

Problematic Pragmatism

The Ruggie Report 2008: Background, Analysis and Perspectives¹

June 2008

Summary

In June 2008, John Ruggie, Special Representative of the UN Secretary-General for business and human rights, is to present his "Protect, Respect and Remedy: a Framework for Business and Human Rights" report to the UN Human Rights Council. The report marks a further interim result of the United Nations debate on the responsibility and accountability of transnational corporations, which has now been in progress on for many years.

The report forms the preliminary conclusion of a three-year research and consultation process that Harvard professor Ruggie had been commissioned to conduct by the UN Secretary-General and had commenced in July 2005. The Special Representative was appointed on recommendation of the then UN Commission on Human Rights, which had turned down a proposal on binding UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights in the same year. Ruggie's **mission** was less ambitious. In particular, he was supposed "(...) to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;" and "(...) to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation".²

John Ruggie's report identifies grave **deficits** in the current human rights regime that represent an obstacle to protection to individuals and communities against corporate-related human rights violations. He notes "escalating charges of corporate-related human rights abuses"³, regarding this as "the canary in the coal mine, signalling that all is not well".⁴

The Ruggie Report regards the "governance gaps created by globalization" as the **root causes** of the "business and human rights predicament".⁵ "These governance gaps provide the permissive environment for wrongful acts by companies of all kind without adequate sanctioning and reparation."⁶ Ruggie sees the fundamental challenge as identifying "how to narrow and ultimately bridge the gaps in relation to human rights".⁷

Nevertheless, the Report does not **respond** to the global governance gaps it notes with global governance solutions. Instead, it is limited to what its author deems politically achievable. This above all includes incremental steps towards observing human rights at

¹ This paper was written by Jens Martens, Global Policy Forum, and edited by Elisabeth Strohscheidt, Misereor.

² E/CN.4/RES/2005/69 of the 20th April 2005.

³ UN Doc. A/HRC/8/5 of the 7th April 2008, para. 2.

⁴ Ibid.

⁵ Ibid., para. 3

⁶ Ibid.

⁷ Ibid.

national level, especially in Bilateral Investment Treaties (BITs) and in export promoting via Export Credit Agencies (ECAs). Ruggie is in favour of strengthening judicial capacities to hear complaints and enforce remedies against corporations. He recommends the corporations themselves to observe "due diligence" regarding respect for human rights and gives some practical recommendations in this context.⁸

However, Ruggie categorically rejects the UN Norms or any other global legal instrument to establish the human rights duties of corporations. Neither does the report address calls by human rights organisations for a UN special procedure (e.g., independent expert or group of experts) on business and human rights or a proposed International Advisory Centre offering governments of developing countries legal support vis-à-vis transnational corporations.

Thus Ruggie's report falls way short of the expectations of civil society organisations. With his "*principled pragmatism*" approach, Ruggie formulates what he feels is politically feasible given the forces that be in society but does not state what would be desirable and necessary to protect human rights.

1. Background

The report that John Ruggie is to present to the Human Rights Council in June 2008 has a long history. As early as the mid-1990ies, the then Sub-Commission on Prevention of Discrimination and Protection of Human Rights⁹, which at the time was a subsidiary body of the UN Human Rights Commission, had commissioned three reports on Transnational Corporations (TNCs) and human rights.¹⁰ These reports stressed the need to create an international legal framework for TNCs. For example, the 1996 report states:

*"A new comprehensive set of rules should represent standards of conduct for TNCs and set out economic and social duties for them with a view to maximizing their contribution to economic and social development."*¹¹

This basic consideration prompted the Sub-Commission to appoint a working group to address in more detail the working methods and activities of TNCs in 1999. Already at its first session in August 1999, this working group announced that it would develop a "*code of conduct for TNCs based on the human rights standards*".¹² After a consultation process lasting almost four years and involving enterprises, industrial associations, civil society organisations, trade unions and institutions of the UN system, the working group submitted its draft version of "**Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**" in 2003.¹³ On the 13th August 2003, the Sub-Commission approved by consent the draft version and transmitted it to the UN Commission on Human Rights.

At its 2004 Session, this draft version of binding standards for enterprises was given a cool response by the Commission. It explicitly stressed that this document "*has not been requested by the Commission and, as a draft proposal, has no legal standing*".¹⁴ Instead of adopting the norms, it commissioned the Office of the High Commissioner for Human Rights to compile a further report on the topic. In 2005, the Office submitted a comprehensive report following a transparent consultation process involving all stakeholders. This report still

⁸ Ibid., paras 60-64

⁹ ECOSOC renamed it as the Sub-Commission on the Promotion and Protection of Human Rights in 1999.

¹⁰ UN Doc. E/CN.4/Sub.2/1995/11 of the 24th July 1995, E/CN.4/Sub.2/1996/12 of the 2nd July 1996 and E/CN.4/Sub.2/1998/6 of the 10th June 1998.

¹¹ E/CN.4/Sub.2/1996/12 of the 2nd July 1996, para. 74.

¹² E/CN.4/Sub.2/1999/9 of the 12th August 1999, para. 32.

¹³ E/CN.4/Sub.2/2003/12/Rev.2 of the 26th August 2003.

¹⁴ E/CN.4/DEC/2004/116 of the 20th April 2004.

refers to the UN Norms as one of several instruments deemed important regarding corporate responsibility that require further assessment.¹⁵

However, the resolution on the topic of "Human Rights and transnational corporations and other business enterprises" of the Human Rights Commission 2005 completely ignored the norms, effectively hushing them up.¹⁶ Instead, it called on the UN Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises for an initial period of two years. The Special Representative was to be given the following **mandate**:

- "(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;*
- (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;*
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";*
- (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;*
- (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises ..."*¹⁷

The resolution was adopted with 49 votes in favour, three against, and one abstention.¹⁸ The USA rejected it arguing that the resolution *"takes a negative tone towards international and national business, treating them as potential problems rather than the overwhelmingly positive forces for economic development and human rights that they are"*.¹⁹ The USA would reject any resolution not explicitly clarifying that it *"was not intended to further the cause of norms or a code of conduct for TNCs"*.²⁰ The USA's unequivocal declaration to reject any binding international standards being set that were critical of business also gave a clear signal to the address of the future Special Representative.

On the 28th July 2005, the then UN Secretary-General Kofi Annan met the request by the Human Rights Commission and appointed his confidant of many years' standing John Ruggie as Special Representative for business and human rights. Ruggie, a US American, had been Assistant Secretary-General and Chief Advisor for strategic planning to United Nations Secretary-General Kofi Annan from 1997 to 2001. He is regarded as one of the spiritual fathers of the Global Compact and a champion of a global governance concept based on co-operation with business rather than on its global regulation. Thus the appointment of Ruggie also meant setting a political course.²¹

In his **first** Interim Report, in 2006, Ruggie distances himself in unusually harsh terms from the proposed UN Norms. In his words, *"(...) the Norms exercise became engulfed by its own doctrinal excess. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims*

¹⁵ E/CN.4/2005/91 of the 15th February 2005

¹⁶ E/CN.4/RES/2005/69 of the 20th April 2005.

¹⁷ Ibid., para. 1.

¹⁸ Votes against: Australia, South Africa and USA, abstentions: Burkina Faso.

¹⁹ Statement of US Delegate Leonard Leo at the Commission on Human Rights on item 17 "Transnational Corporations", April 20th, 2005.

²⁰ Ibid.

²¹ John Ruggie works as Special Representative in an honorary capacity. Ruggie's main profession is that of Evron and Jeane Kirkpatrick Professor of International Affairs and director of the Kennedy School's Mossavar-Rahmani Center for Business and Government at Harvard University. The Center's most important programmes include the Corporate Social Responsibility Initiative. It is financed by 11 large-scale enterprises, among them Chevron, Coca-Cola, General Motors, Microsoft and Shell as well as the United Nations Industrial Development Organization (UNIDO) (cf. www.hks.harvard.edu/m-rcbg/CSRI/index.html).

*and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers.*²²

Ruggie criticises the norms claiming that they "(...) *take existing State-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law – hard, soft or otherwise.*"²³

Additionally, he is critical of the UN Norms because of their "(...) *imprecision in allocating human rights responsibilities to States and corporations*".²⁴

His conclusion: "(...) *the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights*".²⁵ Thus Ruggie once again emphasised his approach based on a consensus and co-operation with business, with which he himself restricted his political scope for action regarding the subsequent surveys and consultations far more than his mandate prescribed.

Ruggie required more time than originally provided for to complete his final report, so that he only submitted a second interim report in 2007 and requested that the now existing Human Rights Council extend his mandate by a further year.

The **second Ruggie Report** is conceived as a mapping exercise, describing the existing international standards, instruments and the current trends in the field of corporate responsibility and accountability.²⁶ Its scope ranges from the Human Rights Treaties, stressing the principle of the state duty to protect, through "soft law" instruments such as the OECD Guidelines for Multinational Enterprises to various forms of corporate self-regulation.

"*By far the most consequential legal development*" is seen by Ruggie in "*the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards*".²⁷ The most striking example of this is the US American Alien Tort Claims Act (ATCA). It enables businesses to be taken to court in the USA for violations of human rights in third countries. Ruggie expects such legal action to be taken against companies more frequently in future: "*The risk environment for companies is expanding slowly but steadily, as are remedial options for victims.*"²⁸ Elsewhere, with a view to companies, he speaks of the "(...) *greater risk of their facing allegations of 'complicity' (...)*".²⁹

Ruggie attaches special importance to the soft-law approaches: "(...) *while States have been unwilling to adopt binding international human rights standards for corporations, together with business and civil society they have drawn on some of these instruments in establishing soft law standards and initiatives. It seems likely, therefore, that these instruments will play a key role in any future development of defining corporate responsibility for human rights.*"³⁰ As an example, he particularly stresses the OECD Guidelines, the Extractive Industries Transparency Initiative (EITI) and the Kimberley Process.

According to his own statements, the second Ruggie Report was based on two dozen research papers, five multi-stakeholder consultations, four legal expert workshops and several visits by Ruggie to companies in developing countries. The results of all these

²² E/CN.4/2006/97, para. 59.

²³ Ibid., para. 60.

²⁴ Ibid., para. 66.

²⁵ Ibid., para. 69.

²⁶ A/HRC/4/35 of the 19th February 2007.

²⁷ Ibid., para. 84.

²⁸ Ibid., para. 27.

²⁹ Ibid., para. 30.

³⁰ Ibid., para. 44.

activities are documented not only in the Report itself but also in four Addenda and a companion report on the topic of human rights impact assessments.³¹ Given this effort, the result turned out to be modest, for its substance did not go beyond earlier reports and research exercises of the UN.

Thus expectations focused on the third and (for the time being) final report of the Special Representative. In a joint letter to John Ruggie, more than 200 civil society organisations formulated four priority tasks that Ruggie was supposed to fulfil with his third report:

- *help to deepen the focus by the UN on actual situations relating to human rights and business, especially with regard to the perspective of victims so as to illustrate the scope and nature of abuses;*
- *analyze the factors driving the failure of states to adequately discharge their duty to protect the human rights of individuals, communities and indigenous peoples;*
- *assess the inherent limitation of voluntary initiatives, in order to avoid an overreliance on such initiatives; and*
- *help to spread awareness of the compelling need for global standards on business and human rights to be outlined in a UN declaration or similar instrument adopted by member states.*³²

However, Ruggie's reply to this letter already dampened expectations. He referred to the restricted scope of his mandate and announced that he would not submit any report "*that limits itself to solutions that may – or may not – materialize a quarter century hence*".³³

2. The third Ruggie Report

In his third report, John Ruggie above all intends to work out the conceptual frame for the future political discourse on business and human rights. For he feels that so far, the business and human rights agenda has been "*hampered because it has not been framed in a way that fully reflects the complexities and dynamics of globalization and provides governments and other social actors with effective guidance*".³⁴

The frame that Ruggie proposes comprises three core principles:

- The State duty to protect against human rights abuses by business.³⁵
- The corporate responsibility to respect human rights.
- The effective access to remedies.

Thus Ruggie makes a basic and explicit distinction between the comprehensive *duties* of the states regarding human rights and the limited *responsibility* of business enterprises to respect human rights. In doing so, he is again distancing himself from the approach of the UN Norms, which, while recognising the *primary responsibility* of states to protect human rights, formulate a much wider definition of corporate responsibility by noting that:

*"Within their respective sphere of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights (...)."*³⁶

³¹ A/HRC/4/35/Add.1-4 of the 8th, 13th, 15th and 28th February 2007 and A/HRC/4/74 of the 5th February 2007.

³² Letter to Professor John Ruggie, 25th October 2007 (final version).

³³ Letter of John Ruggie to Julieta Rossi, Director, ESCR-Net, 15th October 2007.

³⁴ A/HRC/8/5, para. 10.

³⁵ Ruggie explicitly points out that "*duty to protect is well established in international law and must not be confused with the concept of the 'responsibility to protect' in the humanitarian intervention debate*". (H/HRC/8/5, footnote 5).

At the same time, Ruggie acknowledges that *"state regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish and redress abuses"*.³⁷

Priority fields of action for governments

For Ruggie, one of the core issues is how the generally accepted state duty to protect human rights can be translated into concrete policy measures of governments vis-à-vis companies. Here, he refers to a number of political issues that can be addressed at national and international level, such as:

- **Fostering Sustainability Reporting:** Governments can take advantage of and support market pressure on companies by promoting sustainability reporting of companies or prescribing it as a binding requirement. This also includes reporting on compliance with human rights and social standards. This applies in particular to public or state-owned enterprises. As an example, the Ruggie Report cites Sweden, which demands that its state-owned enterprises submit sustainability reports applying the Guidelines of the Global Reporting Initiative.³⁸ In this manner, Ruggie argues, stakeholders are in a better position to compare rights-related performance of companies. However, the Ruggie Report does not mention that the market pressure he is relying on above all urges enterprises to cut costs and increase profits in order to be able to compete with their rivals. Thus there is an inherent conflict of aims between the protection of human rights and maximising profits that cannot be resolved by the markets.
- **Human Rights obligations in investment treaties:** The Ruggie Report is correct in noting incoherence between state policies to promote investment and the protection of human rights. Thus the thousands of Bilateral Investment Treaties (BITs) primarily serve the purpose of protecting investors. However, owing to the binding complaints and arbitration procedures, they considerably restrict the readiness of governments to raise environmental, social and human rights standards. For if the latter increase the production costs of companies, they can be interpreted as the expropriation of future profits and entail corresponding compensation demands.

Similar arguments apply to agreements between host governments and companies, which not rarely contain the commitment of governments to freeze the existing legal framework to cover the entire period of the agreement, which may be up to 50 years. Thus extending environmental and social standards can result in the investor claiming for damage, especially in developing countries. A survey conducted together for the Special Representative and the International Finance Corporation (IFC) shows that the agreements between companies and governments of non-OECD countries *"constrain the host State's regulatory power significantly more than those signed with OECD countries (...)"*.³⁹

The consequences that Ruggie draws from these deficiencies remain vague, however. He confines himself to demanding more transparency in the arbitration procedures and recommends that together with companies and institutions promoting investment, governments *"should work towards developing better means to balance investors' interests and the need of host States to discharge their human rights obligations"*.⁴⁰ Thus he is asking for trouble by placing the business interests of investors on the same level as that of the human rights duties of states – instead of clearly giving human rights precedence over economic interests. Ruggie makes no

³⁶ E/CN.4/Sub.2/2003/12/Rev.2, para. 1.

³⁷ A/HRC/8/5, para. 82.

³⁸ Ibid., para. 30.

³⁹ Ibid., para. 36. The survey, titled "Stabilization clauses and human rights", is available at www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf

⁴⁰ Ibid., para. 38.

mention of further reaching proposals to establish human rights clauses in investment agreements or the detailed draft drawn up by the International Institute for Sustainable Development (IISD) for a Model International Agreement on Investment for Sustainable Development.⁴¹

- **Linking ECAs to human rights:** One aspect that Ruggie proposes to motivate governments and enterprises to gain greater respect for human rights is the guarantees of Export Credit Agencies, ECAs. So far, however, only few ECAs have considered human rights aspects in awarding guarantees. But ECAs ought to "(...) *require clients to perform adequate due diligence on their potential human rights impact*".⁴² This would enable them "(...) *to flag up where serious human rights concerns would require greater oversight – and possibly indicate where State support should not proceed or continue*".⁴³ Nevertheless, here too, the Report fails to mention any concrete recommendations for action.
- **Revision of OECD Guidelines:** The only international instrument in the area of CSR mentioned explicitly in the Ruggie Report is the OECD Guidelines for Multinational Enterprises. Here, he clearly complains that in their human rights provisions, the Guidelines "*not only lack specificity, but in key respects have fallen behind the voluntary standards of many companies and business organizations*".⁴⁴ For this reason, he is in favour of reviewing the Guidelines – without making any proposal on what the revised Guidelines should look like in terms of their contents.
- **Use of Security Council sanctions:** In conflict regions in which the rule of law is not guaranteed, violations of human rights can be punished only insufficiently. In order to directly call companies to responsibility in these regions, the Ruggie Report points to the options for sanctions that the UN Security Council has. Its direct sanctions vis-à-vis individual companies have shown "*a restraining effect*" in the DR Congo, Sierra Leone and Liberia.⁴⁵ In this context, Ruggie refers to a report of the UN Secretary-General recommending that in future, better use be made of sanctions vis-à-vis companies.⁴⁶

The Specific Responsibility of Corporations

Regarding the issue of direct responsibilities that companies have to protect human rights, Ruggie repeats his basic criticism of the UN Norms and explicitly assumes a counter-position. In his words, the norms would have defined a "*limited list of rights linked to imprecise and expansive responsibilities*".⁴⁷ Instead, he calls for a definition of "*the specific responsibilities of companies with regard to all rights*".⁴⁸ In reality however, the UN Norms are by no means restricted to a limited number of rights but are based on a very comprehensive human rights approach. They merely combine these rights in 23 norms that are of particular relevance to the area of corporate activities.

He demonstrates that there is no point in limiting the responsibility of business to certain rights by referring to an examination of 320 cases of human rights violations that companies

⁴¹ Cf. Mann, Howard et al. (2005): IISD Model International Agreement on Investment for Sustainable Development. Winnipeg: IISD (www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

⁴² A/HRC/8/5, para. 40.

⁴³ Ibid.

⁴⁴ Ibid., para. 46.

⁴⁵ Ibid., para. 48.

⁴⁶ Cf. the UN Secretary-General's Report S/2008/18 of the 14th January 2008, paras. 16-18 and 64 (d), stating there that: "*The use of sanctions could be broadened to apply not only to belligerent States but also to non-state actors. In that regard, the Security Council should continue the debate it held in June 2007 on natural resources and conflict, examining options such as the use of sanctions, monitoring and reporting to increase transparency in the international private sector.*"

⁴⁷ A/HRC/8/5, para. 51.

⁴⁸ Ibid.

were involved in from 2005-2007.⁴⁹ Ruggie maintains that this examination shows that "there are few if any internationally recognized rights business cannot impact".⁵⁰

In order to define the specific responsibility of companies, Ruggie introduces the concept of "**due diligence**" in his report. In his words, this concept describes "the steps a company must take to become aware of, prevent and address adverse human rights impacts".⁵¹ A human rights due diligence process ought to comprise the following four elements in a company:

- A corporate **human rights policy** that can act as a guideline for the different fields of action of a company.
- The systematic conducting of **human rights impact assessments**.⁵²
- The **integration** of human rights policy in all areas of the company.
- **Monitoring and auditing processes** in order to check the implementation of the human rights policy.

The substantive content of a company human rights policy ought to be formed, "at a minimum", by the international bill of human rights and the ILO core conventions.⁵³

Responding to the issue of how the due diligence process for the area of human rights could be established in a company, Ruggie points to "comparable processes" which "are typically already embedded in companies because in many countries they are legally required to have information and control systems in place to assess and manage financial and related risks".⁵⁴ But Ruggie fails to recommend precisely such a comparable legal requirement for the area of human rights. Instead, he once again merely refers to industry and multi-stakeholder initiatives that ought to serve to "promote sharing of information, improvement of tools, and standardization of metrics".⁵⁵ It comes as no surprise that in Ruggie's view, it is above all the Global Compact that "is well-positioned to play such a role".⁵⁶

By dispensing with any legal provisions, Ruggie's concept of "due diligence" remains purely appellative and only addresses those companies that voluntarily subject themselves to this process, whereas his appeal has no effect precisely for the "black sheeps" among companies.

Sphere of influence and complicity

The Special Representative gives special focus to the terms "sphere of influence" and "complicity", thus fulfilling the mission of the Human Rights Commission which, in its description of his mandate in 2005, explicitly demanded that he "research and clarify the implications" of these concepts for companies. However, rather than clarifying them, the Report tends to qualify these terms.⁵⁷

In Ruggie's words, the term "**sphere of influence**" was used as a "spatial metaphor" in the Global Compact.⁵⁸ The spheres are described as concentric circles around a company, with a company's influence as well as responsibility decreasing from the inner (employees,

⁴⁹ The "Survey of Scope and Patterns of Alleged Corporate-Related Human Rights Abuse" will be published as an Addendum to the third Ruggie Report, cf. A/HRC/8/5/Add.2.

⁵⁰ A/HRC/8/5, para. 52.

⁵¹ Ibid., para. 56.

⁵² Cf. on this topic the special Report A/HRC/4/74 of the 5th February 2007.

⁵³ A/HRC/8/5, para. 58.

⁵⁴ Ibid., para. 56.

⁵⁵ Ibid., para. 64.

⁵⁶ Ibid.

⁵⁷ Titled "Clarifying the concepts of 'sphere of influence' and 'complicity'", a special Companion Report on these topics is to be published by the Special Representative in 2008, cf. A/HRC/8/16.

⁵⁸ A/HRC/8/5, para. 66.

shareholders) to the outer circles (suppliers, state institutions, etc.). Ruggie thinks that the term is still useful as a metaphor but not "*as a basis for attributing legal obligations to companies*".⁵⁹

However, at the same time, he also thinks that the picture of concentric circles is misleading, for "*it is not proximity that determines whether or not a human rights impact falls within the responsibility to respect, but rather the company's web of activities and relationships*".⁶⁰

Thus however, he is not questioning the fact that the influence of companies on human rights reaches beyond one's own company but rather the interpretation of sphere of influence formed by the Global Compact itself.

The term "**complicity**" is established more strongly legally, especially in the area of international criminal jurisdiction. The Ruggie Report stresses that "*the number of domestic jurisdictions in which charges for international crimes can be brought against corporations is increasing, and companies may also incur non-criminal liability for complicity in human rights abuses*".⁶¹

But even if a company cannot be directly held to account as an accomplice of human rights violations, there is a danger of high reputation costs if the company is deemed guilty in the eyes of the public. Ruggie claims that it is "*not possible to specify definitive tests for what constitutes complicity in any given context*".⁶² But in order to avoid complicity, companies should in all circumstances employ the above-described due diligence process, especially the human rights impact assessments, also taking into consideration the relationships with external actors.

Ruggie's opposition against a binding treaty

John Ruggie has repeatedly stressed that he rejects any legally binding instrument to regulate companies at global level. In an article written for Ethical Corporation in May 2008, he refers to three reasons for this:⁶³

1. Treaty-making can be "*painfully slow*".
2. A treaty-making process "*risks undermining effective shorter-term measures to raise business standards (...)*".
3. Serious questions remain "*about how treaty obligations would be enforced*".

None of the three statements is particularly convincing as an argument against global regulations for companies, for they all apply to most instruments of international law. If governments had acted in accordance with Ruggie's logic, there would be neither a Covenant on Civil and Political Rights nor a Covenant on Economic, Social and Cultural Rights. For their negotiation and ratification processes also made "painfully slow" progress. The negotiations on climate protection give an example that short-term measures of like-minded governments are perfectly conceivable in spite of obstacles during negotiations at global level, for example regarding the promotion of renewable energies. And that problems occur in enforcing conventions would also be an argument against many of the ILO conventions – without their rationale being seriously disputed for this reason.

So it would be perfectly feasible to start a treaty-making process now, while simultaneously taking shorter-term practical steps. But even with such a strategy, Ruggie sees four "*serious risks*":

⁵⁹ Ibid.

⁶⁰ Ibid., para. 71.

⁶¹ Ibid., para. 74.

⁶² Ibid., para. 76.

⁶³ John Ruggie: Business and human rights – Treaty road not travelled. 6 May 2008.

(www.ethicalcorp.com/content.asp?contentid=5887)

1. Governments "*may invoke the fact of treaty negotiation as a pretext for not taking other significant steps, including changing national laws (...).*"
2. The limited capacities of governments, NGOs and companies would be tied down by a treaty-making process, thus making them unavailable for "*practical and urgently needed innovations*".
3. A treaty agreed on a consensus among governments would only reflect the lowest common denominator and "*would not match the highest voluntary standards today*".
4. Pressure from NGO campaigns on companies "*to perform at the highest voluntary level*" would be less effective if the latter could appeal to lower international standards.

These arguments are speculative, too, and can easily be neutralised by counter-arguments.

Ad 1: Governments regularly argue that they are unable to introduce higher standards and more stringent national laws unilaterally precisely because this would put them at a locational disadvantage. One particularly obvious example in this respect is corporate taxation.

Ad 2: All experiences with international negotiations have shown that relatively few experts are involved in the negotiating processes proper. This does not tie down capacities to a significant degree. But at the same time, with an international negotiating process, a discursive forum can be created via which public awareness can be raised and political pressure can be created. Here too, the climate negotiations are a good example.

Ad 3: If international negotiating processes are initially driven by a coalition of like-minded governments and NGOs, as was the case, for example, with the Anti-personnel Mines Convention or the preparations for the founding of the International Criminal Court, the result by no means needs to represent the smallest common denominator, which is determined by some governments intent on blocking the process. But at the same time, in the case of globally agreed conventions, too, there is the option of a sub-group of like-minded governments to go beyond the minimum consensus with the aid of Optional Protocols.

Ad 4: Civil society organisations will by no means be deterred from calling on companies and governments to meet further-reaching commitments in their campaigns by the existence of international agreements at low level. Thus the existence of the core labour standards of the ILO by no means represents an obstacle to trade unions to fighting for more far-reaching rights at national level vis-à-vis companies. And neither the insufficient Framework Convention on Climate Change nor the Kyoto Protocol have prevented environmental groups from calling oil companies and automobile corporations to account for the detrimental effects that their products have on the climate.

Finally, Ruggie's argument that there are no realistic enforcement instruments for a possible treaty and that it would therefore rapidly lose legitimacy is hardly convincing either. He is probably right in claiming that the enforcement of global corporate rules would not yield any value added if it was restricted to the existing legal instruments in the home or host states of the companies. Also, the option of an international court for companies really is hardly conceivable for the foreseeable future (although this was also thought of the realisation of an International Criminal Court just two decades ago). And the notion of elevating the Treaty Body of a global corporate convention to the status of a supervisory body for the 77,000 Transnational Corporations and committing them to report to this Treaty Body is not only unrealistic but is not seriously being advocated by anyone.

In contrast, the arbitration procedures along the lines of WTO and the international investment agreements would present perfectly feasible models. They show that enforcement instruments can indeed be employed efficiently and in an unbureaucratic

manner provided that there is corresponding political will. Ruggie, however, does not mention this option at all.

In the third part of his Report, he at least describes the current range of complaints and damage compensation instruments in the field of human rights and concedes that "*yet this patchwork of mechanisms remains incomplete and flawed*".⁶⁴ Ruggie's conclusion is that "*It must be improved in its parts and as a whole*".

Mechanisms to investigate, punish and redress

The most important part of the Ruggie Report deals with the options that victims of corporate human rights violations have to complain and obtain compensation for damages sustained. Here, the Report distinguishes between State-based judicial and non-judicial mechanisms and non-State mechanisms.

The Report complains that "*judicial mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse*".⁶⁵ At least, it notes, progress is slowly being made, for instance regarding extraterritorial complaint options. One example is the Alien Tort Claims Act already described in the 2007 Report, on the basis of which companies were brought to court in the USA in more than 40 cases since 1993 to account for human rights violations committed outside the USA. However, there is still considerable scope for improvements. Ruggie's demand:

*"States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should address obstacles to access justice, including for foreign plaintiffs – especially where alleged abuses reach the level of widespread and systematic human rights violations."*⁶⁶

Among the State-based non-judicial mechanisms, the Report above all highlights two dealing with grievances relating to human rights violations. At national level, they are the National Human Rights Institutes (NHRI). They deal in different manners and with different intensity with grievances vis-à-vis companies.⁶⁷ Ruggie holds that "*the actual and potential importance of these institutions cannot be overstated*".⁶⁸

At international level, complaints of corporate human rights violations may in particular be addressed to the National Contact Points (NCPs) of the OECD Guidelines for Multinational Enterprises. The Report regards the NCPs as "*potentially an important vehicle for providing remedy*".⁶⁹ But it also notes that they have "*too often failed to meet this potential*". Above all, "*the housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest*".⁷⁰ In order to avoid this, the NCPs would have to be turned into independent institutions. The Report refers to the commendable example of The Netherlands, where the NCP consists of an independent four-person multi-stakeholder group. The Report does not address a number of further deficits that the OECD complaints procedure has and that have again and again been criticised by NGOs and trade unions. This includes restricting the complaints procedure to investment cases and the lack of effective sanctioning and compensating instruments.

The Report also regards complaints mechanisms as indispensable for companies and multi-stakeholder or industry initiatives. It notes: "*An effective grievance mechanism is part of the*

⁶⁴ A/HRC/8/5, para. 87.

⁶⁵ Ibid., para. 88.

⁶⁶ Ibid., para. 91.

⁶⁷ Cf. here the special survey "Business and Human Rights: A Survey of NHRI Practices", to be published together with OHCHR in 2008.

⁶⁸ A/HRC/8/5, para. 97.

⁶⁹ Ibid., para. 98.

⁷⁰ Ibid.

*corporate responsibility to respect.*⁷¹ At the same time it addresses the warning to multi-stakeholder initiatives that *"in the absence of an effective grievance mechanism, the credibility of such initiatives and institutions may be questioned."*⁷² The Report formulates six minimum requirements for such complaints mechanisms:⁷³

1. Legitimate: Clear, transparent and sufficiently independent governance structures;
2. Accessible: Information on the mechanism must be publicized to those who may wish to access it;
3. Predictable: A clear and known procedure with a time frame;
4. Equitable: Fair and equitable terms for all parties engaged;
5. Rights-compatible: Outcomes and remedies must accord with internationally recognized human rights standards;
6. Transparent: Sufficient transparency of process and outcome.

The Ruggie Report does not cite examples of companies or multi-stakeholder initiatives that already fulfil these criteria.

Instead, it notes that in the current *"patchwork of grievance mechanisms (...) considerable numbers of individuals whose human rights are impacted by corporations, lack access to any functioning mechanism that could provide remedy"*.⁷⁴ This is not only due to a lack of information but also to the *"(...) limitations in the competence and coverage of existing mechanisms"*.⁷⁵

In response to these deficits, the Report cites the proposals for the creation of a *"global ombudsman function that could receive and handle complaints"*.⁷⁶ Although this represents the only substantial innovation in the entire Report of the Special Representative, he above all refers to the problems that the creation of such an institution would entail and is unable to wholeheartedly support such a notion.

And yet it is this proposal that the international lobbying associations of business, the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC), have reacted to very sensitively in their preliminary commentary on the Ruggie Report. Whereas they give a mainly positive assessment of the other passages of the Report, they declare: *"We do, however, have serious reservations about the idea of establishing a global ombudsman function as part of the business and human rights mandate. There are no convincing arguments that establishing an international ombudsman – even if it were practical and possible – would do anything to address the lack of access to effective and impartial judicial mechanisms at the national and local levels that the Special Representative mentions."*⁷⁷

They are thus indicating that governments will have to reckon with considerable resistance on the part of business if they go beyond the existing mechanisms and voluntary arrangements in combating corporate violation of human rights.

⁷¹ Ibid., para. 93.

⁷² Ibid., para. 100.

⁷³ Ibid., para. 92.

⁷⁴ Ibid., 102.

⁷⁵ Ibid., para. 103.

⁷⁶ Ibid.

⁷⁷ Joint initial views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the third report of the Special Representative of the UN Secretary-General on Business and Human Rights, May 2008. (www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf)

3. Conclusion and next steps

In its first sentence, the Ruggie Report notes: "*The international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm.*"⁷⁸

It is just as right in doing so as it is in identifying a wide governance gap preventing adequate sanctioning and reparation of corporate human rights violations.

However, Ruggie's self-restriction to solutions which he deems feasible and politically expedient in the short term prevents him from addressing the gap he notes with adequate governance solutions.

Not only does his explicit distinction between the "State duty to protect" and the "corporate responsibility to respect" restrict the extent of corporate duties, but it also limits the degree of their commitments. For in legal terms, "responsibility" is much weaker than "duty". Thus the Report does not go beyond a description of the current status quo. Innovative ideas to develop international law vis-à-vis companies will be sought in vain.

At least the Special Representative has had a wealth of material developed in his three years in office so far that has enriched the discourse on business and human rights and requires further evaluating.⁷⁹ This includes, for example, the above-mentioned "Survey of Scope and Patterns of Alleged Corporate-Related Human Rights Abuse".⁸⁰

In addition, the Ruggie Report refers to some issues to be addressed by reforms, which, developed consistently, could indeed bring about some progress. Among the following ten steps, the first seven immediately take up the recommendations of the Ruggie Report, while the last three go beyond them, filling in the blanks in this report.

1. Sustainability Reporting: Governments ought to foster independently verified sustainability reporting following the Guidelines of the Global Reporting Initiative – up to mandatory sustainability reports, especially for State-owned enterprises and sovereign wealth funds.

2. Bilateral Investment Treaties (BITs): The interests of human rights have to be given more consideration in BITs in future. An initial step would be to establish human rights, as well as environmental and social clauses and duty of disclosure, for governments and enterprises in all newly negotiated bilateral and regional investment agreements.

3. Linking ECAs to human rights: Human rights ought to be taken more strongly into account in granting government guarantees for export credits. This includes mandatory human rights impact assessments ahead of awarding the guarantees as well as the withdrawal of a guarantee if a company supported is proven to have been involved in the violation of human rights.

4. Revision of the OECD Guidelines: The OECD ought to introduce a process on the revision and tightening of Guidelines for Multinational Enterprises, especially in the field of human rights. At the same time, the National Contact Points ought to be reorganised and set up as independent institutions outside the ministries of economics.

5. Use of Security Council sanctions: The instrument of Security Council sanctions vis-à-vis individual enterprises implicated in human rights violations in conflict regions ought to be made better use of. Here however, care has to be taken that the Veto Powers do not exempt companies from their own countries from prosecution.

⁷⁸ A/HRC/8/5, para. 1.

⁷⁹ Cf. here the complete "List of documents prepared by and submitted to SRSG on Business and Human Rights" as of 1 May 2008 (www.reports-and-materials.org/Special-Rep-documents-list-1-May-2008.pdf). All documents are available on the excellent website www.business-humanrights.org.

⁸⁰ A/HRC/8/5/Add.2.

6. Strengthening national complaints mechanisms: Judicial and non-judicial complaints procedures vis-à-vis companies ought to be extended. This includes adopting laws along the lines of the US American Alien Tort Claims Act as well as extending the mandate and capacities of the National Human Rights Institutions (NHRI) in order to handle grievances related to the human rights performance of corporations effectively.

7. Creation of a global Ombudsperson function: The Terms of Reference for a global ombudsperson who can receive and handle complaints against individual enterprises complementary to legal recourse at national and international level ought to be developed.

8. Special Procedure on business and human rights: The UN Human Rights Council should adopt a mandate for a UN special procedure (e.g., independent expert or group of experts) on business and human rights. This procedure should have a remit to research and analyze patterns of corporate human rights abuses with reference to real situations, to conduct field visits, to receive individual communications from victims of human rights abuses and human rights defenders working on their behalf, to issue recommendations to states and companies and to contribute to conceptual development within this field.

9. Creation of an International Advisory Centre: In order to support Governments of developing countries in their negotiations with transnational investors, an International Advisory Centre (similar to the one proposed under the former UN Centre for Transnational Corporations) could be established through the UN to provide legal advice in contract negotiations with TNCs, especially on Host Government Agreements.

10. Steps towards a framework agreement on corporate accountability: Any journey, as long as it may be, always begins with the first step. Governments ought to take this first step and commence preparations for an international legal instrument to establish duties of corporations. With such a process, a discursive forum could be created that could promote debate on the responsibilities of Transnational Corporations under the conditions of globalisation. It could bring together the still often separately held discourses on corporate accountability in the areas of human rights, environmental and consumer protection, labour, combating corruption and taxation.

A consensus among all member states of the United Nations is not required to this end. Following the example set by the Anti-personnel Mines Convention and the run-up process to the International Criminal Court, a pacesetter coalition of like-minded governments and non-state actors could initially be formed to take the first steps.

At the end of his Report, John Ruggie correctly notes that the United Nations "*must lead intellectually and by setting expectations and aspirations*".⁸¹ However, this role demands far-sightedness, and therefore far more than merely restricting oneself to what is feasible in the short term and to what is politically pragmatic.

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⁸¹ A/HRC/8/5, para. 107.