

Articles

Two Steps Forward, One Step Back: The 2010 Report by the UN Special Representative on Business and Human Rights

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Abstract

The relationship between human rights law and business has emerged in recent years as one of the most topical to be discussed and put on the agenda almost worldwide. The activities of corporations in this globalized environment have often served as the catalyst for human rights violations; due to the lack of institutional protection, some corporations are able to exploit regulatory lacunae and the lack of human rights protection. On 9 April 2010 Professor John Ruggie, the United Nations Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises, submitted his fifth Report under the title "Business and Human Rights: Further steps toward the operationalization of the 'protect, respect and remedy' framework." The objective of this short article is to examine his 2010 report and to establish whether this Report has contributed to clarifying standards in the field of human rights and business.

A. Introduction

In Roman Polanski's 2010 political thriller, *Ghost*, a corporation controls with the help of carefully selected politicians the decisions of the most influential and powerful governments on the world stage. This eventually leads to an assassination of a ghost-writer after he leaves a party having discovered the hidden identity of the wife of the assassinated British Prime minister. Such a scene may have been presented as a work of the imagination, but it should not be dismissed too quickly as it nevertheless illustrates the inherent conflict between human rights and business issues. The relationship between human rights law and business has emerged in recent years as one of the most topical to be discussed and put on the agenda almost worldwide. The activities of corporations in this globalized environment have often served as the catalyst for human rights violations; due to the lack of institutional protection, some corporations are able to exploit regulatory lacunae and the lack of human rights protection. Academics and practitioners alike have in

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recent decades attempted to find an answer to the conundrum of corporate responsibility for fundamental human rights and to date a comprehensive solution has been sought in vain. Articulating the appropriate normative response to deal with challenges posed by corporate activities and globalization is therefore a long-term project.¹ It appears that what is required is an equal emphasis of rights and obligations of corporations.

Professor John Ruggie (hereinafter Ruggie), the United Nations Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises submitted his fifth Report under the title "Business and Human Rights: Further steps toward the operationalization of the 'protect, respect and remedy' framework."² The aim of this short article is to examine his 2010 report and to participate in the ongoing debate as to whether corporations have human rights obligations and responsibility in national and international law. As Ruggie correctly recognizes: "there is no single silver bullet solution ... in the business and human rights domain."³ This article follows the argument that corporations have substantive human rights obligations and responsibility to observe human rights. As a way of providing a background for the main part of this article, section B briefly discusses Ruggie's mandate and his 2006 - 2009 Reports to the United Nations Human Rights Council. Section C describes the three main pillars of the Ruggie framework. This is followed by an analysis of the 2010 Report in section D. The objective is to establish whether this Report can be said to have contributed to clarifying and setting the standard in the field of business and human rights.

B. Background

I. The UN Norms

A number of attempts to regulate corporate activities notoriously failed at the United Nations level in the 1970s and 1980s when no consensus was reached on the adoption of a code of conduct for transnational corporations. On 13 August 2003, the UN Sub-

¹ See John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 819 (2007).

² John Ruggie, United Nations, General Assembly, Human Rights Council, Fourteenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework, available at: <http://198.170.85.29/Ruggie-report-2010.pdf>, (hereinafter the 2010 report) (last accessed: 17 November 2010).

³ *Id.*, 7.

Commission on the Promotion and Protection of Human Rights approved the “Norms on the Responsibilities of Transnational Corporations and Other Business enterprises with regard to Human Rights” together with accompanying Commentary as a document specifying the human rights obligations of corporations.⁴ The UN Norms offer human rights rules and principles for companies in areas ranging from international criminal and humanitarian law, civil, political, economic, social, and cultural rights, as well as consumer protection and environmental practices.⁵ The UN Norms have been described by their principal author as a “restatement and clarification of the existing human rights obligations of corporations.”⁶ However, the UN Norms have attracted a great deal of criticism, perhaps unwarranted, for the perceived lack of certainty of corporate human rights obligations. The Norms were not adopted by the then UN Commission on Human Rights. Instead, the Commission asked the UN Secretary-General to appoint a Special Representative on the issue of corporations and human rights. In July 2005, John Ruggie, a professor at Harvard University, was appointed Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.

II. 2006, 2007, 2008 and 2009 Ruggie Reports on Human Rights and Business

Ruggie mapped out, clarified and researched in his first two Reports the fundamental legal and policy issues of corporate responsibility and accountability.⁷ The Reports identified

⁴ ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003). ECOSOC, Commission on Human Rights, Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/DEC/2004/116 (20 April, 2004). The Commission, in Resolution 2004/116 of 20 April 2004, expressed the view that, while the Norms contained ‘useful elements and ideas’ for its consideration, as a draft the proposal had no legal standing.

⁵ Surya Deva, *UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction*, 10 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 494, 498 (2004).

⁶ David Weissbrodt, Maria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW, 901, 913-915, 921(2003).

⁷ See Interim Report of the Special Representative, U.N. Document E/CN.4/2006/97; HRC, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, U.N. Doc. A/HRC/4/35 (19 February 2007); HRC, State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries, U.N. Doc. A/HRC/4/35/Add.1 (13 February 2007) (prepared by John Ruggie); HRC, Corporate Responsibility under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops, U.N. Doc. A/HRC/4/35/Add.2 (15 February 2007) (prepared by John Ruggie); HRC, Human Rights Policies and Management

standards currently available for holding corporations responsible. They acknowledged that, in many cases, countries are failing to meet their obligations to protect people from human rights violations by corporations. The first Report, published in 2006, framed the fundamental issues for the relationship between business and human rights. It identified three broad contextual factors in the evolving business and human rights relationship: "institutional features of globalization; overall patterns in alleged corporate abuses and their correlates; and their characteristic strengths and weaknesses of existing responses established to deal with human rights challenges."⁸ Lastly, the 2006 Report argued for a principled form of pragmatism in the promotion and protection of human rights as they relate to business.⁹ In this context, the 2007 Report further investigated standards of corporate responsibility and accountability, state responsibility in regulating and adjudicating corporate activities and corporate complicity.¹⁰ In the 2008 Report, Ruggie proposed a three-pillar framework for corporate accountability for human rights, which he describes as "Protect, Respect and Remedy". The framework "rests on differentiated but complementary responsibilities,"¹¹ which include: the duty of the state to protect against human rights violations by or involving corporations; the corporate responsibility to respect human rights; and effective access to remedies.¹² In his 2009 report, Ruggie notes that corporate responsibility to *respect* human rights" has acquired near-universal recognition by all stakeholders."¹³ Going beyond the previous report, the 2009 Report

Practices: Results from Questionnaire Surveys of Governments and Fortune Global 500 Firms, U.N. Doc. A/HRC/4/35/Add.3 (28 February 2007) (prepared by John Ruggie); HRC, Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations, U.N. Doc. A/HRC/4/35/Add.4 (8 February 2007) (prepared by John Ruggie); HRC, Human Rights Impact Assessments – Resolving Key Methodological Questions, U.N. Doc. A/HRC/4/74 (5 February 2007) (prepared by John Ruggie).

⁸ John Ruggie's 2006 report, 8.

⁹ John Ruggie's 2008 report, 81.

¹⁰ John Ruggie, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts", Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035, 9 February 2007.

¹¹ John Ruggie's 2008 report, para. 9.

¹² Olufemi Amao, Review of the report of the Special Representative of the Secretary-General on the issue of human rights and Transnational corporations and other business enterprises; Professor John Ruggie to the United Nations Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' HRC/8/5, 7 April 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131682 (last accessed: 17 November 2010), 5.

¹³ John Ruggie's 2009 report, para. 46. See J. Letnar Čerňič, A Short Comment on the Report of the 2009 UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Libertas Working Paper 02/2009*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491548 (last accessed: 17 November 2010).

recognizes that “there may be situations in which companies have additional responsibilities. But the responsibility to respect is the baseline norm for all companies in all situations.”¹⁴

C. Ruggie’s 2010 report

In his 2010 Report, Ruggie follows the three-pillar framework for corporate accountability for human rights outlined and developed in his 2008 Report. The 2008 Report proposed a normative framework comprising three main components: the duty of the state to protect against human rights violations by or involving corporations; corporate responsibility to respect human rights; and effective access to remedies.¹⁵ Along the same lines, the 2010 Report notes in its introduction that:

The framework is intended to help close those gaps. Its three pillars are distinct yet complementary. The State duty to protect and the corporate responsibility to respect exist independently of one another, and preventative measures differ from remedial ones. Yet, all are intended to be mutually reinforcing parts of a dynamic, interactive system to advance the enjoyment of human rights.¹⁶

Ruggie argues that the framework can assist governments, companies and civil society “to reduce the adverse human rights consequences of these misalignments.”¹⁷ All Ruggie’s Reports employ the approach “principled pragmatism”, which Ruggie defines 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

¹⁴ *Id.*, para. 48.

¹⁵ See John Ruggie’s 2010 Report, *supra* note 2, para. 2.

¹⁶ *Id.*

¹⁷ John Ruggie’s 2008 report, para. 17. See also John Knox, Concept Paper on Facilitating Specification of the Duty to Protect, Olufemi Amao; Review of the report of the Special Representative of the Secretary-General on the issue of human rights and Transnational corporations and other business enterprises, Professor John Ruggie to the United Nations Human Rights Council, “Protect, Respect and Remedy: a Framework for Business and Human Rights” HRC/8/5, 7 April 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131682 (last accessed: 17 November 2010). Prepared for Special Representative John G. Ruggie, 14 December 2007, available at: <http://www.business-humanrights.org/Documents/Knox-Specification-of-Duty-to-Protect-14-Dec-2007.pdf> (last accessed: 17 November 2010).

best in creating change where it matters most – in the daily lives of people.”¹⁸ In this way, the following paragraphs describe and attempt to analyze each of the three components of the framework “Protect, Respect and Remedy” as presented by Ruggie in his 2010 Report. However, as in his previous Reports, Ruggie does not attempt to explain how his proposed framework relates to the generally accepted framework under international human rights law, where state obligations are usually classified into three categories: the obligation to respect, the obligation to protect and the obligation to fulfill.¹⁹

I. State Obligations

The 2010 Report primarily recognizes the responsibility of states in the protection and promotion of human rights. The Report discusses possible measures states are to adopt to protect and promote human rights and prevent human rights violations.²⁰ Ruggie notes that several states “currently lack adequate policies and regulatory arrangements for effectively managing the complex business and human rights agenda.”²¹ In order to enhance state ability to work efficiently in promoting and protecting human rights in the area of human rights and business, Ruggie has outlined five areas of priority. These areas are: “safeguarding their own ability to meet their human rights obligations; considering human rights when they do business with business; fostering corporate cultures respectful of rights at home and abroad; devising innovative policies to guide companies operating in conflict-affected areas; and examining the cross-cutting issue of extraterritorial jurisdiction.”²² The identified five areas of concern are very ambitious and it is no secret that they will not be followed by each and every state. The majority of states have difficulties already in upholding their own human rights obligations, therefore corporate compliance with human rights norms may not be at the top of their agenda. Nonetheless,

¹⁸ John Ruggie’s 2006 Report, para. 82.

¹⁹ For a detailed discussion on tripartite human rights typology see, Asbjørn Eide, Right to Adequate Food as a Human Right, Human Rights Study Series No 1, United Nations publication (34-37, Sales No. E.89.XIV.2) (1989); Eide, The right to adequate food and to be free from hunger -- Updated study on the right to food, submitted by Mr. Asbjørn Eide in accordance with Sub-Commission decision 1998/106, UN Doc E/CN.4/Sub.2/12 (1999); Magdalena Sepulveda, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights (Intersentia, 2003). See also Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5 HUMAN RIGHTS LAW REVIEW, 81-103 (2005). BRIGIT C.A TOEBES, THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW (1999) 312-316. G.J.H. van Hoof, *Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, in THE RIGHT TO FOOD, 106-108 (P. Alston and K. Tomaševski eds., 1984). NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS, INTERSENTIA (2002), chapter 4 [Human Rights Obligations of Corporations].

²⁰ John Ruggie’s 2010 Report, *supra* note 2, para. 2.

²¹ *Id.*, para. 18.

²² *Id.*, para. 19.

under long-established doctrine, states have an obligation to ensure the protection of one's enjoyment of human rights via the tripartite obligation to respect, protect and fulfill human rights. More specifically, states are obliged to respect, protect and fulfill the fundamental human rights of individuals against corporate conduct in violation of human rights.

II. The Corporate Responsibility to Respect Human Rights

Several scholars argue that the obligation of corporations to respect human rights means that corporations are obliged to refrain from interfering with the enjoyment of human rights of others.²³ In other words, it is an obligation to do no harm to the human rights of others.²⁴ Ruggie explains that "the term 'responsibility' to respect, rather than 'duty'", indicates "that respecting rights is not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws."²⁵ Corporate obligation to respect applies to "the entire spectrum of internationally recognized rights"²⁶, however "some rights will be more relevant than others in particular industries and circumstances...".²⁷ For instance, the protection of right to life and freedom from torture will be more relevant in the extractive industry sector than in the textile industry sector where the prohibition of child labor will be more important. Ruggie argues that the scope of corporate responsibility to protect human rights is "defined by the actual and potential human rights impacts generated through a company's own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-State actors and State agents."²⁸

It would have been more persuasive and interesting if Ruggie had attempted to identify when corporations also have obligations to protect and fulfill human rights.²⁹ To claim that corporations have a responsibility to protect human rights is not controversial. However, in this context he recognizes that "companies may undertake additional human rights

²³ NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS. IN SEARCH OF ACCOUNTABILITY (2002), ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006), Chapter 6 [Corporations and Human Rights].

²⁴ *Id.*

²⁵ *Id.*, para. 55.

²⁶ *Id.*, para. 59.

²⁷ *Id.*

²⁸ *Id.*, para. 58.

²⁹ NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS. IN SEARCH OF ACCOUNTABILITY (2002), A. CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006), see *supra* note 23.

commitments for philanthropic reasons, to protect and promote their brand, or to develop new business opportunities.”³⁰ In some circumstances, the corporate obligations may extend beyond “do not harm”. For example, Ruggie argues that in the case of natural disasters or catastrophes “there may be compelling reasons for any social actor with capacity to contribute temporarily” and “actions by some companies in certain situations may be both reasonable and desirable.”³¹ However, Ruggie finds it troubling that “corporate human rights responsibilities as a general rule should be determined by companies’ capacity, whether absolute or relative to States.”³² Nonetheless, for Ruggie corporate responsibility to respect human rights is there “independently of States’ duties or capacity.”³³ In contrast, there is at least a growing support that corporations also have a normative obligation in national legal orders to protect human rights from potential violations of third parties.

Most national legal orders impose legal obligations upon corporations to respect human rights. However, as Ruggie notes “there are situations where prudence suggests that companies should adopt a legal compliance approach even though precise legal standards may not yet be fully defined.”³⁴ Despite this, many companies are finding “it difficult to grasp that they could be held responsible for contributing to human rights abuses committed by third parties, such as State or other security forces, connected to their operations.”³⁵ It is therefore required that “improvements in companies’ internal control and oversight systems” are made.³⁶ An additional component of corporate responsibility is the obligation to conduct due diligence. The due diligence process should be “ongoing and dynamic” and transparent and accessible.³⁷ All in all, it seems that Ruggie's arguments could have been stronger if he would derive corporate responsibility to respect from national legal orders.

³⁰ *Id.*, para.63.

³¹ *Id.*

³² *Id.*, para. 64.

³³ *Id.*, para.65.

³⁴ *Id.*, para.66.

³⁵ *Id.*, para.76.

³⁶ *Id.*, para.78.

³⁷ *Id.*, para. 84.

III. Access to Remedies

Victims of corporate human rights violations have *hic et nunc* at their disposal only a few effective legal avenues for enforcing corporate responsibility for human rights violations. In his 2010 Report, Ruggie distinguishes between four levels of complaints mechanisms: company-level mechanisms, non-judicial mechanisms, judicial mechanisms and complimentary mechanisms. Some companies have an established internal complaints mechanism. Those internal corporate complaints mechanisms do not prevent individuals resorting to “State-based mechanisms, nor should they undermine trade union representation and collective bargaining arrangements.”³⁸ However, those mechanisms are only a few. Ruggie submits that they “serve as early warning systems” and provide a forum for complaints to “be addressed and remediated directly, thereby preventing harm from being compounded and grievances from escalating.”³⁹ Internal complaint mechanisms are usually organized by a corporation or they are sector-wide. The second category includes non-judicial state mechanisms. National human rights institutions are one of the examples of such institutions, however they are in most cases not competent to hear individual complaints. Therefore, Ruggie argues that “governments should reconsider this limitation as one important step towards enhancing access to effective remedy.”⁴⁰ National human rights institutions are important mechanisms, however “neither exists in all States, and they rarely if ever provide full coverage of business-related human rights complaints.”⁴¹ Consequently, “these gaps contribute to the heavy reliance by aggrieved parties and their representatives on campaigns and lawsuits against companies.”⁴² The third category consists of state judicial mechanisms. Judicial protection of human rights functions at three levels from the viewpoint of states. The first layer forms national legal orders, where corporate responsibility can, arguably, be primarily enforced. The next layer is the regional layer, while the final layer includes the international level, particularly the UN mechanisms. Admittedly, some national legal orders do not often offer effective remedies and reparations and, in many cases, alleged perpetrators cannot be or are not held responsible. Fourth, Ruggie argues that “industry-based and multi-stakeholder initiatives can enable companies to increase the reach and reduce the costs of grievance mechanisms.”⁴³ Whilst corporate industry-wide sectoral initiatives have their limitations,

³⁸ *Id.*, para. 91.

³⁹ *Id.*, para. 92.

⁴⁰ *Id.*, para. 97.

⁴¹ *Id.*, para. 101.

⁴² *Id.*

⁴³ *Id.*, para. 115.

they provide an important role, particularly in those jurisdictions where judicial mechanisms are non-existent or unable or unwilling to tackle corporate human rights violations. Summing up, Ruggie argues that “all types of mechanisms – State-based non-judicial and judicial, company-based, as well as collaborative and international – remain underdeveloped.”⁴⁴ It appears that it is not important which mechanism is more appropriate or effective, but how to get the different levels to connect and to improve their impact by combining their different advantages. In spite of these attempts, however, the combining of judicial protection with non-judicial and voluntary forms of enforcement is not entirely problem free as it may underline victims’ access to justice.

IV. Summing Up

In the concluding paragraphs of 2010 Report, Ruggie confidently argues that his three pillar framework is a good foundational platform for the field of human rights and business. He reasons his statements in that the framework of “respect, protect and remedy” consists of “preventative and remedial measures” and that “it involves all relevant actors: States, businesses, affected individuals and communities, civil society and international institutions.”⁴⁵ Over the next year, Ruggie plans to develop and draft “a set of guiding principles for the operationalization of the framework’s distinct yet complementary and interactive elements and processes.”⁴⁶ He also called for the creation of an “advisory and capacity-building function within the United Nations Office of the High Commissioner for Human Rights.”⁴⁷ It remains to be seen whether his proposals will be successful.

D. Analysis of 2010 Report

The Ruggie 2010 Report makes a welcome and original contribution to the growing field of human rights and business. Having gone through Ruggie’s 2010 Report “Protect, Respect and Remedy: A Framework for Business and Human Rights”, it is now time to draw some, at least preliminary, conclusions as to the contribution of the 2010 Report to the field of human rights law and business.⁴⁸ The 2010 Report has received different responses.⁴⁹

⁴⁴ *Id.*, para. 117.

⁴⁵ *Id.*, para. 22.

⁴⁶ *Id.*, para. 124.

⁴⁷ *Id.*, para. 126.

⁴⁸ Scott Jerbi, *Business and Human Rights at the UN : What Might Happen Next?*, 31 HUMAN RIGHTS QUARTERLY: A COMPARATIVE AND INTERNATIONAL JOURNAL OF THE SOCIAL SCIENCES, PHILOSOPHY, AND LAW, 299-320 (2009), and Larissa Van Den Herik, Jernej Letnar Čerňič, *Regulating Corporations under International Law: From Human Rights to*

While most responses, particularly from the side of state governments, have so far been positive, there are also some responses which offer a critical perspective on the Report.⁵⁰ Clifford Chance observes that the 2010 Report “demonstrates a practical and balanced approach.”⁵¹ In contrast, Amnesty International calls for “greater clarity ... on legal measures that states can take to regulate companies.”⁵² The non-governmental organization Human Rights Advocate notes that “the Framework leaves it to domestic governments to define the scope of legal compliance with human rights, seeming to absolve the corporation from any obligations outside of a call for due diligence.”⁵³ They also urged Ruggie to employ UN norms “as a foundation for developing a set of legally binding standards addressing the obligation of corporate actors towards the promotion and protection of human rights.”⁵⁴ The International Commission of Jurists notes that Ruggie’s “statement in paragraph 66 that ‘the corporate responsibility to respect is not a law-free zone’ deserves to be developed more extensively and prominently.”⁵⁵ The

International Criminal Law and Back Again, 10 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, 725-743. See also James Harrison, 2010 Ruggie Report on Business and Human Rights, available at: <http://internationallawobserver.eu/2010/04/29/2010-ruggie-report-on-business-and-human-rights> (last accessed: 17 November 2010).

⁴⁹ Statement by Amnesty International, 1 June 2010, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010> (last accessed: 17 November 2010).

⁵⁰ See, for example, Larry Cata Becker, A Consideration of John Ruggie’s 2010 Report to 14th session of UN Human Rights Council: “Business and Human Rights: Further steps toward the operationalization of the ‘protect, respect and remedy’ framework”, available at: <http://lcbackerblog.blogspot.com/2010/05/consideration-of-john-ruggies-2010.html> (last accessed: 17 November 2010). See also statement by Stéphane Brabant, Herbert Smith law firm - 28 Apr 2010, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010/Comments#43773> (last accessed: 17 November 2010).

⁵¹ Statement by Clifford Chance, June 2010, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010/Comments> (last accessed: 17 November 2010).

⁵² Statement by Amnesty International, 1 June 2010, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010> (last accessed: 17 November 2010).

⁵³ Statement by Human Rights Advocates, 3 June 2010, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010> (last accessed: 17 November 2010).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Statement by International Commission of Jurists, ICJ Intervention in the interactive dialogue with the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other

International Commission of Jurists makes clear that in future Ruggie's guidelines should make a clear recommendation to business sector as regards "the content of their human rights responsibilities", "modalities in which business may directly or indirectly become involved in human rights abuses", and "the steps they must take to put in practice those responsibilities."⁵⁶ Even more critically, the ESCR-net and Human Rights Watch jointly note that "the corporate responsibility to respect rights is not an obligation that current international human rights law generally imposes directly on companies but rather constitutes 'a standard of expected social conduct'". That view is open to debate and in any case the law is highly dynamic and can adapt to meet pressing needs.⁵⁷ The International Federation of Human Rights and Human Rights in China in a joint statement urged Ruggie to call on states to "provide victims with access to effective remedies."⁵⁸ The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights urged "all actors to interpret and extend existing mandates wherever possible as applicable to the corporate as well as the public sector."⁵⁹ All in all, it seems that civil society is of the opinion that Ruggie in his 2010 Report makes two steps in the right direction, followed by one step back.

The 2010 Report correctly argues that corporations can affect all human rights. It identifies some of the problems and challenges in the field of business and human rights. It lacks, however, suggestions for solutions of the conundrum of corporate responsibility. Ruggie rightly recognizes that states have a primary responsibility to ensure the respect and promotion of human rights. Nonetheless, it may appear that the framework "protect, respect and remedy" does not offer the right or most appropriate answer for establishing the normative framework in human rights law and business. Ruggie recognizes that corporations have obligations and responsibility to respect, but he refrains from addressing

business enterprises, 1 June 2010, p. 1, <http://www.ici.org/dwn/database/ICJStatement-HRC-01062010-BHR.pdf> (last accessed: 17 November 2010).

⁵⁶ *Id.*, 1-2.

⁵⁷ Joint Statement by ESCR-net, 4 June 2010, Statement by Human Rights Advocates, 3 June 2010, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010> (last accessed: 17 November 2010).

⁵⁸ Joint Statement by International Federation of Human Rights and Human Rights in China on the occasion of the Interactive Dialogue with the Special Representative on the issue of business and human rights during the Human Rights Council 14th session, June 2010, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010> (last accessed: 17 November 2010).

⁵⁹ Statement by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 1 June 2010, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010> (last accessed: 17 November 2010).

the question as to whether corporations also have obligations and responsibility to protect and fulfill the fundamental human rights of individuals. This is somehow surprising, particularly as some corporations have already recognized that they have also obligations to protect and fulfill human rights.⁶⁰ In this light, it may well be argued that not only do states have obligations to respect, protect and fulfill, but also that corporations have obligations to respect, protect and fulfill.

The obligation to protect human rights includes the obligations of corporations to protect persons from human rights violations and to support the protection of human rights by employing the corporation's expertise and resources to protect the human rights of individuals and local communities where they operate. For instance, the UK OECD National Contact Point urged "UK companies to use their influence over contracting parties and business partners, when trading in natural resources from this region, to ensure that due diligence is applied to the supply chain."⁶¹ In other words, an obligation to protect would denote that corporations are obliged to adopt internal regulations and take other measures to prohibit and prevent human rights violations internally, in their own activities, but also externally, in business relationships with third parties throughout their supply chains.⁶² Similarly, Clapham suggests that corporations have the "duty to ensure that the contractors with which they do business are complying with the Norms."⁶³ He argues that the obligation to protect exists "even if...threats do not derive from the corporation itself."⁶⁴ It appears, therefore, that the obligation to protect extends much further than the obligation to respect. The obligation to protect is relevant particularly "in the relationship of a corporation with third parties."⁶⁵ Several corporations recognize the obligation to protect human rights within their activities. Shell, for example, notes that "operating companies have a responsibility to identify existing and potential human

⁶⁰ British Petroleum, Human Rights: A guidance note, 2005, available at: http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/BP_Human_Rights_2005.pdf (last accessed: 17 November 2010).

⁶¹ Ibid. See Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd., 28 August 2008, available at: <http://www.berr.gov.uk/files/file47555.doc>, 76 (last accessed: 17 November 2010).

⁶² Corporate Complicity and Legal Accountability, Volume 1: Facing the Facts and Charting a Legal Path, Accountability Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Geneva, September 2008, available at: http://icj.org/IMG/Volume_1.pdf, 29-30 (last accessed: 17 November 2010).

⁶³ ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006), 231.

⁶⁴ *Id.*

⁶⁵ NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS (2002).

rights issues which may arise in their area of operations.”⁶⁶ Similar provisions can be found in the codes of conduct and internal human rights policies of British Petroleum,⁶⁷ Chevron⁶⁸, Citigroup⁶⁹, Coca-Cola,⁷⁰ Exxon Mobil,⁷¹ Total,⁷² General Motors,⁷³ Wal-Mart,⁷⁴ Conoco-Philips,⁷⁵ Daimler-Chrysler⁷⁶ and De Beers.⁷⁷

On the other hand, the obligation to fulfill human rights would require that a corporation adopt a human rights policy and internal codes of conduct that address human rights challenges and this would include measures on how to prevent and respond to human rights violations. The introduction of the framework “protect, respect and remedy” cannot, therefore, be described as a normative framework for the regulation of corporations, but, at most, as a policy framework. All in all, the proposed framework leaves much to be

⁶⁶ Shell Corporation, Shell, Business and Human Rights, A Management Primer, 23.

⁶⁷ British Petroleum, Human rights: A guidance note, 2005, available at: http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/BP_Human_Rights_2005.pdf, 12 (last accessed: 17 November 2010).

⁶⁸ Chevron Corporation, Human Rights Policy, available at: <http://www.chevron.com/globalissues/humanrights> (last accessed: 17 November 2010).

⁶⁹ Citigroup, Corporate Citizenship, available at: <http://www.citigroup.com/citi/citizen> (last accessed: 17 November 2010).

⁷⁰ Coca-Cola Human Rights Statement, available at: http://www.thecoca-colacompany.com/citizenship/human_rights_statement.html (last accessed: 17 November 2010).

⁷¹ Exxon Mobil, Statement of Principles on Security and Human Rights, available at: http://www.exxonmobil.com/Corporate/Imports/ccr2009/community_rights.aspx (last accessed: 17 November 2010).

⁷² Total Corporation, Position and Commitments on Human Rights, available at: <http://www.total.com/en/about-total/group-presentation/business-principles/human-rights-940522.html> (last accessed: 17 November 2010).

⁷³ General Motors – Corporate Responsibility, available at: <http://www.gm.com/corporate/responsibility> (last accessed: 17 November 2010).

⁷⁴ Wal-Mart Corporate, Requirements for Suppliers, available at: <http://walmartstores.com/Suppliers/248.aspx> (last accessed: 17 November 2010); see Equal Opportunity Practices.

⁷⁵ Conoco-Philips Corporation, Human Rights Position, available at: <http://www.conocophillips.com/EN/susdev/policies/humanrightsposition/Pages/index.aspx> (last accessed: 17 November 2010).

⁷⁶ Daimler-Chrysler, The Social Commitment, available at: <http://www.daimler.com/company/sustainability/customers-and-society/social-responsibility> (last accessed: 17 November 2010).

⁷⁷ De Beers Corporation, Community Policy, available at: <http://www.debeersgroup.com/en/Sustainability/Communities> (last accessed: 17 November 2010).

clarified in the future, particularly in relation to the nature of the obligations of corporations under human rights law.

Ruggie has so far produced an impressive collection of materials on business and human rights, having received contributions from major corporations, corporate law firms, NGOs, and international institutions. Taken together, these documents have mapped out a comprehensive understanding of the challenges facing the field of business and human rights. It appears, however, that all five Reports and complementary documents have failed to identify and propose an appropriate answer and response to corporate human rights violations. This becomes even more apparent when investigating the normative value of the Reports from a victim-oriented perspective. A valid point also has to be made that Ruggie did not have an explicit mandate to find appropriate response to corporate human rights violations.

It remains to be seen whether the international community has the will to create access for victims to a judicial or quasi-judicial organ this. However, the question remains the same - what will be the next step in the field of human rights and business? Ruggie is set to present a set of principles in his 2011 Report and he correctly argues for the creation of a special unit within the United Nations Office of the High Commissioner for Human Rights, which would be able to exercise an advisory and capacity-building function. Such a proposal should certainly be welcomed, however it should be considered as a bare minimum. Where a company fails to meet its obligations, adequate and effective remedies must be available to victims whose fundamental human rights were violated. In the future, the UN Human Rights Council may consider establishing an expert working group or complaints mechanisms to receive the complaints of victims. A thematic procedure under the UN mechanism was one of the proposals for the follow-up to the UN Norms.⁷⁸ Some commentators have already discussed the possibility of the world court of human rights, which would also have jurisdiction over corporations.⁷⁹ Such a complaints body might consider individual communications from victims of human rights, conduct field visits, examine the allegations of corporate violations and issue recommendations to states and companies.⁸⁰ In the long term, a special court for corporations could be established which,

⁷⁸ David Weissbrodt and Maria Kruger, *Human Rights Responsibilities of Businesses as Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 345 (P. Alston ed, 2005).

⁷⁹ For some proposals and discussion in this respect see, M. Scheinin, *Towards a World Court of Human Rights*, Research report within the framework of the Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights, 30 April 2009, available at: <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/WorldCourtReport30April2009.pdf>; S. Trechsel, *A World Court for Human Rights?*, 1 NORTHWESTERN UNIVERSITY JOURNAL OF INTERNATIONAL HUMAN RIGHTS, (2004), and M. Nowak, *The Need for a World Court of Human Rights*, 1 HUMAN RIGHTS LAW REVIEW, 251-259 (2007).

⁸⁰ Jens Martens and Elisabeth Strohscheidt, *Problematic Pragmatism, The Ruggie Report 2008: Background, Analysis and Perspectives* June 2008, Global Policy Forum and Misereor.

among other things, could supervise to ensure that corporations actually fulfill their fundamental human rights obligations.

All in all, the proposed framework leaves much to be clarified in the future, particularly in relation to the nature of the obligations of corporations under human rights law and its implementation in practice. It does not provide a needed answer to challenges posed by corporate conduct. However, it has to be recognized that none of the existing reports and documents provide this. Nonetheless, the 2010 Report represents an important, if limited, step forward and it recognizes that when the focus is directed towards the means rather than the ends, the framework for human rights and business could provide some guidance on how to tackle the challenges facing these fields. However, the historical momentum of the development of corporate responsibility and accountability for human rights will be difficult to halt, and, thanks to its normative development, it is hoped that it will be possible to bring timely justice and reparations to those who have suffered from the harmful conduct by or involving corporations. In this light, it may well be argued that not only do states have obligations to respect, protect and fulfill, but also that corporations have obligations to respect, protect and fulfill human rights.

E. Conclusion

The way the activities of corporations impact upon the individual's enjoyment of fundamental human rights has important and far-reaching consequences. In many cases, corporations contribute directly or indirectly to human rights violations. Ruggie has in his 2010 Report contributed only to a limited extent to clarifying and setting the standard in the field of business and human rights and much remains to be desired. However, some limitations of Ruggie's mandate must be recognized. Human rights are best protected in national legal orders and this is where any examination of obligations and responsibility for human rights should and must start. It appears, therefore, that any attempt to regulate corporations must focus primarily on the domestic level and only secondarily within the approaches of international law. The 2010 Report confirms what is already clear at this stage - that corporations have obligations and a responsibility to respect human rights and to claim that only states have human rights obligations would distort the inherent essence of human rights law and the promotion and protection of human rights.⁸¹ However, it fails to offer a victims-oriented solution to challenges posed by human rights and business. Additionally, Ruggie has been also reluctant to concede that corporations do not have only negative but also positive human rights obligations in the field of human rights. Against

⁸¹ *Id.* Andrej Logar, speaking on behalf of the European Union, regarding Action on Resolution on Mandate of Special Representative of the Secretary-General on Human Rights and Transnational Corporations, available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/F862D09328BA5EACC125746C006CB1DF?opendocument> (last accessed: 17 November 2010).

this backdrop, it seems that the normative framework *de lege lata* in the field of human rights and business is directed towards the ends rather than the means. In short, Ruggie's 2010 Report leaves more questions than answers.