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The 2008 Ruggie Report: A Framework for Business and Human Rights

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Christiana Ochoa

The United Nations Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises,¹ John Ruggie, submitted his final Report to the Human Rights Council on June 3, 2008.² The Report and its attendant documents³ are a significant contribution to closing the gaps that exist “between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”⁴ This Insight analyzes the Report and its potential implications for international law on human rights.

Background

The Report responds to needs experts have identified for a framework of rules, practices, and institutions that address the intersection of business and human rights. The Report recognizes the need for this framework because “markets pose the greatest risks--to society and business itself--when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly.”⁵

The Report’s approach to the human rights responsibilities of business entities makes clear that Ruggie and his team appreciated that globalization has produced a disjuncture between business-related activities and the development of capabilities to govern those activities. These “governance gaps” create an environment in which business-related human rights abuses can occur with relative impunity.

The Report acknowledges advocacy and legal work completed prior to Ruggie’s mandate, but the Report distinguishes itself from previous rights-based efforts.⁶ The Report asserts that “there are few if any internationally recognized rights business cannot impact,” and, therefore, any list of specific rights will be highly controversial while also being incomplete.⁷

The Report’s objectives are three-fold. First, the Report sets forth a framework based on the three core principles in its title--protect, respect and remedy. Second, it seeks to provide a foundation and an “authoritative focal point”⁸ to facilitate diverse efforts by various stakeholders pursuing common goals. Third, it provides a useful map to help identify where and how business affects human rights.

The Framework

The Report’s framework “rests on differentiated,” but complimentary responsibilities,”⁹ which include:

- the state duty to protect against human rights abuses by third parties, including business entities;
- the corporate responsibility to respect human rights; and
- the need for more effective access to remedies.

The State Duty to Protect Against Abuses by Non-State Actors

The Report adopts a classical view of human rights in which States form the cornerstones around which the human rights regime is constructed. Particularly relevant here is the duty of States to protect against human rights abuses by non-State actors, including national and foreign-based business entities. This duty requires that States “take all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access to redress.”¹⁰ The Report acknowledges the growing pressure for, and availability of, duties and avenues for redress in the home States of foreign investors.¹¹

Beyond this relatively non-expansive view of State duties in relation to business and human rights, the Report devotes significant attention to additional legal or policy actions States might take to fulfill their duty, including an “urgent policy priority” to “foster a corporate culture respectful of human rights.”¹² States can encourage a rights-respecting corporate culture by, for example, requiring sustainability reporting, as is currently required by a growing number of financial regulations.¹³ Similarly, States may facilitate the possibility of making corporate culture--a company’s “policies, rules and practices”¹⁴--relevant in claims of corporate criminal accountability and punishment.

The Report also addresses:

- The need for greater coherence between State’s initiatives, policies, and institutions relevant to business and those focused on human rights, in order to reduce State activity that encourages and facilitates human rights abuses by business actors;¹⁵
- The steps States can and should take to facilitate greater international coordination and understanding of the business and human rights problem;¹⁶ and
- Particular attention States should give to the human rights problems businesses can cause or exacerbate in conflict zones.¹⁷

The Baseline Corporate Responsibility to Respect Human Rights

In addition to breaking from existing efforts to enumerate rights for which businesses should bear responsibility for violating, the Report asserts that the responsibilities of corporations “cannot and should not mirror the duties of States.”¹⁸ Instead, the Report addresses “the more difficult question”¹⁹ of defining what responsibilities companies have.

Corporations bear the responsibility to respect human rights.²⁰ Where States have laws enforcing this responsibility, companies are occasionally charged in “actual courts.”

More commonly, companies deviate from societal expectations in respect to human rights, leading to adverse consequences in the “courts of public opinion.”²¹

The Report focuses the corporate responsibility to respect human rights on corporate due diligence regarding the full international bill of rights and the core conventions of the International Labor Organization.²² In order to demonstrate due diligence, companies would take into account the human rights contexts in the locations of their operations, the human rights impacts specific to those operations, and whether and how their operations contribute to human rights abuses.²³

The due diligence process for a company would include adopting a detailed human rights policy, conducting impact assessments of business operations, crafting plans to avoid negative human rights impacts, integrating human rights concerns into company operations, and developing monitoring and auditing processes.²⁴

Access to Remedies

The potential avenues for redress for alleged victims of business-related human rights abuses are numerous. In addition to judicial mechanisms, non-judicial mechanisms exist, which include arbitration, agency oversight, mediation, national human rights institutions, National Contact Points (as set out in the OECD Guidelines for Multinational Enterprises), industry-based organizations, and conditions for funding imposed by public and private financial institutions, among others. The Report argues that “this patchwork of mechanisms remains incomplete and flawed.”²⁵

According to the Report, the goal is a well-developed and coherent plurality of avenues for redress. In addition to providing guidance for judicial reform, the Report makes suggestions for improvements to each of the potential avenues and calls on non-governmental organizations (NGOs), academic institutions, and others to increase awareness about remedies potentially available to aggrieved parties.²⁶

Recommendations to UN and Other International Bodies

The Report makes recommendations to the UN and to other international bodies. For example, it suggests that:

- Human rights treaty bodies make recommendations to States regarding their duty to protect against human rights abuses by business actors;
- The Office of the High Commissioner for Human Rights assist in capacity-building in States that currently lack the tools to implement the Report’s framework; and
- The OECD Guidelines for Multinational Enterprises be revised²⁷ because many voluntary corporate codes of conduct have exceeded the Guidelines and made them outdated.²⁸

The Report also highlights proposals for a “well-resourced” “global ombudsman function that could receive and handle complaints.”²⁹ It argues that the Human Rights Council has the unique ability to lead by setting expectations and aspirations that will close the governance gaps between business activity and human rights observance.³⁰

The Report acknowledges that its approach requires the relevant actors to learn to do things differently in respect to business and human rights.³¹ This approach can create cooperation in learning, advocacy, and policy implementation. It also, however, has the potential of failing to gain traction if States, businesses, and civil society are alienated from the framework, or if the costs appear greater than the benefits cooperation within the framework can produce.

An Authoritative Focal Point

The diversity of actors, locations, and issues implicated by the relationship between business and human rights creates complexities that have been difficult to understand, assimilate, articulate. This complexity contributed to a perceived lack of progress on governance of the business-human rights linkage. Although the past decade has witnessed the development of a web of national and global initiatives in both the public and private sectors, these efforts have not enjoyed robust cooperation or coordination. By attempting to provide a common understanding of current governance efforts and a framework in which stakeholders bear specific responsibilities, the Report is intended as an authoritative focal point that could help bring coherence to the complexity of the business-human rights relationship.

The Report will attract attention as an authoritative document. It arises from fourteen multi-stakeholder meetings held in every corner of the world. The process of producing the Report included more than twenty research projects, and contributors came from the business community, global law firms, NGOs, and international institutions.³² Together with its attendant documents, the Report constitutes a comprehensive understanding of the business-human rights problem and identifies a comprehensive and reasonable path forward.

Whether the Report actually becomes a functional authoritative focal point is, however, unclear. In order to enjoy this transition, the Report’s framework must inspire changed behavior in its constituencies and catalyze “coherent and concerted approaches”³³ to closing governance gaps. The framework’s value will depend on the reception it receives and its ability to provide a common language and sensibility among the various communities to which it is addressed.

As may be expected, initial reactions to the Report vary. Some critics have said that the political pragmatism of “Ruggie’s Report falls way short of the expectations of civil society.”³⁴ However, to date, the Report has generally been received with an optimism and openness that may be unprecedented for those who have long focused on this issue.³⁵

A Useful Roadmap

The Report provides a comprehensive and detailed “map” of the emerging and fragmented governance efforts attempting to address business-related human rights abuses.³⁶ In addition to the Report itself, Ruggie’s efforts produced a companion document addressing “spheres of influence” and “complicity,” which have been critical and contentious terms in this discourse.³⁷ These documents, together with the many other reports related to the mandate, provide a roadmap of current thinking and efforts on governance of the business-human rights nexus.

This governance roadmap serves multiple functions. First, it highlights many previous successful governance efforts. Second, it allows interested parties to see the business and human rights “space” in similar ways--to share a vision of the legal and governance progress of the past decade and the gaps, incongruities, and on-going failures that remain to be addressed.

Conclusion

The Report’s multi-tiered approach reflects improved understanding of the complexity of regulating transnational business activity. The Report’s wider importance may be as an experiment in applying the broad theory of governance, for which Ruggie has been a leading expert and proponent. If the Report serves its intended purpose, it may produce not only an improved governance structure for human rights problems arising from business practices but also a model for future attempts at closing governance gaps that arise from other transnational phenomena.

About the Author

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Footnotes

¹ The mandate can be found within Office of the High Commissioner for Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, Human Rights Resolution 2005/69, (April 20, 2005), available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc.

² *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5 (April 7, 2008) (hereinafter Report), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

³ All documents produced by Ruggie in connection with his mandate can be found within the Business and Human Rights Resource Center’s website at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>. A complete list of documents associated with the Report can be found at: <http://www.business-humanrights.org/Documents/Ruggie-docus-list-22-May-08.pdf>

⁴ Report, ¶ 3.

⁵ *Id.* at ¶ 2.

⁶ These efforts include the U.N.'s 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2. (hereinafter, Draft Norms)

⁷ Paragraph 52 of the Report provides a list of nearly thirty previously recognized rights businesses were alleged to have "impacted" between 2005-2007. This list is drawn from a study conducted for the mandate of 320 cases of alleged human rights abuses by corporations. The study was submitted as Addendum 2 to the Report: *A Survey of the Scope and Pattern of Alleged Corporate-Related Human Rights Abuse*, A/HRC/8/5/Add.2 (May 23, 2008), available at <http://www.reports-and-materials.org/Ruggie-2-addendum-23-May-2008.pdf>.

⁸ Report, ¶ 5.

⁹ *Id.* at ¶ 9.

¹⁰ *Id.* at ¶18, citing John Ruggie's 2007 interim report, A/HRC/4/35/Add.1.

¹¹ *Id.* at ¶ 19.

¹² *Id.* at ¶ 27.

¹³ *Id.* at ¶ 30 and fns 23-26.

¹⁴ *Id.* at ¶ 31, citing to Allens Arthur Robinson (law firm), *Corporate culture as the basis for the criminal liability of corporations, prepared for the Special Representative* (2008), available at <http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>

¹⁵ Report, ¶¶ 33-42. Examples include the tendency of States to enter into agreements with companies that prohibit any regulatory changes during the life of an investment. Such "stabilization clauses" were the subject of a recent report prepared by the International Finance Corporation, jointly with the mandate. See International Finance Corporation, *Stabilization Clauses and Human Rights* (2008), available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf).

¹⁶ Report, ¶¶ 43-46.

¹⁷ *Id.* at ¶¶ 47-49.

¹⁸ *Id.* at ¶ 53. This issue is among those explored in John H. Knox, *Horizontal Human Rights Law*, 102 AJIL 1 (2008) (examining proposals to create human rights obligations for non-state actors).

¹⁹ Report, ¶ 53.

²⁰ The Draft Norms extended responsibilities to corporations and other business entities. The Report, however, refers only to corporations when discussing the responsibility to respect.

²¹ *Id.* at ¶ 54.

²² *Id.* at ¶ 55.

²³ *Id.* at ¶ 57.

²⁴ *Id.* at ¶¶ 59-63.

²⁵ *Id.* at ¶ 87.

²⁶ *Id.* at ¶¶ 85-102.

²⁷ *The OECD Guidelines for Multinational Enterprises* (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

²⁸ *Report*, ¶ 46.

²⁹ *Id.* at ¶ 103.

³⁰ *Id.* at ¶ 107.

³¹ *Id.* at ¶ 7.

³² *Id.* at ¶ 4.

³³ *Id.* at ¶ 17.

³⁴ Misereor/Global Policy Forum Europe, *Problematic Pragmatism: The Ruggie Report: Background, Analysis and Perspectives* (June 2008). A number of the NGOs most engaged with the issue of business and human rights issued a reaction to the Report in which they call on the Human Rights Council to, among other things, expand beyond the Report's framework and to "include and explicit capacity to examine situations of corporate abuse." See *Joint NGO Statement to the Eighth Session of the Human Rights Council* (May 20, 2008), available at <http://hrw.org/english/docs/2008/05/20/global18884.htm>.

³⁵ A compilation of reactions to the Report is available at <http://www.business-humanrights.org/Documents/RuggieHRC2008>.

³⁶ Steven Ratner provided a more rudimentary though similarly useful analysis in 2001 and, in 2007, Ruggie provided a more thorough mapping than was possible in the Report. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Responsibility*, 111 YALE L. J. 443 (2001) and John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AJIL 819 (2007).

³⁷ *Clarifying the Concepts of "Sphere of Influence" and "Complicity"*, A/HRC/8/16 (May 15, 2008).