

**YIELDING TO MARKETOCRACY? ASSESSING THE
RUGGIE FRAMEWORK ON BUSINESS AND HUMAN
RIGHTS**

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DECLARATION

This is to certify that this the original work of **Zwelibanzi Lunga**, submitted to the Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa in partial fulfilment of the requirements of the degree of LL.M (2004) in Human Rights and Democratization in Africa.

Any secondary information that has been referred to in this work has been duly acknowledged.

Signed ----- Date-----

Zwelibanzi Lunga

I, **Prof J. Oloka Onyango**, have read this dissertation and approved it for examination

Signed----- Date -----

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Chapter 1

1.1 Introduction and theoretical framework

The emergence of thought and drive to hold business corporations accountable for human rights violations under international human rights law has been unsurprising given the ubiquitous scale corporate activities affect the enjoyment of fundamental rights. This scale increased exponentially with the confluence of world markets into one giant global arena, spurring the rise of giant multinational corporations operating in different regions of the world¹. These corporations increasingly became powerful, and true to the adage ‘there is no power without responsibility’, prompted concerted calls for regulation.

A recognised feature of this emerging world order has been the marked division of markets into suppliers of raw materials and consumers, mediated by the powerful private entities riding on the back of neo-liberal ideologies of ‘free reign’ and deregulation². This has facilitated a quickening dichotomy between countries of the North and South and engineered massive exploitation of the South’s resource base which continues to date³. The vigorous pursuit of profit has thus seen the deliberate and flagrant abuse of human rights in developing countries unable to shield themselves from these powerful global actors⁴.

Cognisant of this the governing world body as early as the 1970’s sought to regulate corporate activities through the United Nations International Labour Organisation (ILO) and the Organisation for Economic Cooperation and Development (OECD). The International media attention that followed scandals of big corporations such as Nike⁵ and Shell in the 1990’s made the case for regulation even more imperative. Effort to hold businesses accountable to human rights violations initially found expression in such instruments as the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*⁶, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social policy and the UN Global Compact⁷.

¹ Steger, M, “Globalism: The New Market Ideology”, Lanham, MD: Rowman & Littlefield Publishers, 2000.

² Smith, C, “International Trade and Globalisation”, 3rd Ed, Stocksfield: Anforme, 2007.

³ Chossudovsky, M, “The globalization of poverty and the new world order”, 2nd ed. Imprint Shanty Bay, Global Outlook, 2003. See also Wade, H.R, “The Rising Inequality of World Income Distribution, Finance & Development”, Vol 38, No 4 Dec 2001.

⁴ Brysk, A, “Globalization and Human Rights”, University of California Press, 2002.

⁵ See lawsuit between *Marc Kasky v Nike* at the California State Court.

⁶ E/CN.4/Sub.2/2003/12 (2003). These Norms are however explicitly rejected by the Special Representative, after suffering a ‘dubious’ fate at the hands of the UNCHR which stated at its 2004 session that as ‘draft proposals they have no legal standing’. Their status remains ambiguous, at best confined to the historical dustbin; see E/CN.4/DEC/2004/116 of the 20th April 2004.

⁷ The GC is a voluntary initiative for business leaders to ‘embrace’ and ‘enact’ nine basic principles with respect

This normative framework was based on non binding voluntary norms and did little to quell the tide of corporate rights violations in the third world amidst tipping power relations between these poor states and the big corporations. The inadequacies of this framework compelled the world governing body in 2005 to commission Mr John Ruggie as its Special Representative (UNSR) on Transnational Corporations and Human Rights with a specific mandate to among others clarify the role and responsibilities of business with regard to human rights⁸.

In 2008 after global wide consultations with business, civil society organisations and governments the special representative proposed a three pillar policy framework for dealing with the challenges of corporate human rights abuse⁹. The first pillar is the duty of the state to protect individuals against human rights violations by third parties, the second is the corporate responsibility to respect human rights and the third is greater access by victims to both judicial and non judicial to remedies.

The United Nations Human Rights Council (UNHRC) subsequently extended the mandate of the special representative by three years and tasked him to operationalise this framework. The special representative is currently engaged with consultations in an ongoing process of finding out how the framework can be adopted and utilised by both businesses and governments. Be that as it may the framework proposal itself has been subjected to excruciating criticism for not going far enough to effectively protect corporate human rights abuses especially in the least developed countries where violations often go unchecked¹⁰.

1.2.1 Problem statement

The impact of corporate activities on human rights in Africa and the rest of the developed world are well documented¹¹. Such violations occur under circumstances where either the corporations themselves are directly involved in the exploitation of human and natural

to Human Rights. It has not escaped controversy and has been labelled as an instrument designed to hoodwink the world while serving neo-liberal agendas designed to entrench the status quo using multilateral international institutions of power and influence. The compact lacks any clear review, oversight and enforcement mechanism. See Smith, J, "Power, Interests, and the United Nations Global Compact" Paper presented at the annual meeting of the ISA's 49th ANNUAL CONVENTION, BRIDGING MULTIPLE DIVIDES, Hilton San Francisco, SAN FRANCISCO, CA, USA, Mar 26, see also Paine, E. "The Road to the Global Compact: Corporate Power and the Battle over Global Public Policy at the United Nations, Global Policy Forum", Retrieved from:<http://www.globalpolicy.org/reform/papers/2000/road.htm>.

⁸ The mandate is contained in Commission on Human Rights resolution 2005/69.

⁹ The full findings are contained in Ruggie's 2008 "Protect, Respect and Remedy: A Framework for Business and Human Rights", available at www.business-humanrights.org.

¹⁰ See for e.g. the Joint NGO statement to the Eighth Session of the Human Rights Council at <http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council> which insists that 'to date the mandate has placed relatively little emphasis on the means of holding companies to account', see also Misereor, "Global Policy Forum, Problematic Pragmatism - The Ruggie Report 2008".

¹¹ See Human Rights Watch, "Nigeria, the Ogoni crises: A Case Study of Military Repression in South East Nigerian", 1995, See also *Social and Economic Action Centre v Nigeria (refer herein as SERAC V Nigeria*, Communication 155/96 to the African Commission on Human and Peoples' Rights.

resources to the detriment of victims, or where they are complicit to rights abuses by third parties. This is the case with massive violations occurring in areas such as the Niger Delta where giant oil companies have caused massive upheavals to the lives of locals. Despite this however most corporations escape accountability under both international and domestic laws due to lack of an effective regulatory mechanism, legal and practical barriers as well as a horde of political and economic factors.

In his 2008 report on human rights and transnational corporations and other business enterprises the UNSR drew particular attention to governance gaps created by globalisation, the adverse scope and impact of economic forces in third world countries and their capacity to manage its adverse consequences. These governance gaps continually create permissive conditions for rights violations by companies without reparations or remedies to victims.

The need to devise a more appropriate international framework to regulate and control activities of corporations especially in Africa is urgent. Whilst it has always been clear that there is a strong need for a new paradigm, perhaps new norms and even a rethink of international human rights law, the situation of poor continents such as Africa continue to demand drastic and urgent measures not short of restructuring massively the existing normative framework and adopting binding norms. However, at a time when the special representative was expected to seal once and for all the question of direct corporate accountability under international law through appropriate recommendations, the proposed 'protect, respect and remedy framework' adopts a different approach which critics believe does little to tame corporate power and leaves human rights at the mercy of powerful global forces.

1.2.2 Purpose of the study

The purpose of this study is to contribute to the current debate on corporate human rights accountability from an African perspective by critically analysing the 'Ruggie Framework' to ascertain whether it affords effective protection and remedies against corporate human rights violations occurring in Africa. In this respect the meaning and content of the three elements will be explored with a view to assessing whether they afford potentially effective redress to individuals and vulnerable communities against human rights abuse. From the foregoing the study intends to draw conclusions on whether the 'Ruggie framework' purports to do what it claims to and whether it leaves corporate human rights abuses unaddressed. The study will attempt to suggest how this scenario can be turned around by active and vigorous engagement at both an international and domestic levels to go beyond the limiting parameters set by the Ruggie framework.

1.2.3 Research questions

Does the ‘protect, respect and remedy’ framework afford effective access to justice to victims of human rights abuses in the context of Africa and does it adequately hold corporations liable for rights violations? In this respect what is the import, content and meaning of the duty to protect and responsibility to respect and does these create a legal basis for claims against corporations violating human rights both under international and domestic systems by individuals and vulnerable communities? To what extent can it be said that the framework treats corporations with reverence at the expense of human rights despite overwhelming evidence of the need for a stricter international regulatory mechanism?

1.2.4 Literature review

A recent paper produced by Alvaro de Regil assessing the Ruggie ‘protect, respect and remedy framework’ discusses issues arising out of that report that lie at the core of this study¹². In his assessment Mr Alvaro claims that the Ruggie framework ‘ignores the customary, massive, ubiquitous and systemic violations’ of a wide range of human rights that the markets exert over billions of people every year. Alvaro reaches a damning conclusion on Ruggie’s underlying assumptions that they are in principle designed to strengthen the status quo through ‘maintaining the market as the supreme ruler of our lives’. Naturally the author does not make a marked and necessary distinction in the impact that businesses exert in countries of the North and the South, due in large part to the relative weaknesses of the latter and the inability of individuals and communities to access effective legal remedies. His observations are albeit pertinent to this thesis.

In a general way, and adopting a similar line of criticism at the current international dispensation that attempts to find solutions to the problem of corporate human rights violations, which involves among other institution the Global Compact (GC), Susan Soederberg¹³ argues that multinational corporations use international institutions such as the GC as a neo liberal strategy to reproduce their growing power especially in the south by ‘first institutionalising and thereby depoliticising anti corporate struggles that seek social protection from market forces, and second by discrediting the drive to tame corporate behaviour through legally binding codes’. She further argues that in doing so these institutions in essence ‘recreate the dominant neo-liberal led development paradigm based on a central premise that, given the ‘correct policy’ framework, the market will be able to provide adequate levels of social protection as it generates economic growth.

¹² Paper available at www.jussemp.org.

¹³ Soederberg, S, “Taming Corporations or Buttressing Market-Led Development? A Critical Assessment of the Global Compact”, *Globalizations*, 2007, 500 – 513.

The author pens her criticism as a global theorist scrutinising the excesses of global capitalism and the powerful agency that drives it. At the heart of Ruggie's exertion lies a grudging concession that 'marketism' remains desirable and dominant, an assertion Soederdeg takes issue with¹⁴. Could it be that Ruggie's efforts have also been undermined by this 'dominant neo-liberal led development paradigm' which has repelled once again efforts to constitute binding norms for corporate rights violations? A careful assessment of the implications of Ruggie's framework for African countries in this thesis will hopefully yield a presumptive response to this question.

David Bilchitz is also unhappy about Ruggie's non binding normative framework. In his recent paper Bilchitz argues that the Ruggie framework does not go far enough as it shies away from a logical conclusion pointing towards direct corporate responsibility for human rights violations¹⁵. In particular Bilchitz hits out at the underlying assumption that corporations do not have positive obligations but only negative ones, and goes on to trace the basis of positive obligations borne by corporations under international human rights law. He concludes his article by stating that 'accepting Ruggie's minimalist framework as it stands would mean reducing the very possibility of transforming our world from the current status quo of vast differentials'.

When one is considering what an appropriate and effective framework for corporate human rights regulation would be like, one has to look at what some global theorists have termed the Polanyian tension¹⁶ characterised by a belief in global capital on one hand and deep seated suspicion on the other due to the fact that in the South TNC activities have been accompanied by negative social effects such as human rights abuses, environmental degradation and poor labour standards. These activities have been buttressed by commoditisation of basic services and general inability or failure by governments to properly regulate them. The argument here is that any neo-liberal inspired agenda to pacify resistance, grievance and social upheaval, including complaint against corporate human rights violations will always apply lipstick to a frog¹⁷.

¹⁴ See "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, A/HRC/8/5, April 2008, para 2.

¹⁵ Bilchitz, D, "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?" April, 2009.

¹⁶ Munck, R, "Globalization and contestation: a Polanyian problematic, Globalizations", 2006 3(2), pp. 175-186, see also Polanyi, K, "The Great Transformation: The Political and Economic Origins of our Times", MA: Beacon Press, Boston, 1957.

¹⁷ Harvey, D, "Spaces of Hope", University of California), Berkeley, 2000.

This study adopts inadvertently the premise arising out of this tension that any process perceived and defined in terms of global theories inevitably contends with deep seated and conflicting positional demands in space and time¹⁸. International legal evolution as a fundamental facet of globalisation also exhibits these tendencies more pronounced in the struggles between the marginalised wishing to use it as an instrument of struggle on one hand and the powerful hoping to entrench their dominance on the other. Whether the ‘Ruggie framework’ seen from the perspective of marginalised and often vulnerable communities in Africa resolves this tension in favour of powerful corporations is what this thesis intends to tease out.

Therefore this study thus carries the torch further by asking whether in fact Ruggie is not applying lipstick to a frog and whether the framework does go far enough to adequately ameliorate the condition of victims of corporate human rights violations in Africa. A close scrutiny of the framework would reveal whether it provides effective and much needed regulation of TNC activity in the continent. Therefore unlike other studies that have been premised on theories of global power relations and governance which comprise the mainstream¹⁹, this study essentially adopts the North South paradigm in critiquing the framework, which is to the effect that the framework while couched in international terms only potentially finds true expression in the North while conveniently ignoring political and social realities of the South. In fact global forces that drive even the evolution of international law as an instrument or tool for other ends deliberately manufacture a one size fit all jacket incognisant of the disparities between the North and South calling for distinguished treatment.

In short therefore it is the intent of this study to critically analyse the framework from the lenses of an African perspective in view of the unique corporate human rights situation.

1.2.5 Methodology

The study will primarily rely on desk research and will utilise existing literature on the subject available in the form of text books to be collected at Makerere University Library and other partner institution libraries in Uganda. More specifically an analysis will be done of the UN special representative on transnational corporations and Human rights main report including

¹⁸ Munck above n16, at page 502, this tension is better expressed by Lefebvre (2005) as a contradiction in which the push for social protection against corporate power and threats of regulation causes corporate power to respond by ‘depoliticising increasing expressions of discontent or ‘dividing the struggle via exclusionary methods’, see in this regard Lefebvre, H, “Everyday Life in the Modern World”, NJ: Transaction Publishers, New Brunswick 2005.

¹⁹ Ruggie, J, G, “Globalization, the Global Compact and corporate social responsibility, Transnational Associations”, 52(6), p. 54–69, also “Global_Governance.net: the Global Compact as learning network”, Global Governance, 2001, 7(4), p. 371–378, also “The theory and practice of learning networks: corporate social responsibility and the Global Compact”, Journal of Corporate Citizenship, 5(Spring), 2002 pp. 27–36. and “Reconstituting the global public domain: issues, actors, and practices”, European Journal of International Relations, 10(4), 2004 p. 499–531.

commentaries and criticism from various stakeholders who have done so. These materials are found on the internet and specifically on a website of documents dedicated to the special representative's work in this area.

Apart from this the study will heavily rely on other online information resources comprising journal articles, reports on the subjects as well as commentaries which are freely available on the web. Special mention is made on the wealth of information provided by Google books which offers some of the latest books on the subject in general. The study will adopt a multidisciplinary angle and utilise resources that provide information pertaining to various socio-political and economic (law and economics) arguments about the nature of global corporate forces and how they use or subvert law as an instrument of achieving their own ends.

1.2.6 Structure of the study

This study will incorporate five Chapters. The first Chapter will set the theoretical framework of the research and present the problem, purpose of the study, methodology as well as literature review. Chapter two will trace the history of the international drive to hold corporations accountable for human rights violations and locate the emergence of the principles and norms highlighted in the Ruggie framework within a proper historical context. The third Chapter will analyse in depth the fundamental three pillars of the framework, seek to ask and answer the question whether the framework can afford adequate protection and remedy for victims of human rights violations especially in Africa and whether it does indeed hold corporations liable. This Chapter will necessarily review existing criticism and commentary on the framework to ascertain what other scholars and academics think about the effectiveness of the framework and whether it does what it purports to do.

In Chapter four the study will attempt to ask and answer the question to what extent it can be said that the framework treats corporations with reverence at the expense of human rights despite overwhelming evidence of the need for a stricter international regulatory mechanism? In this Chapter criticism of the framework will also be placed within the broader global theories in order to ascertain whether it maintains the status quo and if countries in the South can expect anything out of it by way of a committed approach to eradicating human rights abuses done pursuant to achieve neo-liberal agendas and objectives. This Chapter will conclude the study with overall recommendations and indicate outstanding areas that can be taken up by future studies in a comprehensive manner in this complex yet evolving field of international human rights law.

Chapter 2

THE PROTECT, RESPECT AND REMEDY PRINCIPLES: OLD WINE IN NEW WINE SKIN?

2.1 Introduction

Ruggie's three pillar framework components, namely, the duty to protect, the responsibility to respect and access to an effective remedy are not new norms under international human rights law. This Chapter traces their emergence within a common historical framework which has sought to govern corporate activities in relation to fundamental human rights. It looks at the common approaches comprising non binding instruments, corporate self regulation (soft law) and institutional arrangements such as the global compact and locates these principles within these approaches. More than that the Chapter seeks to determine whether the delineation of these principles offers anything new towards efforts to curb global corporate rights violations.

Thus far, international expectations of corporate conduct in relation to human rights have been perceived within the Westphalian conception of international relations. That conception sees states as the only actors and therefore positive obligation bearers under international law. In fact the whole international legal architecture rests upon the notional sovereign state and concepts such as responsibility, jurisdiction and territory are defined in relation to that structure. Critics of this international legal structure have strongly argued that '...the multiplicity of actors in transnational relations, the proliferation of new forms of governance and the permeability of domestic legal orders by international norms' have made this structure unsuitable for the complex globalised world'.²⁰

A logical corollary to this state centric approach has been that transnational corporations are not seen as positive duty bearers, despite their increasing influence and global reach.²¹ Cutler argues that the fields of international law and organization are experiencing a legitimacy crisis relating to fundamental reconfigurations of global power and authority.²² She goes on to state that '...traditional Westphalian-inspired assumptions about power and authority are incapable of providing contemporary understanding, producing a growing disjunction between the theory and the practice of the global system...' Finally she concludes that '...the actors, structures, and processes identified and theorized as determinative by the dominant

²⁰ See for e.g., Schreuer, C, "The Waning of the Sovereign State: Towards a New Paradigm of International Law"?, (1993) 4 EJIL 447 quoted in Jodoin, S, "International Law and Alterity: The State and the Other", *Leiden Journal of International Law*, 21, 2008 p 1-28 at p 2, see Jodoin, S, quoted here at p 3.

²¹ See Cutler, A.C, "Critical Reflections on the Westphalian Assumptions of International Law and Organisation, *A Crisis of Legitimacy*", *Review of International Studies*, Cambridge University Press (2001), 27, p 133-150.

²² Smith, op cit, at p 135.

approaches to the study of international law and organization have ceased to be of singular importance...' and that '...Westphalian-inspired notions of state-centricity, positivist international law, and public definitions of authority are incapable of capturing the significance of non-state actors, informal normative structures, and private, economic power in the global political economy....' This premise lies at the core of the problem of how to effectively regulate private economic power on a sound basis which is thoroughly grounded within the existing framework of international law.²³ The approaches that reflect this deeply entrenched and problematic position are discussed below and the disjunction between these approaches and their intended purpose become self evidently a limiting factor that has so far failed to deliver on the promise of effective human rights protection against corporate abuse.

2.2 Soft law

It is fairly clear that the inadequacy and perhaps the nature of the international legal order has fostered the emergence of a new layer of 'intersubjective transnational structure' arising out of the 'disaggregation' of power from the state to private non state actors.²⁴ While admittedly this structure occupies an ambiguous position as a mirror of international reality, the body of rules and principles emanating there from is clearly distinguishable and informs the evolution of important areas such as international environmental concerns driven by a multitude of international civil society. International relations is still governed through an edifice of 'hard' or binding rules and consequent mechanisms as opposed to 'soft' or non binding rules, being a structure based on the rights and positive obligations of the state. On the other hand, the proliferation of soft norms has been through non binding treaties, resolutions and codes crafted by regional or international organisations claiming to formulate international principles.²⁵

Concerted efforts to curb massive labour rights violations by corporations took the form of 'soft law' instruments as early as the 1970s with the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises of 1977.²⁶ While not binding, the declaration remains the most authoritative source of norms protecting labour rights and offers pertinent guidelines to governments, multinational corporations and Labour Organisations on areas such as industrial relations, conditions of work and life. An enduring principle that would emerge out of this Declaration, and continues to inform initiatives in soft law regulation to date is the principle of shared and complementary responsibilities,

²³ Smith, op cit.

²⁴ Springer, Berlin Heideberg ,Ed, "Diplomacy and International Law in Globalised Relations: Transnational Regime as Soft Law", 2007.

²⁵ Roht-Arriaza, N, 1995, "Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment", *Ecology Law Quarterly*, 22: p 479-539.

²⁶ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006).

which in essence is that there is a possibility of assigning appropriate obligations to different actors at both international and domestic levels.²⁷

The OECD Guidelines for Multinational Enterprises²⁸ are the other principal instrument crafted by member states and are a basic code of conduct concerning transnational corporate activities.²⁹ OECD member states undertook to enforce the Guidelines and to take initiatives to ensure that corporations operating within their territory voluntarily passed them as part of their company code of conduct. These Guidelines are voluntary standards designed to guide and foster responsible business conduct in a wide array of corporate activities such as employment and industrial relations, environment, competition, science and technology and importantly key human rights principles.³⁰

While the Guidelines are an important international instrument for promoting responsible corporate behaviour they suffer from a number of limitations. First of all, they originate from an organisation with limited membership. Thus, even though Africa as a continent suffers among the most serious corporate rights violations, it is underrepresented in the OECD.³¹ Secondly after almost ten years since the amendment of the Guidelines there are concerns that their implementation by member states has been weak and have consequently failed to effectively reign in corporate rights abuse³². It appears governments have not been eager to take strict action and corporations have been too slow in implementing some of the recommendations.³³

²⁷ Ruggie, op cit, at para 9.

²⁸ Adopted 21 June 1976 as revised in 2000.

²⁹ The OECD is an organisation comprising 30 countries to address various challenges posed by globalisation, including governance gaps, the global economy and environment.

³⁰ The full breadth of the principles include areas concerning information disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and taxation.

³¹ Despite its claim to represent all the regions of the world Egypt is the only African country which is a member of the OECD while most of the developed world is represented in the organisation. The OECD however does account for 85% of the world's foreign direct investment.

³² According to OECD watch arrangements regarding to confidentiality, lack of sanctions, weak implementation and lack of possibilities to identify specific companies all contribute to the fundamental weakness of the Guidelines, see the OECD Watch September 2009 Review of NCP: The OECD Guidelines for MNE's, Are they fit for the job?, at http://oecdwatch.org/publications-en/Publication_3201 see also Cernic, J, L, "Corporate Responsibility for Human Rights: A critical Analysis of the OECD Guidelines for Multinational Enterprises", Hanse Law Review, Vol 4, No 1, 2008, 71-100.

³³ In a recent 2009 report entitled "A Governance Gap: The Failure of the Korean Government to Hold Korean Corporations Accountable to the OECD Guidelines for Multinational Enterprises Regarding Violations in Burma", two rights groups, Earth Rights International (ERI) and the Shwe Gas Movement (SGM) highlight the failures by the Korean government which is a member of the OECD to respond positively and effectively to human rights abuses by Daewoo International and KOGAS operating in Myanmar. On the other hand, the Dutch National Contact Point (NCP) on the 31st of August 2009 found that Shell at violated the Guidelines in Philippines, see report at <http://www.foei.org/en/media/archive/2009/>.

The permissive influence of the Westphalian notion is conspicuous in the Guidelines. Thus, for example, they state that subsidiaries of TNC's fall under the jurisdiction of the state in which they operate. Secondly, the Guidelines provide that governments '...have the right to prescribe conditions under which they operate.'³⁴ Furthermore the Guidelines state that MNE's are '...to respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.'³⁵ This general and non specific provision touches on the 'responsibility to respect' that corporations have regarding human rights.³⁶ In this respect they reinforce the notion that the nature of obligations borne by both governments and corporations differ and that the earlier bears the primary and onerous obligation to protect human rights.

2.2.1 The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

Very few can argue against an observation that the UN Sub Commission Draft Norms embraces divergent norms and standards of corporate conduct in a single comprehensive document.³⁷ The Norms were adopted in August 2003 by the Sub Commission at its Fifty-fifth session. Despite their ambiguous status,³⁸ an important principle to emerge from the Norms is that governments retain the primary responsibility to protect human rights, even though businesses also have human rights obligations within their sphere of activity. Also, the Norms address a very broad spectrum of human rights which could potentially be violated by corporations'.³⁹

The Norms ignited heated debate on the question of corporate regulation from the advocates of stricter regulation on the one hand and corporate representatives on the other.⁴⁰ It

³⁴ See the 2000 amended Guidelines, Art 18. This poses a challenge where subsidiaries fall under weak countries who are not members of the OECD and ignores corporate reality that parent companies do dictate conduct and pace for their subsidiaries.

³⁵ 2000 amended Guidelines, Art 19.

³⁶ Ruggie adopts this term from like instruments such as the Guidelines and the UN Global Compact Principles to mean that corporations must '...act with due diligence to avoid infringing on the rights of others', see The Corporate Responsibility to Respect Human Rights, Briefing on the work of the Special Representative of the Secretary-General on Business and Human Rights at www.unglobalcompact.org/docs/news_events/Bulletin/CR_and_Human_Rights_Report.pdf May 2009.

³⁷ See for example The Joint Views Of The International Chamber Of Commerce (ICC) And International Organisation Of Employers (IOE) On The United Nations Norms on The Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and the response by Sir Geoffrey Chandler who highlights that '...the value of the Norms to business is that they distil, in a single comprehensive and authoritative document, the international human rights principles applicable to the whole range of business responsibilities for all businesses' at www.businesshumanrights.org/Links/Repository/179848/link.

³⁸ Due to the heated debate surrounding the adoption of the Norms by the Sub Commission on Human Rights at its 61st session requested the UN Secretary General to appoint a Special Representative on the issue of human rights and business, thereby shelving any substantive consideration of the status of the Norms. What has become of the Norms after the work of the special representative is still very unclear.

³⁹ See Preamble to the Draft Norms which lists substantive rights that corporations are obliged to respect

⁴⁰ Essentially the debate around the Norms was that they potentially dilute the responsibility of the state for human rights and that they are a misstatement of international law and unduly negative towards businesses

can be argued that the contentions behind the Norms sealed their somewhat unhappy fate and led to their ‘sudden death’.⁴¹ When the special representative was appointed to continue consultations in light of the controversies surrounding them, he reached a finding that effectively buried the Norms, but not necessarily their substance whose debate continues to date.⁴² In his interim report the special representative unreservedly labelled the Norms as ‘...engulfed by its own doctrinal excesses,⁴³ and creating ‘confusion and doubt’ through ‘...exaggerated legal claims and conceptual ambiguities’.⁴⁴

Ruggie’s condemnation of the Norms cannot be without suspicion. Some authors have postulated several reasons that, taken to their logical conclusion could indict the special representative as an undercover agent of global capital and perhaps a wolf in sheep skin. Kinley, Nolan and Zerial believe that,

One of the reasons the Norms have engendered such controversy is that they have stepped into the middle of the CSR debate, not only by crystallising the connection between human rights and CSR but by positing a system whereby international law responds directly and forcefully to corporate action that violates such rights. It is thus not surprising that much of the critical commentary on the Norms corresponds with many of the concerns frequently voiced in respect of other CSR matters such as the perceived problems that might flow from soft laws made hard and from the alleged inappropriateness of placing human rights obligations on corporations.⁴⁵

Unlike other CSR initiatives the Norms placed the question of state responsibility and corporate human rights violations within an international framework while at the same time defining human rights broadly and collecting their obligations into one document. The Norms were a direct attempt at imposing obligations on corporations, an attempt which TNC’s are uncomfortable with.⁴⁶ It is therefore unsurprising that detractors of the Norms would seek their early downfall, given the direction that the Norms were forcing the international community to take on corporate human rights regulation.⁴⁷ According to the authors, this would have sought to ‘address one of the most significant barriers to regulating TNC’s: the fact that due to their transnational nature they operate within a legal vacuum, particularly in states that are

⁴¹ The Commission declined to adopt the Norms stating that ‘while they contain useful elements and ideas, they have no legal standing’.

⁴² The substance of the Norms was essentially an attempt to hold corporations directly liable under international law for rights violations. That debate still proliferates; see for example Parker C, “Meta-Regulation: Legal Accountability for Corporate Social Responsibility”, in McBarnett et al,(eds), “The New Corporate Accountability: Corporate Social Responsibility and the Law,” 2007.

⁴³ See the Interim Report of the Special Representative to the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N.Doc. E/CN.4/2006/97 at para 59.

⁴⁴ Springer, op cit, para 60.

⁴⁵ Kinley, D et al, “The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations”, 2007, 25 C & SLJ 30-42 at 33.

⁴⁶ See for example Corporate Europe Observatory,” Shell Leads International Business Campaign against United Nations Human Rights Norms”, CEO Info Brief (March 2004, available at <http://www.corporateeurope.org/norms.html>.

⁴⁷ Draft Norms, op cit, Art 18.

themselves human rights violators or are too weak to prevent or remedy human rights violations'.⁴⁸

Given this scenario, it is not too difficult to see the underlying reasons why the special representative would reject the Norms, aside from their alleged structural and conceptual deformity.⁴⁹ The problem was really one of fundamental design, a problem global capital and its agents could not swallow. Besides this however, the substance of the Norms can be seen reflected in latter attempts through the 'protect, respect and remedy framework' especially through the primary duty of the state and complementary responsibilities of corporations themselves. The deficit of remedial mechanisms is also addressed in the Norms and finds its way in the Ruggie framework as well.⁵⁰ Be that as it may, the Norms did have problem, not least the ones highlighted by Ruggie.⁵¹

2.2.2 The Global Compact

Apart from the legal instrumentation in the form of soft law the international community also engaged with the problem of corporate rights abuse via international institutional arrangement. The Global Compact (GC) stands out as the most significant, albeit controversial one.⁵² The GC is an initiative by the world governing body tackling corporate social responsibility initiatives in partnership with business corporations. The GC calls on business leaders to 'embrace and enact' nine basic Principles with respect to human rights, including labour rights, anti-corruption and environmental practice. Businesses adopt the principles on a voluntary basis and without any additional criteria or benchmarks for monitoring, verification or enforcement.⁵³

NGOs, corporations and Labour organisations have accepted the GC as representing a win-win situation on the basis of partnership and further from the failed 'statist centred policies'.⁵⁴ This system is touted as favouring dialogue, cooperation and not control and

⁴⁸ Kinley et al, op cit, p 35.

⁴⁹ For the detractors of the Norms the principal fault was that the Sub Commission and the Working Group did not sufficiently consult with various stakeholders before coming up with the draft. A more detailed analysis of the substantive arguments for and against the Norms is done in Kinley, D and Chambers, R, "The United Nations Human Rights Norms for Corporations: The Private Implications of Public International Law", 6(3) 2006 Human Rights Law Review, p 16-33; and Nolan, n 26, p 584-605. and these arguments are beyond the purview of this study.

⁵⁰ See for example the 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, at p 82 -103.

⁵¹ Ruggie, op cit,

⁵² The other is the Kimberly Process Certification Scheme which was set up in 2002 to prevent the flow of illicit trade in diamonds which fuels deadly conflicts and massive human rights violations in Africa.

⁵³ See Bremer, J, A, "How Global is the Global Compact? Business Ethics": A European Review, Vol. 17, No. 3, 2008, p 227-244.

⁵⁴ See Global Policy Forum Europe (Ed.), who's Partnership for whose development? Corporate accountability in the UN System beyond the Global Compact, Speaking Notes of a Hearing at the United Nations, Geneva, 4 July 2007.

command, a key feature that augurs well for its success. On the other hand is critics have argued that the initiative is superficial and a ‘blue-wash’, designed to advance superficial contribution to development but leaving the inequalities within the system virtually untouched.⁵⁵ Of course the fundamental weakness of this institutional arrangement is its reliance on voluntarism and the absence of an effective enforcement mechanism. Furthermore its impact in curbing violations occurring in Africa is highly negligible.

2.3 Issues arising out of soft law approaches

Two issues arise out of the current ‘soft law’ approaches to corporate regulation for human rights violations. In the first instance there was a lack of conceptual clarity and policy consistency which allowed corporations to continue human rights violations without effective control.⁵⁶ This may have been in part due to the underlying assumptions of international relations which continue to be impervious to necessary changes recognising non state actors as complete subjects of international law.⁵⁷ But also one could not ignore the counter social struggle agenda by global forces perceiving a threat against their interests from concrete action at a global level. Global politics may have stalled the process for effective regulation against corporate rights violations

Secondly, and as noted by the special representative, this framework has been lagging behind the rapidly increasing pace of global governance which has created damning governance gaps.⁵⁸ These gaps are visible in two respects, the first being the increasing marginalisation from global benefits of countries in the South, while those who already enjoyed benefits continue to do so, and secondly the rise of global capital from the North coupled by the ever decreasing power of the state in the South.⁵⁹ What is relevant out of these observed gaps in global governance has been the inability of the weakened state to protect human rights, especially, social, economic and cultural rights.

The special representative thus goes further in the protect, respect and remedy framework to engage with what he calls the ‘weak governance zones’ and his vicarious

⁵⁵ See Berne Declaration, NGOs Criticize “Blue Washing” by the Global Compact, 4 July 2007. <http://www.globalpolicy.org/reform/business/2007/0704ngobluewashing.htm>, also Capdevila, G, Inter Press News Service (IPS), UN: Global Compact with Business ‘Lacks Teeth’ NGOs, 6 July 2007. <http://www.corpwatch.org/article.php?id=14549>.

⁵⁶ Ruggie, op cit, para 5. The Special Representative begins from this lack of ‘conceptual clarity’ and lack of ‘authoritative point’ in the existing initiatives to curb corporate human rights violations.

⁵⁷ This confusion can be seen in the Norms which prematurely attempted to impose direct responsibility to corporations at a time when the question of the nature of the international system based on a ‘statist’ model had not been resolved.

⁵⁸ Ruggie, op cit, para 3.

⁵⁹ See for example a warning by the United Nations Development Program in its Human Development Report 1999, Globalisation with a Face (HDR-99) at <http://hdr.undp.org/en/reports/global/hdr1999>.

concerns with corporate complicity in states human rights abuses.⁶⁰ But to assume the traditional view of state responsibility through asserting the state's duty to protect is however to ignore the reality of 'failing states' and developing states whose conduct also violates human rights. This situation presents a formidable challenge to the special representative to date, although it is interesting to note that he admits that '...there are no inherent conceptual barriers to states deciding to hold corporations directly accountable by establishing some form of international jurisdiction'.⁶¹

Inherent in the efforts thus far undertaken to curb corporate rights violations within the soft law approaches set out above, has been the inability to acknowledge that the problems created by corporate malfeasance largely arise out of the consequences of globalisation. The basic assumption that the state still retains the sole duty to protect human rights is fundamentally flawed. This assumption of course has created problems of how other entities can be made liable when the international mechanism does not permit the possibility of such liability. The mismatch here is apparent, that powerful global actors do not assume effective responsibility, a mismatch which is damning to the global effort to stop human rights violations through appropriate and effective corporate regulation.

2.4 Conclusion

Although the old framework does advance the notion that private non-state actors could bear certain non-binding responsibilities these are more voluntary than compulsory. These responsibilities arise out of the special position and relative power that non-state actors bear, and the impact they exert on social spheres at a domestic and global level.⁶² What this does not take into account however is the fact that global power relations have tipped to such an extent that it is no longer adequate to merely prescribe non compulsory standards whose influence is still deliberately overridden by other motives such as capital and profit accumulation. Even when standards are accepted in the form of CSR these are done with capital accumulation and profit in mind, and not for the goals of human rights protection.

It is not surprising therefore that this framework would suffer from a want of effective enforcement mechanism and essentially 'lack teeth'. As noted by Ruggie, the incoherent framework suffered from want of effective remedial mechanism where violations occur, be it in the form of complaint enabling structures or clear legal and policy direction. The soft governance mechanism has not only lacked the initial impetus to create platforms for effective

⁶⁰ Ruggie, op cit, para 3. Admittedly the first in doing so is admitting these global governance incongruence's and their causes and placing them at the centre of the initiative to hold corporate power accountable to its actions.

⁶¹ Ruggie, op cit, para 65.

⁶² Kinley, op cit, p 30.

complaint, it has also failed to reform in accordance with the realities and dictates of a global mechanism requiring nothing less. It is this primary deficiency that has so far failed to effectively control human rights violations and which continues to imbue international legal governance mechanisms, with poor countries in the south having to bear the worst consequences.

In the final analysis, while the new framework by Ruggie identifies and singles out the key principles forming the basis for further effort to curb corporate human rights abuse, for the most part these principles have been an integral aspect of the old framework. From a conceptual and critical perspective singling out the duty to protect, the responsibility to respect and access to remedy principles as the core of a new approach has several distinct advantages, not the least of which is the potential to focus attention on the problematic question of who bears what duties, obligations and responsibilities. More than that, this enables a thorough look into the nature and scope of the obligations and responsibilities assigned to the different key players and the implications of the failure to live up to those responsibilities, especially to the victims.

The framework also proceeds from a principled policy position which lays a solid foundation for future engagement between various stakeholders in an effort to come up with an appropriate human rights regime governing corporate behaviour. It coheres around various historically fragmented actions and approaches and ties them into one common foundation from which action by different stakeholders becomes complimentary. This has obvious advantages, some of which can already be seen in the focused debates arising within the framework and its underlying assumptions. Conceptually, the Ruggie framework adopts a very different focus in its proposal to deal with the problem of business and human rights. What the practical effect of this on human rights violations taking place in Africa can and must be deduced from a close and critical analysis of the core elements of the framework.

The next Chapter will thus look at the three principles in detail and how they create a mechanism whose primary goal is to guide efforts to regulate TNCs. The Chapter will also ask and answer the question whether this principled approach will be sufficient or adequate to curb rights violations in Africa and what impediments if any, stand on its way. Also the question whether taken as a whole the new approach is fundamentally different from the old approaches will be answered, with a focus on whether possible mechanisms under the framework will potentially strengthen or merely stall regulatory efforts and access to grievance means and remedies by victims.

CHAPTER 3

IS THE RUGGIE FRAMEWORK FIT FOR THE JOB?

3.1 Introduction

The last chapter of this study retraced the emergence of the duty to protect, responsibility to respect and access to remedy principles within well established soft law approaches to solving the problem of corporate human rights violations at the international level. The conclusion that these principles are not new is quite inescapable, prompting the necessary question: *what is different about their reformulation and recasting within the Ruggie framework?* This Chapter deals with the principles by isolating their key elements as highlighted by the Special Representative in order to ascertain the nature and the potential impact of the proposed new approach to dealing with the links between business and human rights.

3.2 The State's Duty to Protect

In his 2008 report, Prof. Ruggie's initial intention was to distinguish the duty to protect from what he called the 'humanitarian concept' of the responsibility to protect.⁶³ This distinction was not only misleading but has serious underlying implications for the effectiveness of the framework and the protection of human rights from corporate intrusion.⁶⁴ A number of questions arise from this juxtaposition of the two aspects of the responsibility. First, it is necessary to ask what is the nature of the duty to protect under international law and how does it differ from the responsibility to protect?

Ruggie rightly asserts that under international law states have a duty to protect against human rights violations by third parties affecting persons within their territory and jurisdiction.⁶⁵ What happens when a particular state fails to fulfil this duty under international law? The answer to this question cannot be understood without considering the supposedly distinct responsibility to protect doctrine. This doctrine has indeed been prominent within the debate on the subject of humanitarian intervention.⁶⁶ This responsibility is emerging as an important norm of international law despite its controversies.⁶⁷ Even though arguments and

⁶³ Ruggie, *op cit*, p4, footnote 5.

⁶⁴ Some authors do not distinguish between the duty to protect and responsibility to protect, see for example The International Commission on Intervention and State Sovereignty, International Development Research Centre (Canada), "The responsibility to protect: report of the International Commission on Intervention and State Sovereignty", IDRC, 2001 at p 147, see also Hilpold, C, "The Duty to Protect and the Reform of the United Nations-A New Step in the Development of International Law", Max Planck UNYB 10, 2006.

⁶⁵ Hilpold, *op cit*.

⁶⁶ See Bellamy, A, J, "The Responsibility to Protect", *Polity*, 2009 at p 51.

⁶⁷ See Arbour, L, "The Responsibility to Protect as a duty of care in International Law and Practice", *Review of*

counter arguments abound about the moral rightness of intervening in another state's affairs, it has long been recognised that in certain extreme humanitarian circumstances shocking the conscience of the world other states could step in to ameliorate gross human rights violations.⁶⁸ Following grave situations of genocide in Rwanda, Yugoslavia and Cambodia in the early 90's this right of intervention has since mutated to become a responsibility falling upon the community of states and endorsed by the General Assembly of the United Nations in 2005.⁶⁹

The basis of this responsibility is significantly the duty to protect which has been asserted to mean that states have a duty to ensure the protection of human rights within their territory and that the international community assumes a responsibility to protect when the state has failed to do so.⁷⁰ The duty and the responsibility to protect are essentially one and the same thing, or at least ought to be two sides of the same coin. This understanding has a necessary logical consistency to it arising out of the doctrine of state sovereignty with its common and sometimes controversial limitations.⁷¹ Among the controversial limitations of state sovereignty to emerge in the 20th Century has been the notion that states can unilaterally intervene in another state's affairs to stop the occurrences of grave human rights violations or serious threat to the peace and security of the international community,⁷²

Ruggie's narrow conception of these supposedly distinct concepts leaves a gaping hole with regard to possible recourse by the wider international community where a state has failed to prevent serious human rights violations by corporations from being committed within its borders.⁷³ It essentially domesticates international human rights protection under global conditions dominated by large international private actors. This produces what Virginia Haufler describes as the 'growing asymmetry' between burgeoning corporate power on the one hand and the power of international relations theory and international institutions on the other.⁷⁴ This fundamental weakness surfaces for example in the problem of how to treat the subsidiaries of

International Studies, 38, 2008, p 445-458, see also Welsh, J.M, "Humanitarian Intervention and International" Relations Oxford University Press, 2006, p 234.

⁶⁸ See Abiew, F.K, "The Evolution of the Doctrine and Practice of Humanitarian Intervention", Martinus Nijhoff Publishers, 1999, p 325.

⁶⁹ See paragraphs 138-139 of the World Summit Outcome Document of the High Level Plenary Meeting of the General Assembly in September 2005 on the Responsibility to Protect.

⁷⁰ König, D, "International law today: new challenges and the need for reform?" Springer, 2007, Vol 193 at p 5.

⁷¹ See "A more secure World: Our shared responsibility", Report of the Secretary General's High Level Panel on Threats, Challenges and Change, New York: United Nations, 2004, p66-106.

⁷² Less controversial is intervention through the architect of the United Nations and its Security Council under similar circumstances but requiring collective consent for such drastic action, see the International Commission on Intervention and State Sovereignty, International Development Research Centre (Canada) "The responsibility to protect: report of the International Commission on Intervention and State Sovereignty", IDRC, 2001, Vol 1.

⁷³ This has arisen for examples in the case of the DRC were the state has shown profound inability to exert its control on corporations within its borders due to raging conflicts and wars in the extreme parts of the country.

⁷⁴ Cutler, A et al, "Private Authority and International Affairs", Albany, N.Y.: State University of New York Press, 1999, p 3-28.

giant corporations operating in different countries with the controlling body in another country raising the well known defence of separate entity.⁷⁵ It also rears its ugly head within the context of an international reality, viz., that some states—especially from the south—are hapless and weak when confronted by these giant corporations, or simply bow down to their stratagems and blandishments thereby turning a blind eye to rights violations.⁷⁶ In some other well documented instances, the corporations go as far as perpetuating rights violations through connivance.⁷⁷

Ruggie furthermore points out that the application of this duty as extrapolated by core United Nations human rights conventions requires states to take all necessary steps to protect against such abuse including to prevent, investigate and punish the abuse, and to provide access to redress.⁷⁸ In this regard while states have a very wide discretion in taking such steps regulation and adjudication of corporate activities vis a vis human rights is deemed appropriate. This approach is tantamount to taking one's eyes off the ball and focusing on the supporters. Coupled with the arguments on state limitations made above, the real conundrum in the problem of business and human rights is transnational; the crisis is international and pertains to the overarching reach of powerful borderless entities buoyed by globalisation and all its fallibilities.⁷⁹ If there is one lesson the recent worldwide financial crisis has taught us it is that not only are irresponsible actions of big corporations incapable of being properly calibrated domestically, but also that it takes concerted international effort to undo the harm caused by them and not just isolated instances of state regulation and adjudication. Surprisingly, Ruggie does admit that the problem lies in the governance gaps created by the excesses of globalisation.⁸⁰ Confining the crux of the problem to domestic levels is equivalent to dipping a finger in the ocean and hoping to cause huge waves.

In fact, the effect of placing an undue emphasis on the narrow conception of the duty to protect which does not permit effective international recourse is to shift the focus of the international community from thinking about transnational solutions to the problem of business and human rights. This approach is not just a clear example of global market partisanship, it

⁷⁵ For the principal arguments involved in this see an article entitled "Parent Corporation Liability For Foreign Subsidiaries" by Fasken Martineau DuMoulin LLP at <http://ca.vlex.com/vid/parent-corporation-liability>.

⁷⁶ See KARP, D, V, "Transnational corporations in 'bad states': human rights duties, legitimate authority and the rule of law in international political theory", Cambridge University Press, 2009 available at http://journals.cambridge.org/download.php?file=%2FINT%2FINT1_01%2FS1752971909000074a.pdf&code=0a49cc6fd379b3a3954f7b01a59f9543.

⁷⁷ See Irene Khan, Secretary General of Amnesty International in "Understanding Corporate Complicity: Extending the notion beyond existing laws", Business Human Rights Seminar, London December 8, 2005 at http://www.amnesty.org.au/wiki/Understanding_Corporate_Complicity:_Extending_the_notion_beyond_existing_laws/.

⁷⁸ 2008 Protect, Respect and Access Report, n14 above p10.

⁷⁹ See Hedley, A, R, "Transnational Corporations and Their Regulation: Issues and Strategies" International Journal of Comparative Sociology, Vol. 40, 1999.

⁸⁰ Ruggie, op cit, above p 5.

reverses the very gains that the Draft Norms sought to achieve, and in a way allows the international community to take its foot off the accelerator. A sustainable acceptable solution clearly lies with the international community taking effective action fundamentally different from that which has been followed before.⁸¹

The only mention of the need for an international focus on the problem by Ruggie is isolated to instances where states are encouraged to share information, support, guidance and assistance in the form of knowledge, resources and technical capacity.⁸² Ruggie also hesitatingly directs international engagement on the matter to the discredited framework of the OECD Guidelines which he believes can be useful when revised again to root out certain conceptual difficulties.⁸³

Other than the very sparse mention of international initiative which essentially is cooperative in nature the Special Representative offers nothing more. He does however refer to the problematic conflict zones and abuses perpetuated by corporations taking advantage of the absence of the rule of law and civil order to further their own ends.⁸⁴ Even in this, his proposals are essentially premised on the states themselves taking action, albeit with limited intervention by international institutions such as the Security Council imposing sanctions against the corporations themselves. Not only is the absence of a drive to push the international community to take more effective action in conflict zones glaring, it is baffling how these countries (failed states proper) can even manage to come up with and enforce appropriate regulatory policies.

It is true to say that the state's duty to protect is not a '...standard of result but a standard of conduct'⁸⁵ meaning that it is inconceivable to hold states accountable for the acts of third non-state parties.⁸⁶ This observation succinctly unmasks the problem, namely the fact that if states cannot be liable who else should be other than the violator? And this is where international civil organisation fingers have been pointing towards in respect of corporate rights violations.⁸⁷ The duty of the state to protect should not, and cannot be a pretext for lessening

⁸¹ See Zumbansen, P, "Beyond Territoriality: The Case of Transnational Human Rights Litigation," *The Constitutionalism Web-Papers* p0020, University of Bath, Department of European Studies and Modern Languages, 2005.

⁸² See Business and human rights: Towards operationalizing the "Protect, Respect and Remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13, 22 April 2009, p 12, para 38-42.

⁸³ Ruggie, *op cit*, at p 13.

⁸⁴ Ruggie, *op cit*, at p 10.

⁸⁵ Ruggie, *op cit*, p 7 para 14.

⁸⁶ See O' Brien, J, "International Law", Routledge Cavendish, 2001, p 369.

⁸⁷ See Kennedy, J, "Global Rules for TNC's in an era of globalisation and Uncertainty", KAIROS – Canadian Ecumenical Justice Initiatives, Canada, 2003.

the appropriate responsibilities to corporations who have within their means the capabilities to respect human rights if compelled by sterner action. And such responsibilities cannot be overly left to domestic systems to marshal in light of the reasons set out above.

While states can perfectly regulate corporate conduct within their sphere of influence, this proposition must not be taken too far. It assumes that the state is a homogenous abstraction which is the same everywhere, carries the same capabilities and wields the same power.⁸⁸ This however is very far from the truth. For example, the entity of the state in Africa is vastly different from that in the West. Furthermore, the two occupy historically different positions. While the latter can afford to impose stricter corporate regulation, the opposite is true in Africa where because of the dire hunger for foreign investment states may not be prepared to ruffle the furthers of big corporations.⁸⁹ The advantage with turning to the international community to set clear norms and standards and thereby effectively compelling corporations to comply with human rights norms is that these inherent weaknesses in the entity of the state in Africa would not be taken for granted by powerful transnational corporations.

Ruggie's focus on the duty of the state therefore is not only narrow but distracts from what should be the sole engagement of the international community, that is finding means of and ensuring that appropriate obligations are imposed on corporations for human rights violations.⁹⁰ A look at the second principle of the framework, the responsibility to respect, shows that in essence the framework adopts more of the same old notions while promising a difference.⁹¹ It fails to interrogate the possibilities of stronger standards coupled with even stronger enforcement mechanisms at an international level against corporate rights violations. The corporate responsibility to respect merely masks the illegitimate and discredited idea that self regulation is better imposed under the cloak of a supposedly international principle curved out of society's expectations of good corporate conduct.

3.3 Corporation's Responsibility to respect

Ruggie contends that the baseline responsibility for corporations is to respect human rights and that failure to do so may subject such corporations to the courts of public opinion.⁹²

⁸⁸ See Handel, M, I, "Weak States in the International System", Routledge, 1990.

⁸⁹ See Haglund, D, "Regulating FDI in Weak African States: A Case Study of Chinese copper mining in Zambia", *J. of Modern African Studies*, 46, 4, 2008, p. 547-575.

⁹⁰ See Duruigbo, E, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" available at 6 *Nw. U. J. Int'l Hum. Rts.* 222 at <http://www.law.northwestern.edu/journals/jihr/v6/n2/2>.

⁹¹ Prof Ruggie introduces what he terms a 'principle based conceptual and policy framework' providing an 'authoritative focal' on business and human rights, an approach designed to be fundamentally different from the current initiatives on the matter, see n8 above at p 4 para 1-5.

⁹² Ruggie, op cit, at p 17.

By this Ruggie is taken to mean that recognising the power of social action on the survival of corporations, the first real indictment on errant corporate behaviour is mobilised social action based on societal expectations. Society expects, and corporations have to refrain from doing any harm, and it is not merely the expectation to refrain from doing harm in a negative sense but to also take positive steps to prevent and address human rights violations where they occur. Ruggie conceives what essentially amounts to a new standard and this is the human rights due diligence standard that corporations must abide by in order to fulfil their responsibility to respect. Like corporate governance mechanisms, a due diligence component of corporate conduct would involve systems and processes carefully designed to ensure that corporations actually respect human rights.

One must applaud the Special Representative for formulating such clear guidelines pertaining to corporate conduct and human rights. In principle their effectiveness goes beyond the measures often accepted as sufficient for companies to deal with human rights violations—such measures being deeply embedded in corporate social responsibility initiatives that companies undertake. Time and again it has been shown that these CSRI's are however really publicity stunts designed to enhance the image of a company and strengthen its brand, in the same way the green tag⁹³ has become, and nothing more. In this respect the incorporation of human rights requirements into a company's governance systems is a milestone and should indeed be encouraged as it presents possibilities for a more robust approach to the problem of corporate rights violations.

However, the problem is whether liability arises in respect of a company that has failed to observe due diligence in relation to the protection of human rights and whether the victims can use that failure to make legally recognisable claims against the company or its officials. This problem is compounded by the fact that even under traditional companies' laws a board of directors has certain duties owed to the company and the shareholders only.⁹⁴ Moreover regulators all over the world have been hesitant in extending the duties owed by companies to categories of persons other than the shareholders such as consumers, society, communities affected by the company's operations and even employees in most cases.⁹⁵ Unless

⁹³ A green tag has become a symbol adopted voluntarily by corporations and signifying their supposed compliance to policies and practices that not only conform to environmental requirements but contribute to its protection and preservation.

⁹⁴ See Baxt, R, "Duties and responsibilities of directors and officers", AICD, 2005 at 22. Some jurisdictions are now moving towards wider statutory duties for directors that non share holder interests see in this regard Part 10 of the UK Companies Act 2006.

⁹⁵ In England the Companies Act of 2006 in Section 171 has significantly changed the overarching principle to require Directors to consider the interests of employees and other stakeholders who may be affected by a Director's exercise of his duties. This is however not to be taken that Directors owe duties to employees and indeed the Act retains the traditional position in relation to duties of Directors. See a comment by James Gold

states impose these obligations as direct legal standards it is inconceivable that those whose rights have been violated will have recourse in courts of law on the basis of the failure to exercise human rights due diligence.

The corporate responsibility to respect approach appears as just another voluntary initiative with marginal consequences on the taming of corporate rights violations. For the reasons set out above pertaining to the likely inability or unwillingness of states to directly and strongly regulate companies through appropriate laws at domestic levels, most corporations would continue paying lip service to human rights diligence, as they are doing now. Furthermore, focusing on internal company systems shifts attention away from the search for appropriate international standards dealing with corporate rights violations committed by giant multinational corporations at a global level. It is not enough that transnational corporations merely respect human rights without the possibility of attendant binding obligations at the international level and effective mechanisms to ensure that victims are compensated for the harm perpetuated against them.⁹⁶

Available evidence suggests that by and large corporations have tended to ignore even non-binding recommendations for good corporate conduct in relation to human rights from global institutions such as the Global Compact to which they are an integral part of. Quite clearly the solution does not lie in unrealistic expectations that these corporations would someday conform to substantive human rights norms without necessary compulsion or that they would ever subject their pursuit for profit to human rights interests. Even if that day were to come, massive violations still occur and many communities and individuals have suffered persistent human rights violations without access to remedies at both local and international levels. In the context of the two other principles discussed above, Ruggie addresses the problem of the lack of access to remedies for human rights violations by individuals and vulnerable communities.

3.4 Access to remedies

One of the most visible failures of CSRI's to date is lack of enforcement mechanisms which make it possible for victims of violations to access remedies. This is because soft law approaches lack hard rules with consequent remedies for their violations and the Special Representative aptly notes this weakness. His model makes a necessary distinction between

on the English Companies Act 2006 available at <http://www.mondaq.com/article.asp?articleid=67262>. See also S76 of the new South African Companies Act (2008).

⁹⁶ See Engle, E, A, "Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?" *Willamette Law Review*, Vol. 40, No. 103, 2004, 40.103 (2004): 103-121. Available at: http://works.bepress.com/eric_engle/25.

judicial and non judicial mechanisms which allow victims to be recompensed apart from possible criminal action against the corporations themselves or against their officials. While on the face of it the Special Representative's extrapolation of the need and type of mechanisms desired to afford remedies is acceptable, it soon runs into manifold problems, some of which are actually highlighted in the April 2008 and 2009 reports.⁹⁷ These problems are an inevitable consequence of the manner in which the framework proposes to assign duties between the state and corporations.

Ruggie's starting point is to insist that the duty of the state to protect can only be fulfilled when it provides legal remedies and sets up appropriate institutions for corporate rights violations.⁹⁸ This seems all too well except that it is based on the assumption that all states are capable of effectively regulating corporations at all levels. If indeed states were capable and could do so one would suppose that the evolution of international human rights law and its attendant institutions would have been redundant but it is precisely because of the fallibilities of the state that the international human rights regime exists. Again the state in Africa has exhibited inability, and in some instances unwillingness to effectively regulate in this sphere of domestic activity because it is too concerned to lose foreign direct investment or too compromised to do anything.

It is also imperative to highlight that the form of developmental model pursued by, and in a large number of cases imposed on the African state inhibits a strict regulation of corporate activities in the name of liberalisation and de-regulation.⁹⁹ Prescriptions from the world developmental institutions such as the World Bank and the International Monetary Fund demand that states interfere less in market activities and allow market freedom to thrive in order to attract the large investments necessary for economic growth.¹⁰⁰ Despite widespread criticisms about the International Institutions' market fundamentalism the IMF continues to seek contractionary financial policies from developing countries while paying lip service to developmental issues.¹⁰¹ Therefore even in circumstances where a country may be willing to pursue strong regulation against corporations it may be constrained by these prescriptions and generally compelled to subjugate human rights interests in favour of trade and economic

⁹⁷ Ruggie, op cit, at p 22.

⁹⁸ Ruggie, op cit, at above p 7, para 18.

⁹⁹ See Mbaku, J, M, "Institutions and development in Africa", Africa World Press, 2004, See also Madavo, C, Africa: The Development Challenges of the 21st Century", available at <http://www.wilsoncenter.org/topics/pubs/OP004.pdf>.

¹⁰⁰ See Singh, A, "Globalisation And The Regulation Of FDI: New Proposals From The European Community And Japan", Oxford Journals; Contributions to Political Economy, Vol 24, Number 1 p 99-121 available at <http://cpe.oxfordjournals.org/cgi/content/abstract/24/1/99>.

¹⁰¹ Stiglitz, J, "Globalization and Its Discontents" W.W. Norton & Company, New York June 2002.

growth.¹⁰² It is primarily because of these reasons that we see a reluctance by most states in Africa to impose human rights obligations on corporations.

At the very least, the search for solutions to transnational human rights problems must begin at an international level with appropriate instruments and institutions setting the standards and norms for corporate human rights violations. One would remember the effect that ILO instruments have had in compelling states to enact domestic laws governing industrial relations and protecting fundamental labour rights and requiring the creation of appropriate domestic forums for the enforcement of such rights. The institutional support of the International Labour Organisation has been indispensable to the success of this enterprise without which there is considerable doubt that any headway would have been achieved. Recognising the necessity for enabling domestic remedies and the principle of complementarity under international law, international efforts to curb corporate rights violations should be translated into clear norms that would trickle down to influence and affect domestic processes, thus empowering weaker states which will be under an international obligation to implement these norms.

Beginning at an international level will also address the nemesis in the corporate rights violations problem which is the difficulty of holding corporations accountable to violations occurring overseas.¹⁰³ Because of the multiplicity of different rules regarding the legal question of forum in different jurisdictions, it is a nightmare to conceive of an effective approach to enabling legal cases against transnational corporations who by their nature span numerous jurisdictions and operate in different countries.¹⁰⁴

3.5 Conclusion

It has thus become clear what the central problem of reliance on Ruggie's three principles is. This problem is that while the state bears the ultimate duty to protect it cannot be held liable for direct corporate rights violations but failing to regulate these corporations. On the other hand the framework overtly avoids the question of the direct accountability of corporations and instead chooses to rely on the principle of responsibility to respect whose legal ramifications is not precise. Whilst the delineation of the three principles comprising the framework would be acceptable, and indeed bears a certain conceptual consistency to it, this delineation fails the test of effectiveness when analysed within the context of global realities

¹⁰² See Aaronson et al, "Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking", Cambridge University Press, 2008, p 337.

¹⁰³ Report of the Secretary General's High Level Panel on Threats, Challenges and Change, n71 above.

¹⁰⁴ The typical problem of forum can be seen in the case of *Khulumani Communication (SA) and Barclays Bank et al* which was instituted in the US under the Aliens Tort Claims Act for rights violations that occurred under Apartheid South Africa with the complicity of the defendants. Earlier on the case had been dismissed for non suitability and in a progressive twist in 2007 the Court of Appeal in New York decided to admit the claims.

pertaining to the nature of the state entity in Africa, the effect of global capital on both state and non state relations and in particular the whole framework of global governance. From this analysis the framework does little to address the underlying disparities in global governance that render the state in Africa weak against corporations, and the human rights of communities even more vulnerable to the exploits of global capital.

Perhaps most significantly, the three principles of the framework fail to espouse a clear definition and standard of corporate obligations which can be applied territorially or extraterritorially. This failure arises out of the misplaced emphasis by the principles on domestic fora as the possible means and enforcement of what could be divergent standards of corporate human rights obligations, instead of enshrining human rights standards for businesses at the multilateral levels applying to all corporations. What is clear from the framework is that an over-reliance is still placed on voluntary initiatives requiring corporations to adopt systems of corporate governance that seek to enable the corporations to avoid rights violations.

In essence, the framework prescribes the wrong medicine for an apparent disease. The next Chapter treats this problem in more detail and analyses the effect of the Ruggie framework on rights violations in Africa.

CHAPTER 4

THE CONTINUED REIGN OF UNBRIDLED MARKETISM?

Most of today's critical problems—from environment to protection and financial volatility to AIDS and the drug trade—cut across national jurisdictions. They are global problems that call for global responses... There is a gap between economics and politics, a discrepancy between the interdependence of markets and the lack of effective mechanisms for supervision and control.¹⁰⁵

4.1 Introduction

From the preceding discussion we have seen the apparent asymmetry that exists between the powerful global markets and their major players on the one hand and the glaring lack of effective global rules designed to supervise and control their excesses on the other. This lack of a meaningful regulatory mechanism is consistent with the essence of marketism which is that markets are efficient allocators of resources and perform optimally when left to their own designs.¹⁰⁶ Prof Ruggie unreservedly accepts this premise by insisting that '...business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources.'¹⁰⁷ At the same time, he acknowledges the problems that markets create and the effects of market-led economic paradigms on a broad spectrum of rights.¹⁰⁸

4.2 Analysing the frameworks assumptions

Prof Ruggie's fundamental assumption therefore is that markets '...work optimally only if they are embedded within rules, customs and institutions.' In contrast, this thesis argues that markets simply do not work. As shown by the current global economic crisis and its roots, markets can be extremely irrational and capitalism is incapable of self restraint and consequently there is need for controls. The assertion that they are the most efficient means of social and economic organisation flies in the face of the vast differentials in wealth and poverty that characterise the world today and material disparities between the rich and the poor. This failure to achieve even a semblance of equality remains a heavy indictment on the argument that markets function efficiently to adequately distribute social resources.

¹⁰⁵ Keynote Speech by Fernando Henrique Cardoso, Chair of the Panel on UN – Civil Society Relations, at the DPI – NGO Annual Conference, New York, 8 September 2003.

¹⁰⁶ See Smith, A, "An Enquiry into the Nature and Causes of the Wealth of Nations," Strahan, W & Cadell, T, (ed), London, 1776. See also McCreddie, K, "Adam Smith's The Wealth of Nations: A Modern-Day Interpretation of an Economic Classic: Infinite Ideas," Oxford, UK, 2009. Smith is considered not only as the father of modern economics but also the father of 'marketism' due to his ideas on the free reign and optimum operation of markets without government interference.

¹⁰⁷ Ruggie, 2008, op cit, at p 2.

¹⁰⁸ Ruggie, 2008, op cig, at p 3.

With governments lacking any meaningful say in the market's operations its primary agents are left to pursue their own private motives without due regard to other interests. While there have been attempts at controlling market activities there is a reason why current soft law approaches undertaken domestically and through global institutions of corporate self regulation have so far not produced the desired result, and it is that the market equation does not accept rules and customs beyond those traditionally formulated as necessary to keep them working. Indications that most governments are pulling out of the market even after the worst economic crisis in history—that saw them dishing out trillions of dollars as bailout for rogue corporations—is nothing but a sign that political clout has succumbed to marketism. Political institutions seem reluctant to tamper with the market equation and this explains the neo-liberal disinclination at the global level to appropriately control corporate power.

This also explains why some critics have pointed out that the Special Representative's framework gives us more of the same and is just another attempt to "...continue relying on the 'good old' formula of pretending to make changes only so that, in the end, everything remains the same."¹⁰⁹ While it may be true that the debate on business and human rights has up to this point 'lacked an authoritative focal point',¹¹⁰ and that the framework lays the basis for engagement on that note, the proposals in the framework are nothing new. Nor do they represent a radical departure from current approaches to the business and human rights problem. For example the state's duty to protect is well established under international law and the mere fact that it is does not take away the need for corporations to shoulder more onerous obligations and responsibilities. Neither does it mean that calling for appropriate obligations is tantamount to creating "...benign twenty-first century versions of East India companies" which threaten to undermine the "...capacity of developing countries to generate independent and democratically-controlled institutions capable of acting in the public interest".¹¹¹

As framed, the responsibility to respect is not only weak but defers the crucial decision on corporate behaviour to self initiative and mechanisms for corporate self preservation. These CSRI initiatives have not produced any meaningful and desired protection to fundamental rights and the mere fact that the responsibility to respect is a baseline expectation for good corporate conduct does not make corporate self control all the more effective or even desirable. One realises however the opportunity in this for corporations to define their status as global citizens amidst social expectations of good corporate conduct and

¹⁰⁹ Alvaro, op cit.

¹¹⁰ Ruggie, 2008, op cit, page 4.

¹¹¹ John Ruggie, Opening Statement to United Nations Human Rights Council (Sept. 25, 2006).

ethical business practices. The problem thus far is that corporations have not taken this task seriously, subjugating in the process fundamental rights in favour of profit maximisation. In spite of this failure, the framework does not seriously consider an appropriate basis upon which political power can be used to redefine the corporate role in a way that protects other interests.

4.3 Re appraising the role of multinational corporations in a global world

Notwithstanding the above, it is an undeniable fact that corporations are a socio economic and political reality and that the market vastly remains the means by which economic life is organised.¹¹² Thus an appraisal of the mechanisms of this economic organisation, together with the purpose of its main agents, the corporations, is critical. This appraisal has to reconsider the purpose and role of corporate economic activity on development, capital accumulation and investment and how this role can be utilised to reverse the material disparities and gross inequalities in the world. The question whether corporations have a positive role to play in eliminating poverty and in the realisation of socio economic rights, areas largely and traditionally reserved to the political bureaucracy must therefore be answered affirmatively.

An honest look into these questions would invariably lead—without doubting the social and economic legitimacy of corporations as an integral unit of society—to conclusions that what the world needs is an effort that harnesses corporate activity for the good of all through suitable accountability mechanisms. Prof Ruggie has not satisfactorily canvassed this point. There is doubt about the viability of the framework and more specifically concerning the ability of its theoretical foundation to propel corporate accountability for rights violations to acceptable levels. The framework fails to break free of marketism whose essence still inhibits stronger regulation. This marketist problem is manifest in environmental matters; it is also present in human rights in general and undermines legislative requirements for corporate behaviour as well as progress towards the establishment of new international standards, norms and rules.

In the area of business and human rights, marketism manifests itself in the one approach that emphasises corporate social responsibility initiatives (CSRI).¹¹³ Its hallmark is the voluntary commitment adopted by corporations towards environmental issues and human rights and is touted as encouraging the active involvement by corporations themselves in initiatives going beyond legal and regulatory compliance.¹¹⁴ Despite this focus on corporate

¹¹² See Hedley, R, “Transnational Corporations and Their Regulation: Issues and Strategies” *International Journal of Comparative Sociology*, Vol. 40, 1999.

¹¹³ Crowther et al, “Perspectives on Corporate Social Responsibility,” Ashgate Publishing, Ltd., 2004.

¹¹⁴ Subhabrata, B, “Corporate Social Responsibility: The Good, the Bad and the Ugly”, Edward Elgar Publishing, 2007, p5.

social responsibility initiatives the central issue as argued by this thesis is not responsibility but corporate accountability which is more verifiable and enforceable. Despite attempts to marry the two by propositions that CSRI extracts some form of accountability from corporations, there is a clear divide between them. CSRI and good corporate governance may be important but cannot be seen as a substitute for corporate accountability in a legislated framework with enforceable mechanisms.

4.4 Towards corporate accountability

Varied arguments have been made elsewhere about the merits of direct corporate accountability for human rights violations at an international level.¹¹⁵ Further arguments have also been made pertaining to the status of corporations in international life and whether they are subjects of international legal rules.¹¹⁶ Despite the heated debates on this issue this study aligns itself with a much more developed view that sees private non state actors as not only bearers of rights but also of duties under international law.¹¹⁷ This proposition arises from three pertinent reasons identified by Andrew Clapham which lead to the inevitable conclusion that multinational corporations have become positive obligation bearers.¹¹⁸ First of all it is undisputed that globalisation has created fragmented centres of power beyond the traditional state as the sole actor in international life.¹¹⁹ Multinationals wield profound influence in individuals' lives and their position is no longer taken for granted.¹²⁰

Secondly, what has been traditionally perceived as the private sphere has undergone considerable metamorphosis due to the kind of identity politics referred to by Peter Muchlinski.¹²¹ Muchlinski argues that the notion of a private sphere based on a paternalistic model of the domestic space has been replaced by a more regulated sphere of private behaviour. As pointed out earlier in this thesis there is an ongoing fundamental rethinking taking place about the status and role of multinational corporations as global citizens. This rethink has

¹¹⁵ See Alston, P, "Non-state Actors and Human Rights", Oxford University Press, New York, 2005 p 387, also Clapham, A, "Human Rights Obligations of Non-state Actors", Oxford University Press, 2006, p 613, and also De Schutter, O, (ed.), "Transnational Corporations and Human Rights," Oxford: Hart, 2006, p 430.

¹¹⁶ See Duruigbo, E, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges," 6 Nw. U. J. Int'l Hum. Rts. 222 at <http://www.law.northwestern.edu/journals/jihr/v6/n2/2>. Duruigbo runs a thorough and comprehensive analysis of eminent opinions on the question whether international law recognises entities other than states as subjects.

¹¹⁷ See Oppenheim, L, "International Law: A Treatise", 636 (H. Lauterpacht ed., 8th Ed, 1955). Also Friedmann, W, "The Changing Structure of International Law", 1964,233, (citing Georges Scelle, *Precise de Droit des Gens*, 42-44, 1932. See also Orakhelashvili, A, "The Position of the Individual in International Law", 31 Cal. W. Int'l L.J. 241, 244 (2001).

¹¹⁸ Billet, B,L, "Investment Behavior of Multinational Corporations in Developing Areas: Comparing the Development Assistance Committee, Japanese, and American corporations", Transaction Publishers, 1991, p 1.

¹¹⁹ Goodman, J, "Contesting Corporate Globalism, Sources of Power, Channels of Resistance?", *The International Scope @ Review*, Vol 3 (2001), Issue 5, also James, P, "International Relations and Scientific Progress: Structural Realism Reconsidered", Ohio State University Press, 2002, p 11.

¹²⁰ See Grant, M, "Key Ideas in Politics", Nelson Thornes, 2003, p 73.

¹²¹ Muchlinski, P, "Human Rights and Multinationals: Is there a Problem?" *International Affairs*, Vol 77, 1, 2001, p 31-48.

blurred the distinction between private and public spheres. Thirdly the emergence of global centres of power such as the WTO has allowed multinational corporations to by-pass the state machinery while engaging in activities that directly exert a significant influence over people's lives. In spite of this there has been a glaring lack of democratic accountability within these institutions allowing for other interests to be ignored.

It is also apparent that the idea that individuals are not subjects of international law has become tenuous in light of the Nuremberg precedent and the evolution of international criminal law holding individuals accountable for human rights violations.¹²² Other international instruments such as the Universal Declaration recognise that not only the state but 'every individual and every organ of society' has a duty to protect, promote and respect fundamental rights.¹²³ Multinationals have frequently influenced the evolution of international law and in that regard are capable of bearing duties despite their disputed status as subjects under international law.

It is apparent that Prof Ruggie opted out of this approach for various conceptual reasons and chose instead to focus on a middle path that compels states to put in place appropriate regulatory mechanisms for the protection and promotion of human rights. The portal is domestic substantive and procedural rules that regulate the conduct of corporations in a wide variety of areas of concern to society. This approach however may not work in host states that lack effective regulatory rules and mechanisms. It is the position of this thesis that adequate supranational regulation will create appropriate rules which will trickle down to the domestic sphere through binding obligations and this may work despite concerns some states have about 'protectionism' and 'cultural imperialism'.¹²⁴

4.5 A Regional framework for corporate accountability?

The question of corporate accountability for rights violations is not one that will evolve on its own. Prof Ruggie argues that international law does not currently settle that question. Although this may in future be possible, Ruggie argues that it is not yet the time and place to forge norms for direct corporate accountability.¹²⁵ Whilst this may be true of international law today this does not mean the international community should shy away from creating such norms where there is an imperative. The following proposal is based on the

¹²² Ratner et al, "Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy," Oxford University Press US, 2001, p 151.

¹²³ See Preamble to the Universal Declaration of Human Rights, 1948.

¹²⁴ See an article entitled "The place of development in theories of imperialism and globalization" published in Ronaldo Munck and Denis O'Hearn (editors), Contributions to a New Paradigm: (Re)Thinking Development in the Era of Globalization, in memory of Vincent Tucker, London: Zed Books, 1999.

¹²⁵ See article entitled "John Ruggie; Business and Human Rights-Treaty Road not travelled", available at <http://www.ethicalcorp.com/content.asp?ContentID=5887>.

known rule making mechanisms and procedures of states under international law and suggests direct creation of corporate human rights norms.

Apart from proposals canvassed elsewhere on the prospects of direct corporate human rights obligations, and bearing in mind the precarious situation that Africa finds itself in relation to human rights and business, this thesis proposes an approach focusing on a regional framework for corporate accountability. Whatever international attempts have been used to curb corporate rights violations have not only lacked an impact in Africa, but have continually failed to approach the problem with the continent's unique situation in mind.¹²⁶ Therefore it is now for the fathers of the continent together with civil society organisation to make the business and human rights problem one of their central business beginning with an appropriate regional instrument.

4.5.1 Declaration on the problem of business and human rights in Africa

A great set back is that the problem of business and human rights in Africa, unlike other human rights issues, has not received due attention from governments.¹²⁷ This may be because business and human rights are still perceived to be separate and unrelated concerns or that the impact of business on human rights is not fully appreciated at a domestic and regional level. Whatever the case may be there is certainly a gap created by a lack of recognition, perhaps acknowledgement, that business presents a real threat to the promotion, protection and enjoyment of fundamental rights and that rules have to be developed that address this problem. This approach stands a better chance of succeeding outside the already depoliticised processes of the United Nations, which as shown, have been compromised by market ideologies.

Apart from serving as recognition of the problem of corporate rights violations a regional framework would also take the first step of concretising in an international forum the substance of norms and rules governing corporate conduct in relation to human rights. It would serve as a standard setting instrument that member states would be obliged to adhere to and enforce against corporations within their sphere. Such a framework may establish a regional mechanism for complaints against corporations themselves or against the state for failing to adhere to its obligations. An approach that may serve as a guide in this respect is the concept of horizontal and vertical application of constitutional norms that has been interpreted by the South African Constitutional Court.¹²⁸ In essence this approach asserts that private

¹²⁶ See Corporate Watch "Report Update: The Commission for Africa and corporate involvement" available at <http://www.corporatewatch.org.uk/?lid=1535>.

¹²⁷ There is currently no instrument or formal regional AU policy outlining how member states should approach the problem of business and human rights.

¹²⁸ See the case of *Fred Khumalo and Four Others v Bantubonke Harrington Holomisa* (2002), CCT, 53/01.

individuals may in certain circumstances be liable for rights violations due to the fact that the rights in the Bill of Rights apply horizontally.¹²⁹ Similarly such a declaration may be crafted to apply between the state and individuals and between corporations and individuals.

4.5.2 Normative framework

One of the pertinent questions to be addressed as a preliminary is what rights can be violated by corporations. Internationally there seems to be consensus coalescing around the idea that corporations can violate the whole spectrum of rights as found in major international human rights instruments.¹³⁰ This position has problems of its own not the least that it is difficult to conceive how corporations can violate political rights. Perhaps more problematic is the question of economic and social rights, which by their nature are largely positive rights and require a positive act for their fulfilment.¹³¹ Can corporations be saddled with such burdensome obligations? There are rights that by their nature can only be obligated upon a state and those that can be violated by private individuals.¹³² Moreover these entities are different and therefore their responsibilities would differ.¹³³ It is beyond the purview of this work to treat in detail what norms should bind corporations and why, suffice to mention that to the contrary corporations should bear obligations consistent with their nature, scope of operation and sphere of influence.

4.5.3 Procedural framework

The declaration may oblige member states to implement appropriate legislative reforms that will allow complaints against corporations by individuals and communities for rights violations. Perhaps a more critical question is whether multinational corporations may be held liable at a regional level using the existing mechanisms or through the creation of new ones. There are plausible considerations for either approach. Existing mechanisms such as the various complaints bodies created by different treaties are only designed to hear complaints against states and not private individuals. This would thus seem to favour creation of a new body that would receive complaints against corporations, make an award and refer to member states for enforcement.

¹²⁹ Section 8 (2) of the Constitution of the Republic of South Africa, 1996 states that ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

¹³⁰ Ruggie, 2008, *op cit*, p 4 para 6.

¹³¹ See Sigrun, I, “Economic and Social Rights, Private Actors and International Obligations”, in Addo, M, K, (ed.), “Human Rights Standards and the Responsibility of Transnational Corporations”, The Hague: Kluwer Law International, 1999, p. 239-258, at p. 256.

¹³² Certain political rights such as the right to vote can only be obligated upon the state as a political institution.

¹³³ See Karp, D, “Transnational corporations in ‘bad states’: human rights duties, legitimate authority and the rule of law in international political theory”, *International Theory*, 1:1, 87–118 & Cambridge University Press, 2009, p 100.

4.5.4 Application

Would such a framework apply to all corporations operating within the region? In theory all corporations can violate human rights. There is however an extra dimension which is that human rights violations by corporations often come with a corporation's size, power and influence. Most violations occur due to the activities of giant multinational corporations operating in different parts of the world. Therefore an appropriate definition may be specific and singles out these giant corporations, or may be general and cover within its ambit certain forms of business enterprises according to their legal status. This raises another issue which is how to deal with the subsidiaries of corporations whose operations are spread out and whose central offices are in countries outside the region. Prof Ruggie is also considering a similar issue in his consultations.¹³⁴

Any effort to be successful in holding corporations responsible for human rights violations must be prepared to violate the legal fiction that subsidiaries are independent from their parent companies.¹³⁵ Parent companies must be liable jointly with such subsidiaries in circumstances where the parent company, directly or indirectly, has a controlling stake in the subsidiary.¹³⁶ The declaration would therefore have to specify that the norms bind subsidiaries and their parent companies under conditions where there is a factual relationship of control and influence.

What this thesis has done in this section is to highlight the most important issues that have to be addressed in proposing an appropriate regional instrument. Future studies may deal with these issues, which are substantial, in detail and where possible propose a draft declaration including all these elements. The emphasis on the declaration serves to highlight the central argument of this thesis which is that there must be a discernible movement towards corporate accountability at an international level and that the Ruggie framework shies away from that. The problem of business and human rights can only be adequately tackled when binding norms are adopted and when international law imposes duties on corporations as well.

5 General Conclusion

Despite widespread utterances to the contrary, marketocracy and the ethical dilemma that accompanies it lies at the heart of the problem of business and human rights. With the rise of globalisation this tendency has been exported to poor countries emerging out of devastating

¹³⁴ See 2009 Special Representative's Report entitled "'Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework" A/HRC/11/13, p 23 available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

¹³⁵ See Robinson, J, "Multinationals and political control", Gower, 1983.

¹³⁶ Wallace, C, D, "Legal control of the multinational enterprise: national regulatory techniques and the prospects for international controls", BRILL, 1982, p 27.

years of colonialism. Promises of democratic governance at both domestic and international levels are consistently being supplanted by global autocracy revolving around a caucus of powerful multinational corporations and equally powerful political leaders. Their decisions virtually affect every individual in unprecedented ways that can only be attributed to global processes and changes.

One of the most profound challenges of this century is how to temper the adverse consequences of a consumerist culture that views people as entities driven by a determinate desire to fulfil economic needs.¹³⁷ The question has been posed whether capitalism can have a human face and how this can be done. Adherents of the democratic theory posit that governments must subject international capital to not only democratic governance but ethical standards of humanity expressed in various international human rights so that ‘...sites and forms of power that at present operate beyond the scope of democratic control may be made more accountable to all those who are affected by their decisions’.¹³⁸ There is a call to dismantle the status of transnational corporations as, to use Alvaro’s phrase, ‘the supreme ruler of our lives.’¹³⁹ This is by no means an easy feat.

The Ruggie framework represents efforts by the international community to achieve exactly this. While there is merit in the framework, while it focuses the world on the crux of the problem of business and human rights, the framework fails to make the radical break necessary to hold corporations fully accountable under international law. Not only does it implicitly reject the notion that international law may have crystallised binding norms on corporations, it implicitly reverts to the discredited and largely empty rhetoric of corporate social responsibility. In the hard choice between marketocracy and responsible global corporate citizenship, the framework without doubt resorts to the former and this leaves little comfort for those already suffering serious violations from transnational corporations’ activities.

¹³⁷ Agger, B, “A Critical Theory of Public Life, Knowledge and Politics in an Age of Decline”, Volume 3 of critical perspectives on literacy and education, Routledge, 1991, p 23.

¹³⁸ See Martineli, A, “Global Modernization: Rethinking the Project of Modernity”, Volume 54 of Sage studies in international sociology, SAGE, 2005, p 132. See also Dillard et al, “Understanding the Social Dimension of Sustainability”, Vol 17 of Routledge studies in development and society, Taylor & Francis, 2009, p 104.

¹³⁹ Alvaro, op cit.

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