

**EXTRACTS FROM ERROL MENDES TEXT TITLED “GLOBAL GOVERNANCE,  
HUMAN RIGHTS AND INTERNATIONAL LAW”**

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There had been high hopes that the reference in the UNDR’s preamble, that “every organ of society” has a duty to respect the rights of others and refrain from acts aimed at the destruction of the rights and freedoms in the UDHR, could at least provide the foundation for soft law duties on corporations. It could be cogently argued that the reference in the UDHR to “every organ” includes juridical persons like corporations. Some would argue that the UDHR would impose soft law obligations on corporations to not only do no harm, but to also take measures to ensure that their business partners prohibit and prevent human rights abuses. While the UDHR has become part of customary international law, there is still debate as to whether it provides sufficient legal guidance to impose direct legal duties on non-state actors. However, it has become the foundation for other forms of soft law, at a variety of levels, including corporate, sectorial, national, and global levels, discussed later in this Chapter.

John Ruggie’s “three pillar” framework is the most recent and most high-level attempt at soft law framework for MNEs. It was established in his capacity as the UN Secretary General’s

Special Representative in the aftermath of yet another failed attempt, in August of 2003, to establish direct duties on corporations. At the time, the Sub-Commission on the Promotion of Human Rights, of the UN Commission on Human Rights, approved the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (“the Norms”). This document stated that the primary obligations of corporations was to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights as recognized in international as well as national law.<sup>i</sup> While promoted as a restatement of existing international norms related to corporations it was hoped that it would serve as a foundation for a binding treaty on legal duties of corporations or become part of customary international law. The Norms met with fierce criticism from the global private sector, which claimed that they would represent a fundamental shift in the international framework for the protection of human rights, effectively removing the enforcement of human rights from the state and privatizing it. Due, in part, to such criticisms from the global business lobby, the norms were not adopted by the UN Commission on Human Rights. As a method of alleviating the backlash from the supporters of the Norms, the Commission asked the UN Secretary General to appoint a Special Representative to examine the relationship and duties of states and corporations in the promotion and protection of universally accepted human rights. John Ruggie was appointed as the UN Special Representative (UNSR) for business and human rights. In 2008 Ruggie proposed a three-pillar framework for the promotion of corporate social responsibility and human rights, known as the “Protect, Respect and Remedy Framework” (“the framework”).<sup>ii</sup> The approach taken by the UNSR is to focus on the state’s duty to protect human rights, the corporate responsibility to respect human rights and the need for access to an effective remedy for those who are victims of corporate wrongdoing.

#### **4.1. The States' Duty to Protect**

In his April 2008 Report to the UN Human Rights Council, Ruggie asserted that international law imposes a duty on states “to protect against human rights abuses by non-state actors, including business, affecting persons within their territory or jurisdiction”.<sup>iii</sup> In his 2009 Report, Ruggie insisted that it is human rights law that imposes this duty on states to protect individuals against abuses by non-state actors. In his final report on March 21, 2011, after the Council requested that he operationalize the framework, Ruggie presented the *Guiding Principles on Business and Human Rights; Implementing the United Nations 'Protect, Respect and Remedy' Framework* (“Guiding Principles”). These Principles stressed that states must protect against human rights abuses, including by business enterprises. This requires appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication. These duties should include policies and laws relating to commercial transactions, investment treaties and contracts, and membership in multilateral institutions.

At first, the first pillar of the Ruggie Framework appears to provide a convincing theoretical response to the inability of global governance institutions to make corporations the direct subjects of international law. However, as the case studies in this book that includes experiences of Shell in Nigeria, Union Carbide in Bhopal, India and Texaco/Chevron in Ecuador have demonstrated, the state's responsibility to protect as regards corporate complicity in human rights abuses can be illusory in practice. This includes where the weakness of the institutional

capacity of the territorial state to protect human rights is combined with the enormous economic and even political power of the MNC. This unsavoury combination may not only forestall any ability by the state to protect the rights of its citizens, but the state may even be complicit in the corporate abuses having been enticed to do so by the profits from the MNC operation which may also involve bribery and corruption of the state's officials. There is a need for a much more strengthened first pillar of the Ruggie Framework in the real world of the increasing global power of MNEs.

#### **4.2. The Corporate Responsibility to Respect**

Under this pillar, John Ruggie seems to go out of his way to assert in the Guiding Principles that while corporations are included in the UDHR's concept of "organs of society", they are not states and should not have the duties of states. In fact they do not have duties, but have responsibilities under international law. Ruggie insists that there is no general legal requirement for corporations to observe human rights under international human rights law. He argues that it is states that must impose those obligations indirectly through domestic legislation.

In the Guiding Principles, Ruggie argues that to satisfy the responsibility to respect, corporations should "avoid infringing on the human rights of others and should address adverse human rights impacts on communities with which they are involved".<sup>iv</sup> In his 2010 report, Ruggie suggested that MNEs can meet this responsibility by living up to the expectations on human rights as contained in soft-law and voluntary corporate social responsibility (CSR) initiatives. In other words, the responsibility to respect is defined by the actual and potential human rights impacts that flow from the operations of MNEs, including those of its state, non-state, business and

supply chain partners. The positive actions needed to fulfill the responsibility to respect include the incorporation and demonstration of due diligence for actual and potential adverse impacts on human rights from the corporation's operations and those of its partners.

While not imposing direct legal obligations on MNEs, Ruggie would argue that the responsibility to respect constitutes a universally applicable human rights framework for MNEs in all situations.<sup>v</sup> The Guiding Principles ambiguously refer to the content of this framework as being made up of "core internationally recognised human rights", while also cautioning that corporations may need to consider additional human rights standards not contained in those core documents.

As the first pillar did, the second pillar of the Ruggie Framework supports the *status quo* and it resists the direct imposition of duties on MNEs, the largest of which rival the power of most states. As demonstrated by the case studies above, some of the most severe abuses arose due to the conscious complicity of MNEs in bribery and corruption, the devastating of local environments, and the undermining of core universally recognised human rights and international criminal law standards. These consequences of these actions extend far beyond the operations of the MNC and their partners, and can even infiltrate the political, social, and economic rights of entire nations. What may ultimately be required is that the responsibility to respect must be backed up by the threat of effective judicial or other forms of sanctions which can provide a powerful economic and reputational disincentive against abuses of corporate power by the most powerful MNEs. Ruggie attempted to discuss that missing link in the last of the three pillars, the access to an effective remedy.

### **4.3. Access to an effective remedy**

In this third pillar, Ruggie proposes that existing forms of remedies should be strengthened and made accessible. This includes domestic state remedies, internal and external corporate mechanisms for stakeholder grievances, and the strengthening of national human rights institutions and complaints mechanisms under national and international soft-law corporate responsibility guidelines. In his 2010 report, Ruggie acknowledges that domestic state remedies are few in number, which tends to motivate alleged victims of corporate abuse to seek redress through the courts in the home states of MNEs, so far without much success. Ruggie also calls for more clarity around corporate group liability and the exercise of extra-territorial jurisdiction, which can create legal obstacles to the access of effective remedies. The Guiding Principles also allude to the legal, financial, social and political challenges of using the courts to seek effective remedies for corporate abuse.

It is clear the last pillar of Ruggie's framework does not provide many substantial disincentives against abuse of corporate power that can result in grave human rights abuses as evidenced by the case studies described above in this Chapter. It is also clear that the tragic flaw could be prevalent in the presence or absence of effective legal frameworks and institutions governing the global private sector. Initially there was hope that, due to the dramatic increase in the economic and political power of MNEs, that these new players would not be left outside the growing field of international human rights law, and would have to respect the fundamental rights of all peoples whose communities and lives they can impact on both with very good, but also with very

bad consequences. However, the work of John Ruggie has helped to cement the view of the UN, and most who work in international law, that corporations are not subject to direct duties under international human rights law, and that they can only be indirectly subject to such laws when the relevant state implements them. Instead of looking to law, Ruggie puts all his hope in the voluntary measures and soft-law initiatives that have, since the end of WWII, been multiplying at a staggering rate. But the question remains, how effectively do these long standing initiatives curtail the worst aspects of the tragic flaw in the global governance of the private sector? Research has demonstrated a mixed record at best.

The key factor that will determine whether the John Ruggie three pillar Framework stands or falls as an effective framework to protect against corporate involvement in human rights abuses globally is whether the relevant state actually has effective power over corporations in its jurisdiction in practice, as is often claimed in theory. If the state is so weak that it has little institutional capacity to protect its citizens against serious violations of its citizens' rights by corporations or other state or non-state actors that are co-perpetrators with the corporation, there is little value in the theoretical state responsibility to protect. While state responsibility may be incurred, that provides little comfort to the citizens who helplessly watch while corporations act with impunity, to the peril of whole groups and societies as the case studies in this chapter have illustrated. It is not an exaggeration to state that in many weak states or states with weak governments, corporations in collusions with non-state actors such as militias or renegade army or police units can be more powerful than the state itself. It is particularly in such situations, where it could be argued that there should be some form of direct or indirect international legal obligation imposed on such non-state actors. That already occurs in situations where individuals

belonging to these non-state organizations trigger individual criminal liability by committing the most serious international crimes. But beyond the threshold of serious criminality, it could be argued that new international mechanisms should be developed or existing ones refashioned, in order to make effective all three pillars of the Ruggie Framework in the form of a treaty that imposes either direct duties on MNEs or a global treaty that requires ratifying states to legislate provisions that make the Ruggie three pillar framework effective within domestic law.

Where the John Ruggie Framework is found most wanting are situations where corporations have more power than a weak or potentially failing state, or power that rivals the state. This gap could also exist where the corporate power does not rival the state but where the state is unable to show any responsibility to protect its citizens due to corruption or joint-complicity by the state itself in the abuses of human rights of its own citizens. In such a situation, the international community must go further than the Ruggie Framework.

A practical solution could be for the UN Human Rights Council to appoint a special rapporteur to act as a fact finder on allegations of corporate complicity in serious human rights abuses in weak or failing states that may be incapable or unwilling to fulfill its duty to protect against such abuses. Special rapporteurs are appointed by the UN Human Rights Council and their mandates are determined by the Council, even though they exercise their powers under the UN Charter. The rapporteurs are usually appointed to investigate a particular situation involving UN member countries where there are allegations of serious violations of human rights or humanitarian law and to seek possible solutions with the governments concerned and then report to the Council. In addition to country mandate rapporteurs, there are an increasing number of thematic mandate



rapporteurs that have been appointed to investigate, fact find, monitor, advise and report on a wide range of human rights issues including arbitrary detention, torture, indigenous peoples and violence against women and children.<sup>vi</sup>

One leading international law jurist, Tom Buergenthal, has stated that the establishment of these special rapporteurs was an attempt by the UN to “pierce the veil of [the] national sovereignty” of states to handle serious cases of human rights violations. Where powerful MNEs are taking advantage of weak states to seriously violate the rights of individuals impacted by their operations, the veil of sovereignty may be more illusory than real.

The Human Rights Council could appoint a special rapporteur to investigate the most serious allegations of corporate complicity in human rights abuses to fill the gap where these alleged abuses take place in weak or failing states. A possible rapporteur with the title of “business and human rights” could liaise with other relevant thematic mandate rapporteurs if there is an overlap with their mandate. For example where there are allegations of corporate complicity in violations of the rights of indigenous peoples as in the case of Chevron in Ecuador described above, the business and human rights rapporteur could liaise with the rapporteur on indigenous peoples to investigate and fact find. If there is no effective remedy offered by the corporation, the rapporteur could report back to the Council with recommendations for other measures to be taken by both the governments involved and the MNE.

There has been criticism that there has been a failure on the part of the UN Human Rights Council and other UN agencies to follow up on many of the recommendations of country and

thematic mandate rapporteurs. However, a UN business and human rights rapporteur could have a powerful independent naming and shaming function. This function when combined with recommendations to the UN Council and relevant governments for effective redress for corporate complicity in human rights abuses could be the closest to filling the substantial gap in the third pillar of the John Ruggie framework for access to an effective remedy for victims of corporate human rights abuses.

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<sup>i</sup> Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, ESC Sub.2/2003/12/Rev.2, UNESCO, 2003, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 at s 1. Some on the Commission were no doubt inspired by Louis Henkin's inclusion of corporations in the UDHR, see Louis Henkin, *"The Universal Declaration at 50 and the Challenge of Global Markets"*, (1999) 25 Brooklyn J It. Law, at 25.

<sup>ii</sup> Human Rights Council, UN Human Rights Council, *Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNGAOR, 8<sup>th</sup> Sess, UN Doc A/HRC/8/4/Add.2, (2008), online: UNHCR <<http://www.unhcr.org/refworld/docid/484d2d5f2.html>> (1 August 2012) [Protect, respect and remedy].

<sup>iii</sup> Protect, respect and remedy, *supra* note 35.

<sup>iv</sup> Human Rights Council, *Report of the Special Representative of the Secretary-*

*General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHRCOR, 17th Sess, UN Doc A /HRC/17/31, (2011) at para 11.

<sup>v</sup> Human Rights Council, *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*, UNHRCOR, 14<sup>th</sup> Sess, UN Doc. A/HRC/14/27 9, (2010) at Para 58.

<sup>vi</sup> For an excellent description and analysis of the history and record of UN special rapporteurs see Surya P. Subedi, "Protection of Human Rights through the Mechanism of UN Special Rapporteurs" (2011) 33 Human Rights Quarterly 201.