sum, the interests at stake among businesses and their interest groups, NGOs and civil society, governments and intergovernmental organisations whether favouring an institutionalisation of CSR normativity or not at the outset of the SRSG mandate were considerable. The construction of human rights aspects of CSR or even of specific business responsibilities for human rights has strong implications under each of the scenarios set out, and therefore impact the way in which stakeholders relate to initiatives that may affect their interests through an institutionalisation of business responsibilities for human rights. As the subsequent section shows, socio-legal and related discourse studies of processes of negotiation under international organisations demonstrate that interests play a considerable role, and that some stakeholders have been adept at deploying discursive strategies towards aims that eventually become reflected in international agreements.

3. Negotiating and Protecting Interests in Intergovernmental Processes

Combined legal, international policy and political science studies of non-state actors in international relations have demonstrated that despite their lack of formal role as participants in international law-making, NGOs and private non-state actors engage actively international law-making processes and intergovernmental rule-making in several ways. Reinalda, Northman and Arts (2001) demonstrate that NGOs and business organisations employ a variety of strategies to influence international policy and law-making. These include peaceful means such as advocacy of special interests of public importance, active use of possibilities for speaking and dialogue in consultative capacity, and lobbying or national level pressuring of states to participate in treaty-making efforts. They also include formation of coalitions, mobilisation of and participation in public opinion making, data-gathering to help frame or define a problem in ways that influence the work of intergovernmental conferences, and persuasion in general, as well as less peaceful means such as violent protests.

Studies indicate that NGO and business organisations are either constrained or enabled by other players (such as states and companies) as well as by contextual factors (such as distribution of resources). Arts (1998, 2001) notes that the ability of private non-state actors to exert influence depends primarily on two factors: The quality of their interventions (in particular expert knowledge and skills), and the similarity between their demands and existing related regulatory regimes. The ability to politicise issues and mobilise support among other groups allows NGOs to sometimes compete with powerful business interests. Business organisations gain power from liaising with political elites “as business is the key motor of economic growth on which the political system is so dependent”. In other cases, NGOs have successfully used strategies of persuasion to affect changes the positions of states’ interests (Deitelhoff, 2009).

Kolk (2001) found that business organisations generally favour voluntary initiatives and self-regulation to public regulation, partly because self-regulation enables the self-regulator to decide for themselves what they want to do. While companies and business organisations often oppose regulation at first, they may change stances and embrace (self-)regulation for strategic reasons. These include perceived opportunities for strategic restyling or potential new markets, following competitors’ lead for fear of missing chances for profit, or to avoid financial or publicity risks.

Analysing network based discourse in relation to policy processes on environment and sustainability. Hajer’s pivotal study (1995) of discursive construction of sustainability problems indicates that discursive argumentation employed by coalitions that converge on shared interests influences the conceptualisation of problems, solutions and regulatory strategies. Also applying a discourse approach, Conley and Williams’s (2005) analysis of theory versus practice in the CSR movement suggests that in particular firms’ deployment of linguistic usages is

carefully targeted towards the construction of particular versions of CSR as part of an ongoing construction of the meaning of CSR which involves many actors with varying ideas and objectives.

Perhaps due to public-private regulation of CSR still being somewhat unusual, studies of public private construction of CSR normativity are still limited. Employing discursive institutionalism, Fairbrass (2011) identifies reasons for the discursive construction of CSR in EU policy, exposing why the voluntary mode came to prevail over the regulated approach. Buhmann (2010, 2011) suggests that some business participants in the European construction of CSR were successful in influencing the outcome due to a specific discursive strategy underscoring public sector obligations rather than social responsibilities of firms, and that the construction of the Global Compact was successful in part because the UN organisers did not question the voluntary character of CSR and therefore did not engage firms' in struggling to uphold their preferred voluntary CSR concept. While the UN Framework and its development has been the subject of some research (Backer, 2006; Jerbi, 2009; Knox, 2012), the specific discursive dynamics remain to be analysed.

4. The Value of Discourse Analysis in Research on the Development of CSR Normativity

Discourse theory and analysis provide a way to identify and read texts to understand how their positions and arguments impact on social constructs, such as CSR normativity in general or business responsibilities for human right. In relation to a study of the SRSR process, discourse theory provides a theoretical background for analysis of the argumentative struggles and strategies. Due to its close association with international law and the development of norms within an intergovernmental context, the SRSR process contains elements that resemble some of those for which discourse analysis has been applied by international scholars (Kennedy, 1987; Holdgaard, 2008). The process, however, may also be considered from a more general perspective of power struggles and a quest for hegemony in the construction of CSR normativity, as elaborated below.

Joined by a common concern with power, power relations and their role (and use) to shape society, discourse theory comes in a number of forms and approaches. Some, like the French school some of whose main authors are Michel Foucault, Ernesto Laclau and Chantal Mouffe, are quite abstract theories. Others, such as the Critical Discourse Analysis (CDA) school represented by Norman Fairclough (1992, 2003) and other primarily English or German scholars, are more concretely focused on textual analysis. For the purposes of the case study below, a Fairclough inspired close textual reading is combined with the power oriented analytical focus championed by Laclau and Mouffe (1985) to bring out the significance of underlying power issues and linguistic discourse as a quest for building or preserving power, obtained through hegemony in the discursive construction of particular concepts.

In the discourse theory approach of Laclau, 'democracy' is a 'floating signifier'. The term denotes signifiers without referents, such as a word that doesn't point to an actual object or agreed upon meaning. Floating signifiers are often nodal points in competing discourses or sub-discourses (such as whether businesses responsibilities for human rights should be voluntary or binding, and/or what role should be paid by international human rights law in the substantive normativity of such responsibilities). The discursive battle, therefore, is a battle between discourses for hegemony in deciding the signification ("meaning") of the floating signifier. The normative concept of business responsibilities for human rights was a 'floating signifier' at the outset of the SRSR process. The consensus that emerged around the UN framework meant a clarification of the normative concept and therefore a fixation of the floating character of the previously disputed concept of business responsibilities for human rights.

As explained in detail elsewhere (Buhmann, 2009, forthcoming), the SRSR process may be considered a type of reflexive law. Reflexive law is a process oriented legal theory and regulatory strategy which counts on multi-stakeholder development of norms through exchanges that allow stakeholders to learn about the needs or expectations of other social groups or stakeholders. This learning process which induces internalisation of externalities typically takes place within an actual or virtual dialogue or learning forum organised by authorities. It has also been demonstrated that power relations influenced the construction of CSR normativity in two other intergovernmentally organised reflexive law forums on CSR, the European Multi-stakeholder Forum on CSR and the UN Global Compact (Fairbrass, 2011; Buhmann, 2010, 2011).

A key point in reflexive law's inducing organisations to internalise of externalities is the theory's basis in the systems theory idea of autopoiesis (Teubner, 1984, 1988). Autopoiesis allows social sub-systems such as the political, the economic and the legal system to adapt to changes or expectations in their environment based on 'irritants' from other social sub-systems. 'Irritants' function as perturbation, which leads to internal processes of change. Stakeholders' engagement in a reflexive law process allows social sub-systems to exchange information which causes perturbation inside another social sub-system. In the process of 'digesting' the

perturbance, internal reflection on the sub-system's impact on the environment is strengthened. This may lead to self-regulation to change that impact and, by implication, meet the concerns and needs of other social sub-systems. The process of developing and causing 'irritation' in other social sub-systems entails the use of signals or, in system theory language, of 'binary codes' specific to a system. While a system communicates in its own language, it may mimic the language of another. It may therefore employ signals from another system in order to create perturbance within the latter.

A process of constructing CSR normativity or to define what is to be understood by business responsibilities for human rights involving different social sub-systems seeking to promote and protect their own interests (such as those indicated above) has a discursive element. It involves discursive struggles to influence the construction of the concept that will result from the process. Interaction within a reflexive regulatory forum takes place through discursive exchanges between participants who argue their case to promote and protect their interests in ways intended to lead to the desired adaptation within other participating sub-systems. To cause perturbance, stakeholders will need to apply the system-specific language of the recipient it seeks to influence. In a discourse analysis of the construction of concepts in reflexive law forums, textual reading focusing on linguistic usages, such as usage of system-specific language, connects to the construction of floating signifiers (such as business responsibilities for human rights) and underlying power interests (such as those outlined in the preceding section).

The connection between reflexive law and discourse theory may be illustrated in a simple relational model (*fig. 1*). The model provides a concrete representation, which connects the relatively abstract ideas of floating signifiers and reflexive law-making with the textual analysis and its focus on system-specific language. The model presents the system-specific language dynamic through explicit focus on the context for texts, their production, transmission, consumption and effects.

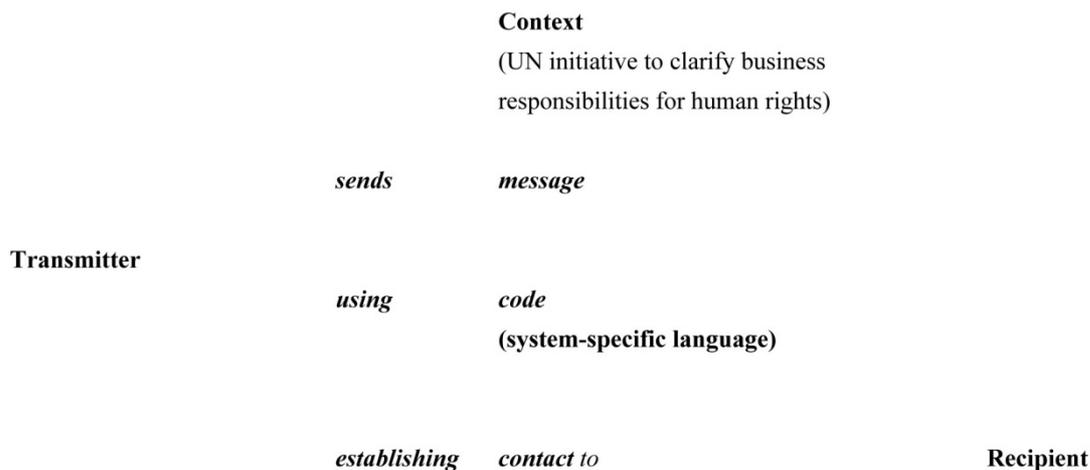


Figure 1. Basic relational model (Adapted from Ditlevsen, M. G., Engberg, J., Kastberg, P., & Nielsen, M. (2007) at 64)

In figure 2 the model is expanded to indicate results of the discursive process with examples to operationalise each of the fields of the model in the current context.

The model indicates the relationship in which the text is sent by the transmitter in the context of a reflexive regulatory forum, which provides for interaction between representatives of different social sub-systems. The transmitter seeks to convey a message to the recipient, typically a representative of another social sub-system, for example activating the economic impact of disregard of social expectations on companies that they will ensure respect for working conditions in the supply chain.

The subsequent analysis of the SRSR process will seek to determine whether and how irritation was made to arise and cause observable results in terms of the reaction, when the transmitter employs a code or system-specific language of the recipient social sub-system. Changes within the system may take the form of self-regulation or acceptance rather than resistance to external demands. The latter may lead to collaboration rather than antagonism. Reactions have an impact on the output of the reflexive regulatory forum. Charged by

the UN with a specific task, John Ruggie in his capacity as SRSR did not himself represent a specific social sub-system but functioned as a medium to deliver an output.

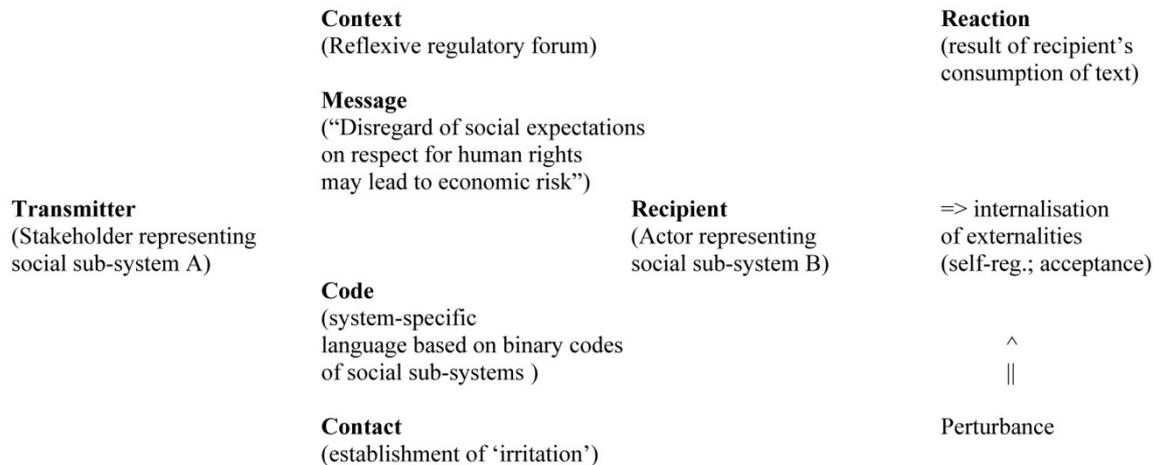


Figure 2. Model for discourse analysis of system-specific language in reflexive law

5. The Construction of the 'UN Framework': Analysing the SRSR's Discursive Course towards Consensus

Recall that the SRSR process was established upon the background of the failure of the draft UN Norms to generate support with Commission on Human Rights. Collaboration between certain governments and business organisations and convergence of arguments against the idea that companies hold human rights responsibilities worked against the Commission's positive reception of the draft Norms. Organisations opposed to the idea of business responsibilities for human rights argued that the draft Norms entailed shifting international obligations from states to corporations. Several arguments referred to classical international law doctrine, according to which international obligations pertain to States, not to private actors such as companies. Others argued that States' lack of implementation of at the national level was a common cause of business related human rights problems, and companies should not suffer from States' disregard of their international obligations (Buhmann, 2012 with references). Many of the arguments which caused the Commission to reject the Norms, including those above, were referred to international law doctrine. As a body under the UN, charged with the drafting and monitoring of international human rights law, international law doctrine was part of the 'code' or language of the Commission. Because these were the arguments that had caused the draft Norms to fail in generating sufficient support, as SRSR John Ruggie was faced with turning his mandate in another direction, while at the same time addressing a plurality of stakeholders with widely diverging interests in the outcome of the process.

In a speech in October 2005, a few months after the inception of the mandate, the SRSR set out his understanding of the institutional framework for the issues to be addressed by the mandate. The main argument was that international law had developed to provide increased protection of the rights of TNCs (especially through international trade law) and that companies had become participants in some areas of "international standards setting". Having thus established that companies had both benefitted from international law and had taken to making rules themselves, the SRSR explained that some types of company action had "generated increased demands for greater corporate accountability". He added that other actors are seeking to build on the global outreach and power of business to "cope with pressing societal problems", such as access to medicines or curbing human rights abuse. Moving from a combined reference to legal and economic system considerations, focusing on firms' interests, the SRSR shifted to legal system related observations on accountability as a counterweight to economic and legal rights of companies. The SRSR proceeded to counter the argument against business responsibilities for human rights, which held that establishing such responsibilities would allow states not to honour their international obligations. He drew on legal system references ("if governments everywhere did what they are supposed to") to remind states as well as other stakeholders that slack state delivery of their obligations contributes to the "urgency" of the need for institutionalising business responsibilities for human rights (Ruggie, 2005a).

In a speech made in December 2005, the SRSR laid out what was to become a main thread of the mandate's work and reporting, that is, the focus on "weak governance zones" as areas that particularly call for business to take responsibility for their impact on human rights. The statement addressed the economic risks that companies may encounter if they disregard human rights ("As companies are discovering at their peril"). Presenting a turn of "prevailing ideas, ideologies and institutional practices" to "catch up with new economic and social forces" as being of benefit to "business and human rights alike", the speech combined divergent interests in a statement that implicitly referred to economic, political and legal system considerations at once ("the alternatives would be bad for business and human rights alike"). The speech built on this to call on "the business and human rights communities" to work on shared interests rather than differences (Ruggie, 2005b). This is significant because it clarified that the SRSR was not on the side of either, but set on assisting towards the development of a shared foundation.

SRSR statements at this time drew on all three system-specific languages. He employed legal system language both to draw attention to the discrepancy between companies' rights under international trade law and their impact on societies, and to states' obligations to implement and enforce their international obligations in national law. Thus, although the SRSR employed international legal system doctrinal arguments, contrary to business he did so with a clear message that human rights matter to both. He employed economic and political system language to strengthen that argument by drawing up implications to companies and states alike of neglecting human rights.

Overall, doctrinal legal system language and arguments dominated in stakeholder statements during the first year of the mandate prior to the SRSR's presentation of his first report. While business persisted in referring to doctrinal international law on international obligations being state obligations, NGOs made connections between national and international law and different aspects of (national) law that protects individuals.

The SRSR's first ('interim') report was kept mainly in political and legal system language. It described how company actions had led to "increased demands for greater corporate responsibility and accountability". Making an economic system reference it built an argument that "good [human rights] practices" may be turned into a "competitive advantage" for companies (SRSR, 2006a). Although the SRSR approached his mandate from what he referred to as a non-doctrinal perspective, doctrinal arguments referring to classic international law were influential for the interim report. Stakeholders who mastered this international law doctrine were successful in influencing the direction which the SRSR set out for the future debate on human rights and business.

Legal doctrine continued to influence the SRSR's arguments, but as the mandate proceeded this entailed increased integration of newer international law doctrine, especially on the state duty to protect against business related human rights violations. The SRSR was increasingly exposed to human rights law experts who appear to have succeeded in explaining that international human rights law recognises that states have obligations to protect, and that these may translate into legal obligations for individuals – including companies – within a state's territory. When addressing companies, the SRSR emphasised the economic issues flowing from this, such as economic risks or losses related to legal liability and reputational damage. When addressing governments, the SRSR emphasised the implications of the state duty to protect in terms of regulating, adjudicating, as well as ensuring 'policy coherence', for example in Export Credit Agencies' funding of business activities in other states.

At a June 2006 at a meeting organised by the Fair Labor Association and the German Network of Business Ethics, the SRSR outlined some key points in his work towards the end of the mandate. Taking its point of departure in company practices and reasons for non-compliance, he combined economic and legal system observations to argue that more emphasis should be given to the part that governments play. He built an argument that human rights problems in the business sector are basically due to government failure to protect human rights (SRSR, 2006b). He met companies on their arguments on states not fulfilling their own obligations, but rather than release companies of human rights responsibilities he proceeded to build an argument during the mandate that companies much respect human rights through compliance with national law and internalising additional social expectations of respecting international human rights standards.

Introducing aspects on the ways in which governments and legislators may draw on the mechanisms of the economic system to induce socially responsible practices in companies, the SRSR opened a new track in his argumentative strategy (SRSR, 2006b). He combined economic and legal system language to build a recommendation for social responsibility as a requirement in government procurement policies. Attention paid to the economic system and its mechanisms as drivers for social responsibility and business self-regulation from the

public as well as the private perspective was to complement other parts of the SRSG's argumentative strategy as the mandate term proceeded.

The shift towards focusing on economic issues, and risks to companies, is apparent also in a speech delivered at a meeting in February 2007 in London. Expanding the line of argument from his previous stance of emphasising obligations for human rights as obligations for nation states, this speech noted that "[n]othing prevents states from imposing international responsibilities directly on companies" (SRSG, 2007a). By putting into such plain words the formal capacity of states to regulate companies' human rights responsibilities under international law the statement brought additional clout to other arguments presented by the SRSG to make clear that respecting human rights is significant to companies, including to preserve their freedom of enterprise with few transnational legal limitations. This speech added a new legal system informed argument the argument on liability risks. Alluding to the powers of states to regulate companies through international law, the speech also played on the incentives for companies to self-regulate rather than to be subjected to formal regulation. As noted, research suggests that companies sometimes prefer to self-regulate in order to pre-empt formal governmental regulation.

The SRSG noted that current international law practice and theory, however, did not "support the claim that companies have direct human rights obligations under international law" and that gaps remain in terms of governance and protection of victims. On that basis, he made a point that was to reappear in some of his later statements, referring to "the courts of public opinion" as complementary to courts of law (2007a). Alluding in this way to the power of media and the market system and its actors – consumers, investors and others – to hold companies to account in reputational and economic terms, the SRSG's speech connected economic and legal systems language to bring forth yet another argument on the significance that human rights observance may hold for companies based on economic system interests. The statement underscores that stakeholders hold companies economically to account for observance of international human rights law, although they are not formally bound by such standards.

The 2007 report (SRSG, 2007b) is a detailed presentation and discussion of a range of issues at the core of the international law relating to business responsibilities for human rights, ranging from the state duty to protect, to corporate responsibility and accountability for international crimes and other human rights violations under international law, to alternative or non-hard regulatory modalities, both in terms of soft law mechanisms and self-regulation. The report takes issue with arguments proposed by both sides of the previous 'doctrinal' debate. In addressing the state duty to protect and corporate responsibility in terms of an analysis of responsibility and accountability for international crimes, the report counters the continued relevance of both the business side's arguments on (sole) state obligations and the civil society side's arguments that dealing with the business and human rights problem can only be solved through the setting of global binding standards. The report presents an understanding of business and human rights that is based on the idea that states do have obligations relevant to business conduct, and that new standards are emerging which impact on legal and social expectations of companies. Establishing this created new common ground for both (or all) sides to consider also the benefits and weaknesses of intergovernmental soft law and of corporate self-regulation. Having established that both warrant merit but also suffer from weaknesses, the report moved on to its conclusion. Only here did the 2007 report revert to the sort of political and economic system language that was prevalent in the 2006 report, arguing implications of the legal findings as they would apply to the states and companies. This was underscored by connecting social expectations on corporate behaviour together with policies and practices that firms adopt voluntarily, and with normative guidance provided by international law on human rights and labour rights. The report suggests that all societal actors have an interest in recognising the connection between human rights and globalisation, and that the political and economic system both have an interest in sustainable globalisation without human rights violations.

During the final mandate year the SRSG tested some ideas and findings for the final report at meetings with stakeholders. The final report (SRSG, 2008a) introduces and elaborates the three-pillared *Protect, Respect and Remedy* framework. In highlighting the state duty to protect first of the three principles, the report adopts a classical international law view of states as duty bearers for international human rights. However, contrary to the arguments by business organisations and some governments opposed to institutionalisation of business responsibilities for human rights during the early part of the mandate and arguing against the UN Norms, the 2008 report adopts the theory of horizontal human rights obligations according to which it is the obligation of states to protect individuals and communities against human rights violations by (other) non-state actors. In addition, the report proposed that states encourage a corporate culture respectful of human rights by requiring sustainability reporting and other measures which support and strengthen market pressures on companies to respect human rights. Also relating to the interface between public and private action, it noted that Export Credit

Agencies represent not only commercial interests but also the broader public interest. They should “require clients to perform adequate due diligence on their potential human rights impacts” (2008, para. 40). Due diligence requirements could help indicate where state support should not proceed or where it should be discontinued, with obvious economic implications for firms.

The second pillar of the Framework, the corporate responsibility to respect human rights is defined essentially as avoiding the infringements of the rights of others and addressing adverse impacts that may occur. This entails acting with “due diligence”, i.e. having in place “a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it” (para. 25). The corporate responsibility to respect goes beyond complying with national laws. On this issue the SRSG report leaves the terrain of legal doctrine and established legal institutions, venturing into the field of “social expectations” and “courts of public opinion”. Striking this note, the report alludes to economic risk and reputation damage, thus once more striking an economic system cord in his argument addressing companies. Often, as in the area of business’ human rights obligations, social expectations are not in accordance with a conventional doctrinal approach, nor would the ‘judgments’ of the courts of public opinion on terms of consumer or investor decisions necessarily stand in a court of law. But both are facts of modern social and economic life, and both may be as important to a company if not more, in terms of economic consequences, as a fine issued by a court of law.

The third pillar, Access to remedy, is part of both the state duty to protect and the corporate responsibility to respect. Without adequate remedy, the duty to protect could be rendered weak or even meaningless. As part of the corporate responsibility to respect, private grievance mechanisms help identify, mitigate, and possibly resolve grievances before they escalate and greater harm is done. Thus, once more the SRSG addressed audiences in the particular system of their social sub-systems: he reminded governments that other efforts to ensure their duty to protect could be wasted unless they also provided for access to remedy. And he made it clear to companies that company based remedies may reduce economic risks, such as compensation claims, loss of production or customers, or reputational damage.

By a unanimous resolution the Human Rights Council (2008) “welcome[d]” the three-pillared framework. This development marked a significantly different reaction within the Human Rights Council than that which was given to UN Norms by the Commission of Human Rights in 2004. The Council’s decision marked the first time a UN human rights body with a political composition (as opposed to the expert composition of treaty bodies and the former Sub-Commission) agreed to the idea that businesses have human rights responsibilities and to a normative constructions of what those responsibilities entail.

Two main findings emerge from the above discourse analysis of the development of the UN Framework based on the usage of system-specific language: First, the SRSG’s arguments on economic system effects of business related human rights abuse seem to have caused business stakeholders to accept that they have human rights responsibilities. Second, when the SRSG’s approach shifted from political system language to more extensive usage of legal system language, it continuously explicated the economic impact, in particular economic risks that human rights abuse may cause to companies. Combined with other factors that are beyond the focus of this article, this led to broad support among business, civil society and governments for the UN Framework and, as a consequence, a normative foundation for further work to promote business responsibilities for human rights. Whereas the process related to the UN Norms led to a situation of status quo, the SRSG process delivered a soft institutionalisation of business responsibilities for human rights through the normative clarification and guidance on actions that the UN Framework provides. Through this, it also delivered a foundation for further work to develop detailed norms on business responsibilities for human rights, such as that which has already occurred with the 2011 UN Guiding Principles.

6. Conclusion

Through the application of discourse analysis this article has demonstrated how the development of the UN Framework proceeded to generate broad support from stakeholders and deliver a soft institutionalisation of business responsibilities for human rights. The consensus that emerged around the UN framework meant a clarification of the normative concept and therefore a fixation of the floating character of the previously disputed concept of business responsibilities for human rights.

The SRSG process represents an example of public-private regulation of a CSR topic under the auspices of the UN, an international organisation which typically regulates human rights through conventional international law. Working in practice as a reflexive law forum, the SRSG process succeeded in generating consensus on a topic whose predecessor, the draft UN Norms, faltered due to lack of support from business as well as some governments. The discourse analysis indicates that the outcome was due to the SRSG employing an

argumentative strategy, which created understanding and acceptance among business, civil society and (inter-)governmental organisations by appealing to system-specific interests of each of these and mitigating concerns of losing power that might have led some to prefer a different outcome (such as was the case with the 'draft Norms'). Combining language and arguments that bid into the particular power concerns of each of these types of stakeholders, the SRSR convinced business that their taking responsibility for human rights, with human rights normativity based on key UN human rights texts, was conducive to reducing economic risks flowing from business related human rights abuse. However, the SRSR process not only led to clarification of human rights responsibilities pertaining to firms. Addressing governments in terms of public policy objectives and states' legal obligations, the SRSR reminded governments of their duty to protect, that flows from their international human rights obligations. Thus, the constructed understanding did not only impact on demands on business, but also on governments.

The discourse analysis does not give the full picture, including the effect of actively engaging business in the process or general developments since earlier UN efforts to formulate social responsibilities for firms that have taken place in society's expectations of business and the private acceptance of such expectations. Yet the application of discourse analysis based on a combination of textual reading and underlying power interests suggests that the argumentative strategy deployed by the SRSR, appealing to specific interests of particular stakeholders in language close to their system-specific code, was effective in catering consensus on a highly disputed issue. This holds important lessons for future regulation of global sustainability concerns that due to both political opposition and international law constraints on international legal personality are not easily regulated by conventional international law.

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