Buchbesprechungen

***Choudhury, Barnali* (ed.): The UN Guiding Principles on Business and Human Rights – A Commentary.** Cheltenham/Northampton: Edward Elgar Publishing 2023. ISBN 978-1-80037-567-3 (hardback), ISBN 978-1-800037-567-3 (eBook). xxxvii, 340 pp. £160.-

Undertaking the project of compiling and publishing an article-by-article – or, in the present case more precisely, a principle-by-principle – commentary on an international document like the 2011 United Nations (UN) Guiding Principles on Business and Human Rights that belongs to the realm of so-called 'soft law', although surely not entirely unheard of in the legal literature,[1] asks to a certain extent for an explanation and justification, already when considering the well-known fact that the academic genre of commentaries is in the realm of legal scholarship traditionally – and also as of today predominantly – reserved for 'hard law' instruments such as domestic constitutions and legislative acts, regulations, codes or – in particular more recently – individual international conventions. Although the editor of the work under review, *Barnali Choudhury*, is herself not directly and explicitly addressing this question, the overarching thoughts and elaborations she provides in her introductory section (pp. 1-10) as well as in particular also the general purposes outlined in the foreword written by *Surya Deva* (pp. xxvi-xxviii) indicate many of the main reasons in favor of the respective publication approach chosen as well as its intended benefits for interested scholars and practitioners.

The topic of international corporate social as well as legal responsibility and thus in particular also the question whether and, in the affirmative, on the basis of what governance approaches non-state corporate actors are expected or even obliged to contribute to the promotion and protection of global community interests like human rights has attracted very considerable attention in recent decades.[2] Nevertheless, viewed from the perspective of the international legal order in the narrow sense, public international hard law rules stipulating obligations in the policy field of business and human rights still remain also as of today scarce or at least controversially perceived as far as their regulatory content is concerned. This applies for example to the

1 See, e. g., Ilias Bantekas and Francesco Seatzu (eds), *The UN Sustainable Development Goals – A Commentary* (Oxford University Press 2023); Winfried Huck (ed.), *Sustainable Development Goals, An Article-by-Article Commentary* (Nomos/Beck/Hart 2022).

2 The contributions on this topic are by now more than legion. See, e. g., recently for a comprehensive comparative analysis of the respective discourses in the United States and Germany Richard Dören, *Business and Human Rights in den USA und in Deutschland* (Nomos 2024), with numerous additional references.

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disputed answer to the question whether states are under international human rights law normatively required to regulate the extraterritorial activities of private business entities under their jurisdiction.[3] However, it first and foremost also concerns the still dominant perception that non-state corporate actors are currently – aside from some notable but until now with regard to their scope of application only quite limited recent developments in international investment treaty-making[4] – neither under treaty law nor in the realm of customary international law addressees of direct obligations to promote and protect international human rights. With generally recognised international legal rules on the issue of business and human rights thus largely absent, it is in fact first and foremost international governance instruments belonging to the realm of soft law that have provided normative guidance and played a quite prominent role in this policy field in the course of the last fifty years.

As also rightly emphasised in the foreword and the introductory section of the present work under review, a very influential position is – ever since its endorsement by the UN Human Rights Council in June 2011 – currently occupied in this connection by the UN Guiding Principles on Business and Human Rights. Two somewhat intertwined reasons seem worth recalling in this regard: First, the UN Guiding Principles enjoy an accentuated status among the soft law instruments in the realm of international corporate responsibility because they constitute the central respective instrument that has been successfully developed under the auspices of the United Nations and received endorsement by this most authoritative global organisation. Second, the UN Guiding Principles are not to be regarded as another 'traditional' code of conduct that is confined to stipulating more or less specific societal expectations on the activities of economic actors and, in this regard, provides for a number of implementation mechanisms. Rather, they aspire to be 'an authoritative focal point' that is meant to serve as a 'coherent and comprehensive template' for the allocation of responsibilities in the realm of business and human rights.[5] Therefore, the UN Guiding Principles are most appropriately to be understood as an overarching conceptual outline of future directions for the application and development of other soft as well as

3 For a more in-depth assessment of this issue see for example Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities', Deakin Law Review 23 (2018), 13-39.

4 See thereto, e. g., Patrick Abel, *International Investor Obligations* (Nomos 2022), 36 et seq.

5 Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31, of 21 March 2011, Introduction, paras 5 and 14.

hard law instruments in this field. And indeed, as nicely and convincingly summarised and illustrated by *Choudhury* in her introductory section (pp. 6-9), this soft law instrument, in the decade since its adoption, undoubtedly 'had a transformative and highly influential effect on a number of different initiatives' (p. 6) at the domestic, supranational, and international level in the realm of soft law and hard law – and are highly likely to continue to exercise a notable influence in the years to come. Against this background, and in particular taking into account the significant impact of the UN Guiding Principles on the progressive development of the business and human rights agenda on the national and international plane, the project initiated by *Choudhury* to publish a principle-by-principle commentary on this soft law instrument appears not only to be fully justified but in fact also a very laudable and felicitous undertaking.

In principle, a legal commentary on the UN Guiding Principles serves the same multiple purposes as the almost countless commentaries addressing hard law regimes. Three purposes stand out in this regard: As also accurately described by *Deva* in his foreword (pp. xxvii-xxviii), a commentary is always expected to provide clarification by identifying and elaborating the normative concepts embodied in the individual standards as well as by addressing and concretising ambiguities in the wording of the respective rules and principles. Moreover, a commentary should provide the reader with examples of how the principles have subsequently been applied in the practice of – in the context of the UN Guiding Principles – states, companies, and other stakeholders. Finally, a proper legal commentary also serves the purpose of identifying regulatory gaps and inconsistencies, thereby, adopting a legal policy perspective, drawing attention to the need or at least desirability to amend and update the normative instrument at issue. By striving to serve these overarching purposes, the commentators can provide helpful assistance and guidance to practitioners tasked with applying the respective governance instrument and – again in particular also in the context of the UN Guiding Principles – thus, ideally, also can promote and further enhance the acceptance as well as the transformative potential of the regulatory framework in question.

Having discussed and confirmed the justification for, and usefulness of, publishing a commentary on the UN Guiding Principles despite its normative character as a 'mere' soft law document, and having outlined the main purposes to be pursued by a good and thus recommendable book belonging to this academic genre, I will now turn more specifically to the individual contributions in the volume under review. For the commentaries on the individual principles, the editor has assembled a truly impressive total of forty-four scholars and practitioners from basically all parts of the world,

most of whom with a legal background and all of whom with proven experience in the field of business and human rights. Interestingly though, the editor *Choudhury* herself is not among these commentators. While slightly unusual, the decision on the approach adopted in this regard is obviously for the respective editor to make and most certainly does not in itself negatively – or positively – affect the quality of the publication.

In a comparatively short book review, it is of course almost impossible – and I'm thus not even going to make an attempt – to comment on and do justice to all of the individual contributions included in this collected work. Nevertheless, and not the least in order to make this review as informative as possible for those who have been involved in the present work as well as of course in particular also for the broader business and human rights community, I will not confine myself to some general overarching impressions but rather make an honest attempt to first and foremost also highlight, and comment on, some more detailed aspects that I observed while reading, and that are more specifically related to, some of the individual contributions.

As already indicated, the introductory section to this collected work, appropriately written by the editor *Choudhury* herself, provides a concise and convincing overview of the topic at issue, thereby in particular also addressing the background, historical evolution and subsequent impact of the UN Guiding Principles as well as potential future directions for this governance instrument. Nevertheless, also two more or less minor inaccuracies are noteworthy in this regard. First, it is not entirely clear – and not explained by the author – why the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises and the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, international codes of responsible business conduct originally adopted already in the 1970s, are in this introductory session occasionally referred to as 'non-voluntary standards for corporations' (p. 3), whereas they are – correctly – qualified as '[v] oluntary standards' in other parts of the same contribution (see, e. g., p. 2). While this thus very likely can be regarded as an avoidable 'slip of the pen' by the author, the second inaccuracy worth mentioning here seems to be more substantial. Contrary to the impression given by *Choudhury* (p. 3), the UN Global Compact was not initiated after the failure of the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights but already a few years prior to it.

The first two commentaries on Guiding Principles 1 and 2 written by *Daniel Augenstein* and *Claire Methven O'Brien* respectively serve already as a clear indication for the overall very high quality of all of the numerous

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individual contributions included in this collected work. However, they unfortunately also already illustrate one of the more notable challenges potentially faced by the readers when consulting this book. Both commentaries address the issue of extraterritorial state obligations to prevent corporate human rights abuses committed while operating abroad and both contributions refer in this regard, and quote from, the same documents adopted by international human rights bodies (pp. 16-17 and pp. 26-27). Respective repetitions can also be found in various contexts in not only some of the subsequent individual commentaries (for example in connection with the relevance of National Action Plans). A more extensive recourse to cross-references and other more comprehensive efforts aimed at coordinating the content to be addressed in individual contributions throughout the collected work would have likely avoided such multiple treatments of the same legal issue and would have thus clearly further enhanced the readability of the book as a whole.

The commentary on Guiding Principle 3 by *Anil Yilmaz Vastardis* and *Rachel Chambers*, while providing an in principle very useful assessment of its regulatory content and implications, suffers – at least in the eyes of the present reviewer – to a certain extent from a quite extensive description – and quotations from – the 'official' Commentary to the UN Guiding Principles (pp. 32-33) and thus from a document that is available – and probably rather well-known – to the broader business and human rights community ever since it was published in 2011. Moreover, whereas the commentaries on Guiding Principles 4 and 5 written by *Larry Catá Backer* and *Humberto Cantú Rivera* serve as examples of very convincing and thoughtful analyses of their respective topics, the subsequent contribution by *Annamaria La Chimia* on Guiding Principle 6 is not only at least in part lacking the specific connection to the regulatory content of the principle at issue that one would expect from a commentary.[6] Rather, it also provides only a rather 'light' treatment of the relationship between international trade agreements and the contracting states' obligations under international human rights law (p. 53), given the fact that it is by now overwhelmingly recognised that the solution to respective normative conflicts should not be based on an approach that gives absolute preference to either trade agreements or human rights obligations, but rather by striving for an appropriate balance in individual situations.

The commentary by *Olga Martin-Ortega* and *Fatimazahra Dehbi* on Guiding Principle 7 dealing with the states' role in addressing the heightened danger of corporate human rights abuses when operating in conflict-affected

6 This is probably also a consequence of the fact that this commentary is partially based on a prior publication of the author as acknowledged by her in fn. 1 (p. 49).

areas, while rightly mentioning the so-called 'Dodd-Frank Act' of 2010 (p. 61), could have been expected to also refer to other relevant governance instruments such as in particular the 2017 EU Conflict Minerals Regulation.[7] The same applies for example to the commentary by *Carolina Olarte-Bácares* on Guiding Principle 9 that concerns the need to maintain sufficient policy space for states to take adequately into account their human rights obligations when concluding, for example, international trade and investment agreements with other countries. In this regard, it could legitimately be doubted whether the assertation by the author that investment agreements basically only 'serve to safeguard the property-related rights and interests of investors' (p. 74) is still supported by more recent treaty-making practice. In fact, the perception that investment treaties – and regional free trade agreements – should also include provisions stipulating obligations for private business actors and provisions on corporate social responsibility is no longer confined to the realm of respective 'proposals' in the legal literature. Rather, there are by now a notable number of examples also in the realm of actual treaty practice in this regard and one, again, could have – and would have – expected the author to mention at least some of them in the course of her commentary.

The commentary written by *Sara L. Seck* on Guiding Principle 11 serves in particular also as a good introductory section to the so-called second pillar of the governance framework established by the UN Guiding Principles, namely the corporate responsibility to respect human rights. That said, the usefulness of this chapter would have probably benefited from an at least slightly more in-depth discussion of the – as rightly emphasised by the author – 'hotly debated' (p. 87) and also dogmatically quite complex and multi-faceted question as to the dogmatic basis and current recognition of international hard law obligations of private business actors to contribute to the protection and promotion of global community interests such as in particular in the realm of human rights. To a certain extent to the contrary, the subsequent commentaries addressing the individual principles of the UN Guiding Principles dealing with the various normative as well as practically relevant aspects of the corporate responsibility to respect human rights (Guiding Principles 12 to 24) provide each a succinct and thus quite helpful description and assessment of the respective regulatory content as well as the challenges in effectively implementing it in business practice. They for example rightly stress the limits inherent in voluntary approaches and thus empha-

7 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ 2017 L 130/1.

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sise the desirability for, among others, effective due diligence regulation and non-financial human rights reporting requirements at the domestic level as well as the overall need for more precise governance guidance for private business actors in order to allow them to determine what procedures and other policies they are expected to adopt and implement in order to meet their responsibility to respect human rights. Respective examples are provided by the commentaries written by *Kishanthi Parella* on Guiding Principles 13 and 15 (pp. 108 and 117), the commentary by *Maddalena Neglia* on Guiding Principle 16 (pp. 122 et seq.), the commentary written by *Claire Bright* and *Celine da Graça Pires* on Guiding Principle 18 (pp. 143 et seq.), the commentary written by *Andreas Rühmkorf* concerning Guiding Principle 21 (pp. 166 et seq.), as well as the commentary written by *Salvador Herencia-Carrasco* on Guiding Principle 24 (p. 190).

The so-called third and final pillar of the expectational governance structure characterising the UN Guiding Principles, namely providing for access to remedies on the basis of state-based judicial and non-judicial remedies as well as non-state corporate based grievance mechanisms is convincingly introduced through the commentary written by *Dalia Palombo* on Guiding Principle 25 (pp. 191 et seq.). Structuring the commentary along the four main questions, namely 'Who is obliged?', 'To whom are the duties owned?', 'What type of remedies are expected?' and 'What is the territorial extent of these expectations?', and thus addressing the active personal scope of application, the passive personal scope of application, the material scope of application as well as the territorial scope of application, proves to be a very suitable approach aimed at clarifying the regulatory content of this principle and the third pillar as a whole. The subsequent commentaries concerning the Guiding Principles 26 to 31 provide each a very well-written and overall quite helpful description and evaluation of the individual remedies envisioned by this governance instrument and the various individual requirements foreseen in this regard in order to ensure the appropriateness and effectiveness of these central mechanisms aimed at ensuring that they create suitable and practically relevant options for people seeking remedy for business-related human rights harm. Particularly helpful, and thus especially worth noticing, are those commentaries that also mention, explain, and assess specific examples of state-based and non-state based judicial as well as other grievance mechanisms. This applies for example to the commentary on Guiding Principle 27 written by *Markus Krajewski* (pp. 213 et seq.) as well as to the commentary written by *Dorethée Baumann-Pauly* and *Lilach Trabelsi* on Guiding Principle 30 (pp. 234 et seq.). Aside from that, the commentary on Guiding Principle 31 written by *Anna Triponel* is worth mentioning in light of the short but quite enlightening and instructive explanation and evaluation of the

individual effectiveness critera stipulated by the UN Guiding Principles in connection with non-judicial grievance mechanisms (pp. 242 et seq.).

The work under review is, however, and contrary to its title, not confined to a commentary on the individual UN Guiding Principles. Rather, it also includes a commentary on the ten Principles for Responsible Contracts (PRC) which – as also rightly highlighted by the editor *Choudhury* in her introductory section (p. 5) – were submitted by the Special Representative, *John Ruggie*, to the United Nations Human Rights Council as an addendum to the UN Guiding Principles in May 2011 with a view to enabling parties negotiating state-investor contracts to integrate the management of human rights risks into contract negotiations more effectively.[8] Particularly from a practice-oriented perspective, the decision made by the editor of this work to also include a commentary on this important governance instrument has to be regarded as very laudable and fortunate. Despite some clearly avoidable and more or less minor inaccuracies – for example the quotation given by *Daria Davitti* and *Sorcha MacLeod* in the first paragraph of their commentary on PRC 1 (p. 250) is not mentioned in the document cited[9] but only in the preface of the subsequently published document 'OHCHR, Principles for Responsible Contracts – Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators, 2015' on page 2 –, the individual commentaries on the ten principles overall provide an in general quite helpful and well-written explanation of the various individual issues addressed in this guiding document. To mention but one example, the commentary written by *Jernej Letnar Černič* on PRC 4 dealing with so-called 'stabilization clauses' (pp. 272 et seq.) is one of the best concise treatments I have read so far on this comparatively complex and multi-facetted regulatory topic.

In sum, despite some more or less minor points of criticism, the work 'The UN Guiding Principles on Business and Human Rights – A Commentary' edited by *Barnali Choudhury*, overall distinguishes itself as an important and in particular also practically relevant addition to the ever-growing literature on the topic of business and human rights. It is undoubtedly a notable contribution to the indeed indispensable global discourses and thus highly recommended to scholars and practitioners interested in this important issue of our time.

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8 See also OHCHR, Principles for Responsible Contracts – Integrating the Management of Human Rights Risks Into State-Investor Contract Negotiations: Guidance for Negotiators, 2015, 1-2.

9 UN Doc. A/HRC/17/31/Add.3 of 25 March 2011.

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