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The Guiding Principles for Business and Human Rights: Labor Violations and Shared Responsibility

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Abstract

The "Protect, Respect, and Remedy" Framework and the Guiding Principles on Business and Human Rights drafted by John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights, places responsibility on multinational corporations to respect human rights in conducting their relationships with business partners. The article explicates and criticizes the normative conception of responsibility underpinning Ruggie's approach. It does so by juxtaposing Ruggie's approach with an alternative normative conception of shared responsibility toward workers' rights, according to which responsibility to prevent and remedy labor rights violations should be shared by all participants in the global chains of production. The shared responsibility approach offers a set of five principles for allocating responsibility among the different participants, whereas Ruggie takes into consideration only two of these principles. Thus, we argue that the moral responsibility of business proposed by the Framework and Guiding Principles is too narrow and does not allow for a substantive protection of labor rights in global supply chains. The Framework and the Guiding Principles should be revised to place stringent responsibilities on multinational corporations. Such revisions are not only morally justified but could also be feasible, as demonstrated by recent developments, such as the creation of the Accord on Fire and Building Safety in Bangladesh and the Alliance for Bangladesh Worker Safety, as well as the demands raised by Ecuador and South Africa in the 26th session of the UN Human Rights Council.

I. Introduction

In 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights (hereinafter, the "GPs"), drafted by John Ruggie, who served since

2005 as the Special Representative of the UN Secretary-General for Business and Human Rights (hereafter, the "SRSG").¹ In the five years since its adoption, the GPs, which are voluntary principles, have been widely endorsed by major business associations, by individual firms, and by some civic organizations. In addition, certain international, regional, and national standard-setting bodies have adopted the SRSG's normative conception, including the OECD, which incorporated it into its influential Guidelines for Multinational Principles.

The GPs elaborated the previously endorsed "Protect, Respect, and Remedy" Framework published in 2008 (hereafter, the "UN Framework"),² which was founded on three central tenets: First, the state bears a duty to *protect* human rights within its territory by ensuring that no state organ or any other actor within its territory violates human rights. Second, multinational enterprises (MNEs) bear the responsibility to *respect* human rights in conducting their business and relationships with business partners. The appropriate response of an MNE to the risk of contributing to a human rights abuse through its supply chain is to initiate a due diligence process to identify any actual and potential adverse impacts on human rights within the supply chain and then prevent or mitigate any such impacts. Third, the *remedy* principle, which applied

¹ Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Doc A/HRC/17/31, 2011. (Hereafter, Ruggie, *Guiding Principles*, 2011). The Guiding Principles and the Framework are at the center of our analysis. However, we refer also to other writings of the Special Representative of the Secretary General, Prof. John Ruggie, and his interpretations, as he is the initiator, the main author, and the strongest advocate of these documents. Although his interpretations of the Guiding Principles and Framework are not legally binding they carry significant weight. Our analysis also takes into account the reports of the "Working Groups on the issue of human rights and transnational corporations and other business enterprises" which was established by the UN Human Rights Council in order to "promote the effective and comprehensive dissemination and implementation" of the Guiding Principles. See: <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>

² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: a Framework for Business and Human Rights*. U.N. Doc A/HRC/8/57, 7 April 2008.

to both states and business, is intended to ensure that victims of business-related human rights abuses have access to a remedy.³

This article focuses on the second pillar of the UN Framework; namely, the corporate responsibility to respect human rights. More particularly, we discuss the responsibility toward labor rights of workers in global chains of production. Violations of labor rights account for approximately 45% of all corporate human rights violations.⁴ Indirect labor rights violations—i.e., violations by actors to which a company is closely connected—constitute about 41% of the overall cases of human rights violations, with most occurring in developing countries.

Scholars and labor activists are increasingly recognizing that the emerging transnational nature of global production chains has created a need for a new conception of shared responsibility for the protection of workers' labor rights. The growing literature dealing with this issue singles out various public and private actors who could be held responsible, including local and foreign governments, international organizations, private corporations, the workers themselves, consumers, and even fashion designers.⁵ Indeed, the SRSG has also acknowledged that governments and MNEs should share responsibility for protecting human rights within chains of production. However, the SRSG assigned these two different types of actors two different types of responsibility: whereas governments bear a duty to protect rights, MNEs are merely expected to respect them.

³ Ruggie, *Guiding Principles*, 2011, p. 6.

⁴ These figures are based on the empirical data underscoring SRGS's framework as to the range and nature of alleged corporate human rights violations or abuse, see, John Ruggie, *JUST BUSINESS*, W. W. Norton (2013), (hereafter, *Just Business*), p. 20-23.

⁵ For recent examples: Anner, M., J. Bair, and J. Blasi, "Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks." 35 *COMPARATIVE LABOR LAW AND POLICY JOURNAL* 1, 6 (2013). Kevin Kolben, "Transnational Labor Regulation and the Limits of Governance." 12 *THEORETICAL INQUIRIES IN LAW* 403 (2011); Richard Locke, *THE PROMISE AND LIMITS OF PRIVATE POWER*. (Cambridge University Press, 2013); Christian Barry & Kate Macdonald, "How should We Conceive of Individual Consumer Responsibility to Address Labour Injustices?" In Yossi Dahan, Hanna Lerner & Faina Milman-Sivan (eds.), *GLOBAL JUSTICE AND INTERNATIONAL LABOUR RIGHTS* (Cambridge University Press, 2016).

But what does “responsibility to respect” mean in the context of labor rights? Moreover, is such a conception of responsibility sufficient to prevent and remedy the unjust working conditions currently prevailing in global supply chains? The main goal of this article is to tackle these questions by exposing and assessing the normative foundations that underscore the SRSG's conception of responsibility as reflected in both the UN Framework and the GPs, as well as in other publications that John Ruggie authored while serving as UN Special Representative for Business and Human Rights.

In explicating the SRSG's conception of responsibility and criticizing it from a normative perspective, the article refrains from drawing on the legal debate on *liability*. While recently the question of workers' rights protections within MNEs had been discussed generally within the framework of legal liability and tort law,⁶ the present article takes a different approach. It focuses on the issue of *responsibility* - a key normative concept in the private regulation of business, as expressed in the vast literature on Corporate Social Responsibility.

⁶ One of the main justifications in recent years for placing legal liability on MNEs for violations of workers' rights that take place in their supply chains has relied on tort law principles. Thus, for example, Brishen Rogers has argued that MNEs have a duty of reasonable care to the violations of workers' rights even in the absence of employment relationships. Third parties are legally liable when primary wrongdoers are insolvent or where the party enjoins the power to deter or prevent foreseeable and preventable violations among its suppliers, at low cost through monitoring and contractual incentives. Rogers argues third party liability will be cost effective when the party can detect and/or deter wrongdoings cheaper than outside enforces. Such an approach is justified not only by a deterrence rationale but also by fairness considerations. Rogers exemplifies his approach by referring to the "hot goods" provision of The American Fair Labor Standards Act. The Act determines that goods produced in violation of FLSA's minimum wage, overtime and child labor provisions are considered “hot goods” because they are tainted by the labor violations and pollute the channels of interstate commerce. Under that provision companies should not sell goods that were manufactured in violation of the Act, even if they played no role in the design or production of those goods. See, Brishen Rogers, "Towards Third-Party Liability for Wage Theft," 31 BERKELEY J. EMPL. & LAB. L. 1 (2010).

Guy Davidov also turns to tort law principles to address the problem of indirect employment, including within global supply chains. He presents several possible principles of allocating responsibilities in order to hold MNEs legally liable for violations or workers' rights not employed directly by the core company. These principles include causation (similar to the contribution principle), prevention and loss spreading, benefit, representation and citizenship/community (equal to the connectedness principle). Applying these principles of responsibility allocation, he identifies certain cases in which an MNEs could be held liable for violations of workers' rights employed by supplies in its chain of production. See, Guy Davidov, "Indirect Employment: Should Lead Companies Be Liable?" 37 Comparative Labor Law & Policy Journal 5 (2015). For a detailed analysis of what she terms "sweatshop liability" in the American legal system see, also, Debra Cohen Maryanov, "Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chains" 14 Lewis & Clark Law Review 397 (2010).

As we further elaborate below, this article rests on the assumption that a comprehensive explication and justification of the moral obligations (i.e., responsibility) of business towards workers comprises a necessary pre-condition for producing private regulation of global business that effectively protects workers rights.⁷ Our analysis leads us to conclude that the moral responsibility of business towards labor rights underpinning the GPs is too narrow and does not allow for a substantive protection of labor rights in global supply chains. More specifically, we argue that the SRSG's conception of responsibility rests on two central principles. First, responsibility should be allocated in accordance with the particular actor's level of direct contribution to the violation of rights in question. Second, MNEs should bear responsibility to respect human rights, given their relationship with entities that directly violate those rights. This conception of responsibility, the argument goes, is too narrow—most notably in its failure to take into account certain factors that are crucial for determining the content and scope of corporate responsibility regarding labor rights. Instead, we herein propose a broader conception of responsibility that incorporates three considerations that either do not play a central role in the SRSG's conception or were rejected by it: (1) the degree of benefit each participant derives from the global production chain; (2) the level of control over workers' conditions throughout the chain of production; and (3) the participants' capacity to prevent and remedy occurrences of labor rights violations. Adding these three factors to the two considerations recognized by the SRSG would better align the determination of MNEs' responsibility for workers' rights with current economic conditions of global production. More importantly, such expansion would also provide substantive justification for assigning greater responsibility to MNEs for labor rights and thereby ensure better protection of those rights.

⁷ See below, Part II, text next to fn 30-31.

The practical implications of this analysis are clear: the Framework and Guiding Principles should be revised to place stringent responsibilities on MNEs. Moreover, our analysis provides justifications for transporting parts of the currently voluntary principles of the GPs into binding laws. While in the concluding section of the article we mention recent developments that support these practical implications, the particulars of the legal doctrines that should be employed in order to translate them into action fall beyond the scope of this article.⁸

The article is structured as follows. Part II below presents a brief overview of the SRSG's approach and some of the criticism that has been voiced against it by scholars and human rights organizations. Part III introduces the conception of shared responsibility that underpins our analysis of the SRSG's approach, which includes a proposed set of five principles for responsibility allocation among public and private actors who participate in the social practice of transnational production. Part IV elaborates on the conception of responsibility that underlies the GPs, which incorporates only two of the five crucial principles suggested herein (we term these the 'connectedness principle' and the 'contribution principle'). This Part also discusses the shortcomings of the SRSG's conception of responsibility deriving from its atomistic understanding of production chains. Part V concludes by arguing that the expansion of MNEs' responsibility towards labor rights is not only morally justifiable, but also practically viable, given recent developments in the field.

⁸ In other works we have engaged more closely with the particulars of the legal implications of our normative conceptions of shared responsibilities in the realm of labor. See, for example, Yossi Dahan, Hanna Lerner, and Faina Milman-Sivan "Shared Responsibility and the International Labor Organization." 34 *Michigan Journal of International Law* 675 (2013). Others have suggested intriguing ways to move forward, including supplementing the GPs with a treaty framework, see, for example: Larry Cata Backer, "Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All," *FORDHAM INTERNATIONAL LAW JOURNAL* 457 (2015).

II. The Guiding Principles for Business and Human Rights: An Overview and Existing Criticism

The GPs are a product of a clear, accessible, and multi-sectoral endeavor to outline what is expected of business in terms of advancing human rights. The SRSG's approach towards business responsibility, which underpinned the GPs, was formulated in an innovative process that drew on an unprecedented mass of data, including web-based surveys of firms' policies. The process was, moreover, a highly participatory one that included outreach to a wide range of experts and civil rights groups, as well as to the business community.

The GPs are generally perceived as representing significant progress in global governance due to their explicit recognition of the weightier—albeit voluntary—duties borne by both states and corporations to promote human rights, both at home and abroad.⁹ They were meant to address directly the problem of a 'governance gap' in the global economy; namely, the declining ability of national governments to oversee, regulate, and constrain the activities of corporate actors that have the ability to move across jurisdictions. According to the SRSG, MNEs have become central in human rights violations because "their scope and power expanded beyond the reach of effective public governance systems, thereby creating permissive environments for wrongful acts by companies without adequate sanctions and or reparations."¹⁰

The process of economic globalization in the last three decades, which intensified the liberalization of trade, domestic deregulation, and privatization, resulted in "the widening gaps

⁹ SRSG, Commentary on Principle 2. See also, Susan Ariel Aaronson and Ian Higham. "'Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms," 35 HUMAN RIGHTS QUARTERLY, 264 (2013). For the assertion that the responsibility of "home states" is unsatisfactory, see, Daniel Augenstein and David Kinley, "When human rights "responsibilities" become "duties": the extra-territorial obligations of states that bind corporations, chapter 11 in Surya Deva and David Bilchitz, HUMAN RIGHTS OBLIGATION OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? (Cambridge, 2013).

¹⁰ Just Business, p xxiii.

between the scope and impact of economic forces and actors and capacity of societies to manage their adverse consequences."¹¹ In recognizing on one hand, the expanding power of multinational corporations, and on the other hand, the weakening capabilities of the nation-state in a globalized world, the GPs have raised high expectation for enabling greater protection of human rights by business.

During the five years since their endorsement by the UN, the GPs have received significant support from national and international institutions and were widely endorsed by the business community. Thus, for example, the International Organization of Employers, the largest network of the private sector, has released a guide for implementing the GPs.¹² In addition, international and national standard-setting bodies have adopted the GPs. The EU, for example, is working to adapt the GPs to certain sectors, while individual member-states have initiated national plans to incorporate the GPs into their domestic regulation. Similarly, the OECD Guidelines for Multinational Enterprises have been adapted to align with the GPs. Already in 2011, the UN Human Rights Council established a multi-shareholders Working Group on the issue of business and human rights, which is intended to ensure an effective implementation of the GPs.¹³ Recent reports published by the Working Groups suggest that indeed, significant progress is being made regarding the dissemination and implementation of the GPs.¹⁴

¹¹ *Ibid.*

¹² IOE, *Guiding Principles on Business and Human Rights, Employers' Guide* (2012) http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2012-02__UN_Guiding_Principles_on_Business_and_Human_Rights_-_Employers__Guide.pdf.

¹³ 6 July 2011, A/HRC/RES/17/4. The WG, a group of five experts, has been very active in the years since its establishment. It initiated regional forums, held several sessions and embarked in various countries visits to assess the progress in individual countries and help disseminate best practices. It also submits reports to the Human Rights Council and to the General Assembly. For an overview of the progress of the WG, see, for example, MACIEJ ZENKIEWICZ, *Human Rights Violations By Multinational Corporations And Un Initiatives*, 12 *REVIEW OF INTERNATIONAL LAW & POLITICS* 121 (2016); Addo, Michael K., "The Reality of the United Nations Guiding Principles on Business and Human Rights", 14 *HUMAN RIGHTS LAW REVIEW*, 133 (2014).

¹⁴ A recent report of the Working Group to the UN General Assembly suggests clear evidence to that effect. It states that: "Over two dozen States have adopted or are in the process of developing National Action Plans on Business and Human Rights. A growing number of National Human Rights Institutions are taking up private-sector impacts as a priority. Global standards, including the International Finance Corporation Sustainability Framework for its

At the same time, however, criticism of the SRSG's approach has been growing. From the very outset, certain non-governmental organizations contended that "the Guiding Principles take a more regressive approach towards human rights obligations of States and responsibilities of non-state actors than authoritative interpretations of international human rights law and current practices."¹⁵ Some, moreover, criticized the moral distinction between the first and second tenets of the GPs, under which whereas the state is assigned a positive duty to protect human rights, corporations are called upon only to respect human rights, which essentially amounts to a negative duty not to infringe them.¹⁶ These critics assert that such a distinction between states and powerful multinational corporations is unjustified, since MNEs often function like quasi-governmental entities, increasingly taking on political roles and emerging as active political actors. As such, the argument goes, MNEs should bear direct moral duties with regard

lending operations, the OECD Guidelines for Multinational Enterprises, the ISO standard 26000, and the Global Reporting Initiative's Sustainability Reporting Guidelines have converged around the Guiding Principles, with regional organizations following suit. An increasing number of companies have adopted policies and due diligence processes in line with the Guiding Principles, and many business organizations have issued guidance to their members in this regard." Summary of the Report of the UN Working Group on Business and Human Rights to the UN General Assembly (A/70/216) - available at: <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (last entered on August 18, 2016).

¹⁵ See A Joint Civil Society Statement On The Draft Guiding Principles On Business And Human Rights, By: Amnesty International, Human Rights Watch and the International Commission of Jurists (2011) https://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf (last visited: 07/06/15). See also Gabriella Wass and Anna Bulzomi, *The 2nd Annual United Nations Forum On Business And Human Rights, Geneva 2013*, IPIS Insights (14.1.2014) http://ipisresearch.be/wp-content/uploads/2014/01/20140114_UNForumGeneva.pdf (last visited: 07/06/15). David Bilchitz argues that whilst the international human rights instruments generally bind states, we can infer from such state's duties binding obligations to protect human rights upon non-state actors. "If states are required by international law to ensure third parties (including corporations) comply with binding human rights requirements, then this entails that the parties are themselves obligated to comply with such requirements." David Bilchitz, "A Chasm between "is" and "ought"? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles", in S. Deva, D. Bilchitz, (eds.) *Human Rights Obligations of Business*", p. 111. (Cambridge University Press, 2013).

¹⁶ See Robert C. Blitt, "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance," 48 *TEXAS INTERNATIONAL LAW REVIEW JOURNAL* 33, 52-26 (2013). See also, UN Human Rights Council: Weak Stance on Business Standards, Human Rights Watch (2011) <http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> (last visited: 07/06/2015).

to human rights, which, under certain circumstances, should give rise to positive duties towards victims of human rights abuses.¹⁷

Why should MNEs have a responsibility to respect human rights? The SRSG's answer is that this duty is already a well-established social norm.¹⁸ In Ruggie's words, "social norms exist over and above compliance with laws and regulation... . Social norms exist independently of states' abilities to fulfill their own duties."¹⁹ According to Ruggie, such social norms comprise part of what is sometimes called a company's social license to operate.²⁰ The SRSG claims that noncompliance with social norms can lead to public criticism of a company's social and political legitimacy to do business and even sanctions. In every society, Ruggie asserts, social norms and expectations of MNEs vis-à-vis human rights can be identified. The fact that social norms imposing corporate responsibility to respect human rights has gained "near universal recognition."²¹ He argues that the business community has expressed this recognition in its CSR codes and that social sanctions imposed on MNEs that fail to uphold this responsibility manifest this common understanding.

Yet relying on the business community as the source of social norms, particularly in relation to human rights, is problematic.²² Corporations can be reasonably assumed to prefer self-restrictions that are not overly demanding of them and to refrain from imposing on themselves

¹⁷ For this point see Michael. S. Santoro. "Post-Westphalia and Its Discontent: Business, Globalization, and Human Rights in Political and Moral Perspective", 20 BUSINESS ETHICS QUARTERLY, 285 (2010)

¹⁸ Ruggie explains: "a social norm expresses a collective sense of "oughtness" with regard to the expected conducts of social actors, distinguishing between permissible and impermissible acts in given circumstances." Just Business, p. 91.

¹⁹ Just Business, p. 91.

²⁰ See Framework. Paragraph 54.

²¹ Just Business, p. 92.

²² Some authors argue that the "Social Expectations argument" for the corporation responsibility to respect human rights is instrumental and not moral, namely it is designed to avoid bad publicity that could hurt business and not on moral grounds. See D. Arnold, "Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20 BUSINESS ETHICS QUARTERLY 371-99, See also F. Wettstein "Making noise about silent complicity: the moral inconsistency of the 'Protect, Respect and Remedy' Framework, in Deva and Bilchitz pp. *ibid*, 243-67. And W. Cragg, "Ethics, Enlightened Self-Interest and the Corporate Responsibility to Respect Human Rights" 22 BUSINESS ETHICS QUARTERLY, 9 (2012). see also Bilchitz, *supra*, note 9.

norms that excessively hinder the conduct of their business and maximization of their profits.²³ Moreover, in determining which social norm should govern MNEs on human rights protection, we should consider the views of the groups whom the norm aims to protect—which, in this context, are workers, unions and any group whose rights are at risk of being violated by MNEs. In addition, legal and moral reasons exist to augment the social sanctions imposed on a corporation that fails to respect human rights with binding legal norms that reflect more stringent social expectations. This need for further augmentation is particularly consequential in the labor rights context, where holding MNEs responsible towards workers is a matter of justice.²⁴

Protecting *labor* rights raises a variety of particular concerns. Scholars of international labor law have questioned the usefulness of the human rights framework and language to address labor issues, pointing, in particular, to the gap between the inherently individualistic and universal framework of human rights on the one hand and the more collective, and traditionally locally-based aspects of labor regulation, on the other hand.²⁵ Would the shift to a human rights framework and strategies lead to an undesirable redefinition of the underlying content of labor rights and standards?²⁶ Specifically, scholars have doubted the usefulness of various aspects of the GP and Framework to provide adequate labor rights protection in global supply chains.²⁷

²³ W. Cragg, for example, claims that the basis of Ruggie's justification of his Framework, namely the enlightened self interests of corporations', is not capable of sustaining the human rights agenda against competing business interests. *Ibid.*

²⁴ For an argument that ameliorating workers' rights in supply chains is a matter of justice see: Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, "Global Labour Rights as Duties of Justice" in: Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, *Global Justice and International Labour Rights* (Cambridge University Press, 2016).

²⁵ See, for example, Virginia A. Leary, "The Paradox of Workers' Rights as Human Rights," in Lance Compa and Stephen Diamond (eds.), *HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE*, (University of Pennsylvania Press, 1996); Kevin Kolben, "Labor Rights as Human Rights?" 50 *VIRGINIA JOURNAL OF INTERNATIONAL LABOR LAW* 449 (2010); Guy Mundlak, "Human Rights and Labor Rights: Why Don't the Two Tracks Meet?" 34 *Comparative Labour Law & Policy Journal* 217 (2012). Labor rights are an integral part of human rights and a prime example of collective human rights. However, traditionally, labor rights activists have rarely invoked human rights strategies, while human rights movements have rarely similarly mostly ignored labor rights.

²⁶ Gay W. Seidman, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS AND TRANSNATIONAL ACTIVISM* 15-47 (2007).

²⁷ Kate Macdonald, "Re-Thinking "spheres of Responsibility": Business Human Rights and Institutional Actions," 99 *J. BUS. ETHICS* 549 (2011).

Anne Treilcock, for example, recently questioned whether realistically, firms can be expected to devote the requisite resources to conduct serious due diligence on labor issues, given the rather comprehensive scope of the substantive international obligations regarding labor standards.²⁸ In addition, given the corporation's primary goal of profit maximization, expecting firms to broaden the scope of their due diligence seems improbable. Particularly, it is questionable whether the rights of trade unions would be respected, "in part, because exercise of these rights potentially weakens corporate control over supply chains."²⁹

In this article, we seek to contribute to this critical discussion by taking a unique perspective, combining a focus on the particular question of labor rights protection with a normative analysis of the GP's underlying presumptions concerning the notion of business responsibility.

In one of his early reports as the SRSG, John Ruggie refused to ground his approach in any particular normative commitment beyond the vague notion of human rights protection. He termed his own approach a "principled form of pragmatism," defined as "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people." In other words, he suggested a pragmatic approach that is not grounded on any underlying normative conception.³⁰ Indeed, one of the SRSG's chief aims has been to gain approval for the GPs, particularly from the business community.

²⁸ Anne Treilcock, *Due Diligence on Labour Issues – Opportunities and Limits of the UN General Principles on Business and Human Rights*, in *RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW* (Adelle Blacket and Ann Trebilcock, eds.) (2015) pp. 93-110, pp.100-101.

²⁹ *Id.* p. 102-103.

³⁰ See "Just Business" pp. xlii-xlvi.

As various critics have noted, the SRSG's professed approach to moral justifications is problematic on a number of counts. To begin with, it disregards the necessarily close interaction between the normative discourse and the world of practice in the human rights sphere.³¹ This approach also fails to take into account the crucial role moral rationales play in legitimizing rules and norms of conduct and the importance of the moral discourse for nongovernmental organizations that promote human rights.

Indeed, although it asserts an absence of moral justification, the SRSG's conception of responsibility does rely on certain moral presuppositions that should be explicated. Thus, our main task in this article is to explicate the normative presuppositions that underlie the SRSG's conception of business responsibility toward labor rights. By devoting particular attention to the problem of labor rights protection in transnational corporations, we examine whether the SRSG's conception of "responsibility to respect" is sufficient to help prevent and remedy the unjust working conditions currently prevailing in global supply chains. The discussion below analyses the SRSG's conception of corporations' responsibility to respect human rights, as it is explicitly stated and implicitly implied in his various documents and writings. We demonstrate that from the labor rights protection perspective, the SRSG's conception of responsibility to respect is lacking.

Before proceeding to the analysis of the SRSG's conception of corporate responsibility, Part III presents a theoretical framework for responsibility; namely, the general recognition that responsibility for protecting labor rights should be shared by private and public actors that participate in the social practice of transnational production. Part III also offers a proposed method for allocating the shared responsibility between the various implicated actors.

³¹ See, Kevin T. Jackson, "The Normative Logic of Global Economic Governance: In Pursuit of Non-Instrumental Justification for the Rule of Law and Human Rights," 22 *Minn. J. Int'l L.* 71 (2013).

III. Shared Responsibility and the Principles of its Allocation

The idea of shared responsibility has been steadily gaining prominence in the global justice philosophical literature.³² Simultaneously, a similar notion has been emerging in areas of the law such as torts,³³ international environmental law,³⁴ international law,³⁵ and development rights.³⁶ Increasingly, international labor scholars and activists are insisting that responsibility for workers' rights be shared by participants in global production chains.³⁷ With the expansion of these production chains beyond state borders, clearly a need has emerged for a revised conception of responsibility for labor rights to contend with the new global economic conditions.³⁸

Labor rights violations and substandard working conditions are arising with growing abundance in the more flexible and less hierarchical modes of transnational production that characterize the global economy; hence, millions of workers worldwide suffer from "structural

³² Marion, Young Iris. 2006. "Responsibility and Global Justice: A Social Connection Model." *SOC. PHIL. & POL'Y* 23: 102-130. Miller, David. 2008. "National Responsibility and Global Justice." *CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY* 11(4): 383-399. Miller, Richard. 2010. *GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER*. Oxford: Oxford University Press. Barry & Macdonald 2016.

³³ Porat, Ariel. 2004. "Collective Responsibility in Tort Law." *MISHPATIM [LAWS]* 23: 322-325.

³⁴ Perez, Oren. 2004. *ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM*. Oxford and Portland, Oregon: Hart Publishing. Gunther Teubner, "The Invisible Cupola: From Causal To Collective Attribution in Ecological Liability," In Gunther Teubner, Lindsay Farmer and Declan Murphy (eds.), *ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY: THE CONCEPT AND PRACTICE OF ECOLOGICAL SELFORGANIZATION*, (Wiley, Chichester) 17 (1994). Taubner's analysis refers not only to the field of environment but generally to responsibility among various participants in various networks in different fields.

³⁵ André Nollkaemper and Dov Jacobs "Shared Responsibility in International Law: A Conceptual Framework," 34 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 359 (2013).

³⁶ Margot Salomon, *GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW* (Oxford: Oxford University Press, 2007).

³⁷ Alan Hyde, "Legal Responsibility for Labour Conditions Down the Production Chain." In *REGULATING WORK: CHALLENGING LEGAL BOUNDARIES*, edited by J. Fudge, S. McCrystal, and K. Sankaran (Oxford: Hart Publishing, Young, 2012).

³⁸ Yossi Dahan, Hanna Lerner, & Faina Milman-Sivan, "Global Justice, Labor Standards, and Responsibility," 12 *THEORETICAL INQUIRIES IN LAW*. 117 (2011).

disempowerment.”³⁹ In labor-intensive industries, such as the apparel, toys, and electronics sectors, global buyers—namely, brand companies and retailers—often dominate the supply chains. Moreover, states and local municipalities also play a central role in coordinating the complex activities involved in producing and selling a product, from the conception stage (formulation and design) to the product’s distribution to consumers. While most global buyers do not own the factories that are directly engaged in production and distribution, they typically do wield significant control over the design specification of products and dictate the distribution of profits within the chains of production.⁴⁰ Under such conditions, production workers often have no control over opportunities and resources and cannot compel external decision-makers to share in the responsibility for their well-being.⁴¹

We assert that all participants in what we termed the ‘labor connection’ of global chains of production bear special responsibility for helping to prevent and remedy the unjust conditions of labor by reforming the processes and institutions that produce the existing structural injustice.⁴²

³⁹ Iris Young, *RESPONSIBILITY FOR JUSTICE*, (Oxford, 2011). A recent detailed report of the ILO describes a dramatic increase in global supply chains related jobs. The report summarizes studies that document violations of labor standards especially in the lower tiers and outsourced firms involving workers hired via labor contracts. Low prices paid to suppliers create pressure down the supply chain to reduce costs, which may lead to downward pressure on wages which contributes to excessive overtime work, occupational safety and health problems and work–life balance. The report also indicates that supply chains practices such as shorter lead times owing to the use of just-in-time or lean production systems, seasonal demand and volatile sourcing contracts also create infringe on workers' basic right to organize and to bargain collectively. International Labour Conference, 105th Session, Report IV, "Decent Work in Global Supply Chains", 2016, pp. 17-27.

⁴⁰ For a discussion of the distinction between direct ownership of factories and production through supply chains and the relations between these modes of production and labor rights violations see Layna, Mosley, *LABOR RIGHTS AND MULTINATIONAL PRODUCTION* (Cambridge University Press, 2011). In this article we will address the more challenging case of production via global supply chain with no direct ownership of the factory by the global buyer.

⁴¹ Kate McDonald, "Globalizing Justice Within Coffee Supply Chains? Fair Trade, Starbucks and the Transformation of Supply Chain Governance," 28 *THIRD WORLD Q.* 793 (2007). Workers who are employed directly by MNEs fair better than workers who work within global supply chains, see, generally, Mosley, *LABOR RIGHTS AND MULTINATIONAL PRODUCTION*. See also, Frederick Mayer, John Pickles, *Re-embedding Governance: Global Apparel Value Chains and Decent Work*. in Rossi, Luinstra, Pickles., eds., *TOWARDS BETTER WORK: UNDERSTANDING LABOUR IN APPAREL GLOBAL VALUE CHAINS* 17 (2014).

⁴² Dahan, Lerner & Milman-Sivan, F. *Global Justice, Labor Standards, and Responsibility. Theoretical Inquiries in Law*. Vol. 12(2), pp. 117-142.

How should the responsibility for labor rights be allocated amongst corporations and other actors engaged in transnational production?⁴³ We propose a set of five principles as a general guide for allocating responsibility in the context of global chains of production:⁴⁴ (1) *The principle of connectedness*: this principle is grounded on the special relationship, or connectedness, that exists amongst certain people, be it based on shared identity (such as membership in a community, nation, or tribe) or on participation in a joint activity (such as the production and supply of a given product). In the labor context, the latter sense of connectedness—i.e., of engaging in a joint activity—should be key in determining the distribution of responsibility for workers’ rights. By ‘joint activity,’ we mean the participation in a certain chain of production, be it transnational or domestic. Underlying this principle of connectedness is the premise that participating in a joint activity gives rise to special moral duties for the participants. In contrast to duties towards anonymous others, those that derive from connectedness, also termed ‘associative duties,’ carry particular moral weight.⁴⁵ (2) *The capacity principle*: this principle relates to the capacity of individuals or institutions to prevent and remedy unjust working conditions. It can be measured using various parameters, including the number of workers whose labor conditions could be improved by the actions of the agent or institution in question and the extent of political and economic power the actor wields on both

⁴³ These principles should be considered as moral reasons for allocating responsibility, and they can be used as a basis for the further development legal doctrines relating to the responsibilities of different actors in the practice of global chains of production.

⁴⁴ In a previous work we have adopted and implemented Christian Barry's general framework for principles of responsibility. Christian Barry, "Global Justice: Aims, Arrangements, and Responsibilities." In *CAN INSTITUTIONS HAVE RESPONSIBILITIES*, (Toni Erskine, Ed., Palgrave) 218-238 (2003).

Since then we realized that a crucial principle of responsibility is missing, namely the control principle. Note that the control principle formulated in this paper is different from the control principle referred to in the discussion concerning the moral responsibility of individuals, for example, discussions of moral luck, where the principle of control claims that we are morally assessable only to the extent that what we are assessed against depends on factors under our control. See, e.g. J.M. Fischer and M. Ravizza, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* (Cambridge; Cambridge University Press, 1998). The meaning of the control principle suggested here is a principle that allocates responsibility among different agents and institutions that share responsibility for an unjust situation.

⁴⁵ Samuel Scheffler, *BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* 48-65 (2001).

the institutional and interactional levels. (3) *The beneficiary principle*: in the context of global labor, this refers primarily to the economic gain actors derive from the labor connection. For example, in an international chain of production, MNEs benefit more than subcontractors or managers of local factories in developing states from production carried out under unjust conditions. (4) *The contribution principle*: this principle factors in conduct by individuals or institutions that is causally related to the unjust working conditions in question. Determining actual contribution to the violation of labor rights requires a detailed empirical investigation regarding the actor's part in creating the unjust labor conditions, directly or indirectly, by actual actions or omissions. (5) *The control principle*: this final principle takes into account the extent of control an individual or institutional actor maintains over the conditions of an unjust situation and the conduct of the participants in creating this situation. In the context of a global chain of production, this principle can apply, for example, to the extent to which an MNE's actions and policies are determinative of unjust conditions in the factories and the conduct of participants, such as subcontractors, that results in workers' rights abuses.

While the SRSG has acknowledged that private corporations should bear responsibility for upholding labor rights, his conception of “responsibility to respect” neglects—unjustifiably, in our view—three of the five principles of responsibility allocation. By disregarding some of the considerations underlying these principles, the SRSG undervalues the responsibility that MNEs should bear for the labor rights of workers in their supply and production chains.

IV. The SRSG's Conception of Responsibility

According to the SRSG, the scope of MNEs' responsibility for labor rights is set by two principles, as follows: “[T]he Framework defines scope in terms of actual and potential adverse

human rights impacts arising from a business enterprise's own activities and from the relationships with third parties associated with those activities."⁴⁶ Thus, of the five principles of responsibility allocation outlined above, in fact the SRSG only seems to apply two to justify attributing corporations with responsibility for human rights. The first is the principle of contribution; namely, a corporation is held responsible for a human rights violation whenever it has a causal connection to the occurrence of that violation. The second principle is that relating to an MNE's business ties, namely its connectedness or association with other business entities: for example, under applicable circumstances, an MNE's business dealings with its suppliers imposes, per se, a certain responsibility on the corporation for the suppliers' conduct in respect to human rights.

Accordingly, the SRSG's conception directs MNEs to engage in a due diligence process, as mandated by these principles of contribution and connectedness. In fulfilling their due diligence requirement, MNEs should take into account not only the specific national context in which they operate but also the "human rights impacts their own activities may have within that context ... [and] whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, state agencies, and other non-state actors."⁴⁷ That is to say, a corporation should examine first, whether through its business activities it contributed directly to human rights violations; and second, whether it is implicated in the rights violations of its business partners and other actors associates.

MNEs' responsibility to prevent rights infringements and address any adverse impacts that may arise from their activities is fundamental and uncontested, comprising a manifestation

⁴⁶ Just Business, p.97, Framework, paragraph 57.

⁴⁷ Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development Clarifying the Concepts of "Sphere of influence" and "Complicity" Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, A/HRC/8/16, page 7 (Hereafter, Ruggie, Clarifying the Concepts of "Sphere of Influence" and "Complicity," 2008).

of the contribution principle. What is more intriguing in the SRSG's conception is the incorporation of what we term the connectedness principle, namely, an MNE's responsibility for any adverse impact on human rights caused by actors with which it maintains a business relationship. This extension of corporate responsibility for violations of business partners without a clear normative foundation raised concerns among scholars. Radu Mares poignantly asked: "On what conceptual foundation would a core company's responsibility to act be based?.... Why does a core company have to act where it apparently did not contribute to its affiliates' harmful impacts? Why would an omission to act be blameworthy?"⁴⁸ The connectedness principle provides this much-needed normative justification for this key assertion, whereby the enterprises' responsibility encompasses the violations of other actors with whom the core company maintains business relationships.

The term "relationships," according to the SRSG, refers to an on-going association with a supply chain entity.⁴⁹ The existence of such a relationship in itself constitutes sufficient grounds for attributing responsibility for human rights abuses to an MNE, in addition to any violations it may have contributed to directly. Accordingly, MNEs must "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."⁵⁰ As the core company and the supplier are connected by the "joint activity" that all entities in the supply chain share, special moral responsibilities of the core company towards all participants in the chain of production arise.

⁴⁸ Radu Mares, "Responsibility to Respect: Why the Core Company Should Act when Affiliates Violate Human Rights" In UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (Radu Mares, Ed.) 169, 170 (2011).

⁴⁹ Ruggie, *The Corporate Responsibility to Respect Human Rights in Supply Chains* 10th OECD Roundtable on Corporate Responsibility (Discussion Paper, 30 June 2010) (hereafter, Ruggie, *Responsibility to Respect Human Rights in Supply Chains*). [

⁵⁰ Guiding Principles 2011, para. 13(a)-(b).

A key concept of corporate responsibility for human rights violations that arise in the framework of a company's relationships with other entities is complicity. This notion refers to a company's indirect involvement in such abuses, i.e., when it indirectly but knowingly is involved with the abuse of human rights by another entity. In this context, however, the SRSG distinguishes between the first tier of suppliers or contractors (regarding whose abuses MNEs should always be held accountable for) and outer tiers of the MNE supply chain. Regarding the latter tiers, an MNE might have difficulty appraising itself of all more distant entities within its supply chain, let alone about violations of human rights they might perpetrate. According to the complicity principle embedded in the SRSG's approach, MNEs should be held responsible only for those human rights abuses perpetrated by business associates in their outer tier that the MNEs can reasonably be expected to have known about.⁵¹ Notably, this distinction between the supply chain's first and outer tiers is incompatible with a more substantive view of the connectedness principle proposed in this article.

According to the SRSG, when a corporation finds it has been complicit either directly or indirectly in human rights abuses, it should strive to mitigate or remedy the situation. It should assess whether the relationship with the business entity that committed the violation is crucial to its business and whether and to what extent the corporation has enough leverage over that entity to influence it to alleviate or stop the violation.⁵² Where the violating entity is crucial to the corporation's business, and the enterprise possesses leverage over this supply chain entity, the priority of the enterprise must be to use that leverage to mitigate the abuse. Again, then, it is the principles of contribution and connectedness that seem to guide the SRSG's conception of responsibility allocation. The principles of beneficiary, capacity, and control play no central

⁵¹ Ruggie, *Responsibility to Respect Human Rights in Supply Chains*, page 5, para. 18

⁵² See Ruggie, *Responsibility to Respect Human Rights in Supply Chains*. 2010' paragraphs 13.

justificatory role in determining the allocation of responsibility for labor rights in transnational production, as we demonstrate below.

First, the SRSB says very little regarding considerations of benefit. The SRSB's work has recognized the idea that MNEs can benefit from human rights abuses.⁵³ However, the SRSB has never indicated that such benefit constitutes autonomous grounds for attributing responsibility to an MNE for the abuses. According to the SRSB, benefit can trigger complicity when an MNE benefits from abuses committed by other actors, such as security forces, for example, through "the suppression of a peaceful protest against business activities or the use of repressive measures while guarding company facilities."⁵⁴ The SRSB clarifies that as a non-legal matter, a company could be considered "complicit" in human rights abuses committed by third parties when it benefits from those abuses.⁵⁵ Yet this contribution to establishing the possibility of MNE complicity in abuses where no business relations exist is only minor, and the beneficiary principle remains quite limited in scope in the SRSB's conception of responsibility; it is usually invoked only in cases of gross violations of human rights, as in the event of an abuse of power by security forces. In contrast, in the shared responsibility framework, benefit from human rights abuses comprises an independent allocation of responsibility principle. Such an analysis should be a crucial element in assessing business' responsibility in benefiting from the rights abuses of workers in the production chain as an integral, ongoing component of MNEs' business operations in a capitalist society.⁵⁶

⁵³ Ruggie, Clarifying the Concepts of "Sphere of Influence" and "Complicity," 2008, page 18

⁵⁴ *Ibid.*

⁵⁵ "Complicity, as mentioned, has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being "complicit" in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party." Guiding Principles, 2011, commentary to principle 17

⁵⁶ In 2000 the Gross profit margins earned by MNEs such as Nike and Reebok were estimated at around 40%. At the same time, direct labor costs typically range between 2 to 5 percent of all costs involved with manufacturing branded products in developing countries. *Global Labor: A World of Sweatshops*, Business Week (November 6, 2000). S. Pratash Sethi, "Corporate Codes of Conduct and the Success of Globalization," 16 ETHICS & INT'L AFF. 89 (2002).

Second, the capacity principle is similarly neglected in the SRSB's conception of corporate responsibility, which does not regard the corporation's capacity to remedy human rights violations as an independent basis for attributing responsibility. The SRSB takes into account an MNE's capacity to influence its suppliers or business partners to remedy human rights violations, but solely in the framework of implementing the MNE's responsibility after a violation was detected. The scale and complexity of the means by which MNEs are expected to fulfill their responsibility are determined by the size, sector, operational context, ownership, and structure of each given enterprise.⁵⁷ The SRSB clarified that size can affect an MNE's ability to discharge its responsibility to respect human rights, as well as the means by which that responsibility is met.⁵⁸ Yet he rejected incorporating capacity to prevent or remedy human rights abuses as an autonomous consideration for assigning to MNEs such a general responsibility in advance.⁵⁹

The SRSB's rejection of the notion of capacity playing a role in determining corporate responsibility for human rights is explicitly articulated in the reservations he expressed concerning the idea of "sphere of influence" as an alternative parameter for allocating

⁵⁷ Guiding Principles, principle 14

⁵⁸ Guiding Principles, principle 14

⁵⁹ The third pillar of the Guiding Principles refers to the responsibility to remedy human rights violations, and includes a description of remedy mechanisms to be employed by states and business alike. According to the SRSB, where business enterprises have caused or contributed to adverse impact, they should remedy this violation, whether on their own or with collaboration with others. Business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available. The SRSB further elaborates the conditions for an appropriate and legitimate non-judicial grievance mechanism, such as transparency, predictability etc. See, Ruggie, Guiding Principles, 2011, Guiding Principles no. 22, 29-31. The question of the appropriate mechanism of remedying of labor violations are beyond the scope of this article. Our point is that the elements that determine capacity to prevent and remedy labor rights violation, elements such as the size, sector, operational context, ownership, and structure of a business, should be taken into account as an independent factor when allocating the scope and extent of the responsibility of an enterprise, and not merely when determining the extent of the remedy, after the fact.

responsibility, which was first introduced in the United Nations Global Compact.⁶⁰ Under this notion, the more influence an MNE has on a certain group, the greater its responsibility for protecting its members from human rights abuses. This approach is conceptualized as a spatial metaphor of concentric circles mapping out the spheres of stakeholders in a company's activities: the innermost circle is occupied by the MNE employees, followed by suppliers, the marketplace, community, and governments in the outer circles. The farther the circle from the center, the less responsibility it reflects on the part of an MNE.⁶¹

In dismissing the sphere of influence notion, the SRSG also rejected the principle of capacity as a basis for attributing responsibility.⁶² The SRSG offered several rationales for his objection to this approach. First, he asserted that attributing responsibility for human rights violations to companies based on their influence on the perpetrators of the violations entails the moral assumption that "can implies ought." He claimed that such attribution would lead to the contradictory outcome of on the one hand, holding MNEs responsible for human rights violations committed by parties over whom they have influence although they have no direct or indirect causal link to the harms inflicted, while on the other hand, relieving corporations of responsibility for adverse human rights abuses when they can show that they lacked influence over the violating acts even if they are connected to the parties that caused the harm.⁶³ A second key argument the SRSG made against incorporating sphere of influence in allocating responsibility is that it conflates two different usages of the term 'influence.' The one is in the sense of 'impact,' referring to situations in which a company's activities or relationships are

⁶⁰ The Ten Principles of the UN Global Compact. <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1> _____

⁶¹ Ruggie, Clarifying the Concepts of "Sphere of Influence" and "Complicity" 2008, Part II.

⁶² For a comprehensive and persuasive critique of the SRSG's rejection of the sphere of influence, see, for example, Stephan Wood, "In defense of Sphere of Influence" (2010) Electronic copy available at: <http://ssrn.com/abstract=1607438>. For a comprehensive defense of the principal of capacity, using the term "leverage," Stephan Wood revised somewhat his position in "The case for a leverage based corporate human rights responsibility" 22 Business Ethics Quarterly pp. 63-98 (2012).

⁶³ Ruggie, Just Business, p.50.

causing human rights abuses; the other usage is as ‘leverage,’ or the power a company might have wielded over actors that are violating human rights or, alternately, the power to prevent such harm.⁶⁴ A final objection that the SRSG raised against accepting capacity as a determinative principle in allocating MNEs responsibility for human rights abuses is that this could lead states to engage in gaming. If powerful corporations are held accountable for human rights violations in their production chains purely by virtue of their power to prevent and remedy those violations, states would shirk their own duty to prevent and address abuses of human rights.⁶⁵

Third, and lastly, the SRSG disregards the control principle in the framework of responsibility allocation. As stated above, this principle relates to the extent to which individuals, companies or institutional actors have control over the conditions creating the injustice and the behavior of the participants in this situation. In labor-intensive sectors, the actions and policies of MNEs often result in unjust conditions throughout the production chain, for they wield significant control over the conduct of subcontractors and other actors that results in violations of workers’ rights.⁶⁶ This conception of control extends far beyond the idea of direct or indirect contribution to rights violations. However, the SRSG does not recognize control as an independent ground for attributing responsibility. Rather, control only comprises one of the possible factors that determine the leverage a corporation has over the particular actor violating human rights and how the corporation should discharge its responsibility to address the violation.⁶⁷

In sum, the conception of responsibility underpinning the SRSG’s approach is too narrow. It fails to incorporate important factors that should determine the contents and scope of

⁶⁴ Ruggie 2008, paragraphs 13-14.

⁶⁵ Ruggie, Framework, Paragraph 55.

⁶⁶ Kate Macdonald, *THE POLITICS OF SUPPLY CHAINS* (2015), page 24-26.

⁶⁷ Ruggie, Responsibility to Respect Human Rights in Supply Chains, paragraph 12.

corporate responsibility vis-à-vis labor rights in the production chain beyond the direct or indirect contribution the relevant MNE might make to the rights violation. The conception of corporations' responsibility should be expanded to allow for effective prevention and remedying of labor rights violations in global production chains. A more suitable conception would take into account factors that are currently missing or very limited in the approach to responsibility underlying the SRSG's conception. Particularly, in addition to considerations of direct causality of or contribution to the rights violations, corporate responsibility should be broadened and based on: (1) a more substantive view of the connectedness of various actors within global production chains; (2) an assessment of who benefits from the rights' violations, beyond the requirement for complicity; (3) an empirical examination of who has the capacity to best prevent and remedy the unjust labor conditions in question; and (4) an evaluation of the extent of control that a given MNE can exert over the abusive working conditions and behaviors of participants in global chains of production.

The conception of business responsibility towards labor rights held by the SRSG is narrow in another respect. It reflects an atomistic understanding of production, which does not correspond with the collective nature of production within global supply and production chains. Multiple actors—both public and private—should share responsibility for preventing and remedying labor rights violations. Although in earlier writings the SRSG refers to Young and acknowledges the importance of collective responsibility and its advantages over individual corporate liability for wrongdoing,⁶⁸ the SRSG's conception of responsibility to respect human rights is grounded on an analysis that is constructed around a single corporation. The duty to conduct due diligence is envisaged as one that each corporation separately should undertake. The

⁶⁸ Ruggie J. G. "Business and Human Rights: The Evolving International Agenda" 101 AMERICAN JOURNAL OF INTERNATIONAL LAW, 819, 839 (2007).

significance given to the contribution principle underscores the emphasis on isolated action by each enterprise. While the GPs acknowledge the need for coordination, they fail to offer any mechanisms of collective action. This lack is particularly striking in the context of labor rights violations. In global production chains, violations of labor rights rarely result from the actions of a lone corporation. Rather, to an increasing extent, different global buyers contract with similar entities and ‘share’ suppliers and factories within their global supply and production chains.⁶⁹

Applying these insights means reframing and rethinking the foundations of the SRSG’s conception in a manner that moves away from the traditional paradigm of responsibility, whereby the contribution of each entity to rights violations should be identified separately at the outset. Such a reformulation would require collective action among the different parties involved and could, for example, entail a duty of coordination, potentially inspired by solutions in French and EU law. Teubner argued that different actors in a network should be subject to a duty of coordination. He pointed to French law as a system that has developed decentralized solutions. In the health and social security sector, for instance, the law imposes a duty of coordination on each actor in the network, with a breach of this duty sanctioned with *responsabilité solidaire*. Similarly, an EU directive regarding the mobile industry imposes on network actors a duty to install a central coordinator with contractually defined responsibilities and to establish a *collège interentreprise* with employee participation.⁷⁰ Such duty of coordination could be similarly developed in this context.

⁶⁹ In the garment industry, the same sweatshops often produce for different brands of cloths. Similarly, in the motor vehicles industry, as of 2008 almost all the major motor vehicle companies have used the services of a contract manufacture company named VALEO to manufacture their air condition systems, and their airbags. VALEO company website <http://www.valeoservice.com/html/unitedkingdom/en/valeoservice.organisation.php>. The same goes for a company named Autolive, which produce the airbags for all those major companies. See Autolive company website <http://www.autoliv.com/Pages/default.aspx>. See, also, 2008Guide to purchasing in the "who supplies who" website <http://whosupplieswhom.com/default.asp>.

⁷⁰ G Teubner, ‘Hybrid Laws: Constitutionalising Private Governance Networks’ in R Kagan and K Winston (eds), *LEGALITY AND COMMUNITY*, (California University Press, 2000).

V. Concluding Remarks: Practical Implications

John Ruggie did not consider the GPs to be a conclusive set of guidelines. Rather, he viewed them as a departure point for discussing the necessary guidelines. In Ruggie's words, the GPs "mark the end of the beginning: by establishing a common global platform for action."⁷¹ In this article we continue this discussion, focusing particularly on the conception of responsibility towards labor rights protection that underlies the GPs.

Our argument is that the GPs' conception of responsibility is limited, as it ignores three key grounds for allocating responsibility for human rights to corporations, based on considerations of capacity, benefit, and control. Moreover, the principle of connectedness justifies the expansion of the corporate responsibility to its supply chain, but this principle should be defined more substantively in the SRSG's conception of business responsibility. These conclusions have significant normative implications. The problem is not simply that the SRSG failed to identify three normative bases for ascribing responsibility to MNEs; more importantly, the cumulative effect of capacity, benefit, and control as principles of responsibility allocation results in far weightier moral responsibility being assigned to MNEs for labor rights violations than that assigned by the GPs.

These additional considerations for responsibility allocation set higher moral standards for MNEs not only in theory. The expectations for higher moral standards have been manifested in practice, as demonstrated by two recent developments: first, the new public-private arrangements for the protection of workers' safety in Bangladeshi sweatshops, which emerged after the Rana Plaza disaster in 2013; and second, the demands to develop legally binding

principles of business responsibility voiced during the 24th session of the Human Rights council in 2014. The SRSB's conception of responsibility is significantly limited compared with the emerging social norms regarding MNE responsibility expressed in both these developments.

First, the Accord on Fire and Building Safety in Bangladesh⁷² and the Alliance for Bangladesh Worker Safety⁷³ are considered the two major arrangements in recent years in the field. The grounds for allocating responsibility in these two arrangements were broader than those set by GPs and the underlying conception of responsibility in both the Accord and Alliance better aligns with the proposed conception of shared responsibility. The Accord and Alliance are both based on a conception of responsibility that incorporates contribution and connectedness as grounds for attributing responsibility to MNEs. They also, however, take into account the relevant MNEs' capacity to prevent and remedy labor rights violations, as well as the benefits they derived from their unique position of control over the production process. In both these arrangements, the beneficiary principle seems to play a key role in allocating responsibility to MNEs, under the reasonable assumption that the extent of their benefit from rights violations correlates to the volume of their production. The Accord agreement, for example, sets the share of each individual company in funding the Accord in relation to its volume of outsourcing from Bangladesh relative to the annual volume of the other MNE signatories.⁷⁴ Similarly, the Alliance for Bangladesh Worker Safety uses a tiered fee structure to calculate members' contributions, which is based on the company's previous year's volume in dollars of exports of apparel

ALEO company website <http://www.valeoservice.com/html/unitedkingdom/en/valeoservice.organisation.php>. The same goes for a company named Autolive, which produce the airbags for all those major companies. See Autolive company website <http://www.autoliv.com/Pages/default.aspx>. See, also, 2008 Guide to purchasing in the "who supplies who" website <http://whosupplieswhom.com/default.asp>.

⁷² Teubner, Hybrid Laws, *supra* at fn 70.

⁷² <http://bangladeshaccord.org/>

⁷³ <http://www.bangladeshworkersafety.org/>

⁷⁴ This is subject to a maximum contribution of \$500,000 per year for each year of the term of the Accord. See <http://www.bangladeshaccord.org/faqs/> Last visited on July 19, 2014 (Hereafter, the Accord Agreement).

products from Bangladesh.⁷⁵

Moreover, we might reasonably assume that the extensive financial capacity of the MNEs that are parties to the Accord played a role in ascribing them responsibility towards the factories. As mentioned above, a key obligation undertaken by the signatories to the Accord is to assist in providing the supplier factories with the financial resources required to maintain safe workplaces and to carry out necessary structural repairs and safety improvements.⁷⁶ It is in fact the MNEs' capacity to help prevent and remedy the unjust working conditions in these factories that generates the social expectations that they undertake such obligations.⁷⁷ These expectations arose due to the control MNEs exert over conditions in these factories, which were continuously monitored by a variety of monitoring companies, but to no avail. To sum, the conception of responsibility in Accord and Alliance arrangements could be seen as incorporating in practice a conception of responsibility that is broader than the one employed by the SRSB.

The second recent development that challenges the SRSB's narrow conception of business responsibility and his preference for unbinding principles of business responsibility is the resolution drafted by Ecuador and South Africa and signed by Bolivia, Cuba, and Venezuela during the 26th session of the UN Human Rights Council in Geneva.⁷⁸ The resolution calls on the Council "to establish an open-ended intergovernmental working group with the mandate to

⁷⁵ See <http://www.bangladeshworkersafety.org/files/Alliance-Action-Plan-Package-FINAL.pdf>, last visited July 19, 2014.

⁷⁶ The Accord Agreement.

⁷⁷ This can also be seen as reflecting the contribution principle. The fact that the MNEs are willing to negotiate their contracts with the suppliers implies that they recognize that the previous prices under which the factories could not fund sufficient safety arrangements in the Rana Palza case that and thus contributed to the disastrous results.

⁷⁸ One explanation for the Government of Ecuador initiative is the battle that took place between the Government of Ecuador and the transnational oil company Chevron. In 2013 Ecuador's highest court upheld a ruling that found Chevron responsible for the contamination of large parts of Ecuador's Amazon region. Trying to evade this ruling Chevron asked investor-state tribunal to revoke that decision. For details to this case and other cases brought by international corporations to investor-state tribunals, see Jens Martens, "Corporate Influence on the Business and Human Rights Agenda of the United Nations". Global Policy Forum, p. 10.

http://www.misereor.org/fileadmin/redaktion/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf

elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights.”⁷⁹ Twenty out of forty-seven members of the Human Rights Council voted in favor of the resolution.⁸⁰

The Ecuador resolution and the Bangladeshi arrangements that emerged after the Rana Plaza disaster illustrate that the social expectations from MNEs are far higher than those assumed in the SRSG’s conception of responsibility. Indeed, we find these expectations reasonable, given the moral considerations outlined in this article.

⁷⁹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>

⁸⁰ The international politics around the vote on the resolution is interesting. The twenty council members that voted in favor of the resolution included a majority of African members, and China, India, and Russia; fourteen members voted against the resolution, including the European Union and the United States, which claimed that the proposal is counter-productive and polarizing. Both stated that they would not participate in the treaty negotiating process. Japan and South Korea also voted against the resolution. Fourteen members abstained. Apart from the resolution’s sponsors, all other Latin American countries, notably Brazil, were among the abstentions. One day after the vote the Council adopted a second resolution, introduced by Argentina, Ghana, Norway, and Russia along with forty additional co-sponsors from all regions of the world, which extended the mandate of the expert working group the Council established in 2011 to promote and build on the GPs, and requests the High Commissioner for Human Rights to facilitate a consultative process with states, experts, and other stakeholders exploring “the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses.