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## 'Protect, Respect and Remedy': A Critique of the SRSG's Framework for Business and Human Rights

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My bottom line is that the last thing victims need is more unenforced declarations; they need effective action....I did not address the implementation provisions [in the UN Norms] because I thought the subject was premature...<sup>1</sup>

### 1 Introduction

This chapter seeks to critically evaluate the 'conceptual and policy framework to anchor the business and human rights debate' outlined by Professor John Ruggie – the Special Representative of the Secretary General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises – in the April 2008 Report to the Human Rights Council (HRC).<sup>2</sup> I will argue that although the Report lays down a few

<sup>1</sup> Professor John Ruggie, Special Representative of the Secretary general for Business and Human Rights, 'Opening Statement to United Nations Human Rights Council' (25 September 2006), <http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf> (2 October 2008).

<sup>2</sup> '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 (7 April 2008) (hereinafter SRSG, 'The 2008 Report'). After this chapter was written, the SRSG presented two more reports to the Human Rights Council in April 2009 and April 2010. In view of the space limitations, this chapter will not refer to these subsequent reports, which by and large elucidate the operationalization of the three principles of the framework: 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework', A/HRC/11/13 (22 April 2009); 'Business and Human Rights: Further Steps toward the Operationalization of the "Protect, Respect and Remedy" Framework', A/HRC/14/27 (9 April 2010).

useful suggestions, it falls short of providing a robust framework that could be employed to promote corporate human rights responsibilities.

The chapter will highlight several drawbacks inherent in the Report. However, before embarking on this ambitious task, an attempt will be made in Section 2 of this chapter to outline the background in which the SRSG was appointed to carry forward the project of mapping the human rights responsibilities of transnational corporations<sup>3</sup> (TNCs) and other business enterprises. This will enable readers to put in context the original as well as extended mandate of the SRSG. Section 3 then will develop a critique of the Report submitted by the SRSG. In particular, I will highlight a few flawed premises and one major omission of the Report. It is explained that the Report is flawed in that it seeks to employ the governance gaps thesis to explain all the current business-human rights challenges and rejects the need for enumerating the human rights responsibilities of corporations. Also critically examined are the problems and limitations inherent in the notion of 'differentiated but complementary responsibilities'. This section further points out one major omission of the Report, that is, the failure of the Report to map the role that international institutions such as the World Bank, International Monetary Fund (IMF) and World Trade Organization (WTO) could play in promoting the business and human rights agenda. Finally, Section 4 will sum up the discussion and also suggest a direction for taking the business and human rights project forward.

Various reports, the accompanying addenda and supporting research material prepared by the SRSG as well as his team have been voluminous.<sup>4</sup> This has been followed by a lot of discussions, papers, submissions, letter exchanges and interviews by a range of stakeholders.<sup>5</sup> For obvious reasons, it will not be possible to analyse all the reports and materials or to cover each and every aspect of the debate. The focus of this chapter will rather be on the 2008 Report, though a reference will be made to other reports or materials at appropriate places.<sup>6</sup>

<sup>3</sup> Despite a technical distinction between transnational corporations (TNCs), multinational corporations (MNCs) and multinational enterprises (MNEs), the term TNCs is used here broadly to include all such variations. See Peter Muchlinski, *Multinational Enterprises and the Law*, updated edn (Oxford: Blackwell Publishers, 1999), 12–15 (hereinafter Muchlinski, *MNEs and the Law*); Cynthia D. Wallace, *Legal Control of the Multinational Enterprise* (The Hague: Martinus Nijhoff, 1982), 10–12.

<sup>4</sup> The SRSG has 'produced more than 1,000 pages of documents.' SRSG, 'The 2008 Report', *supra* note 2, para 4.

<sup>5</sup> For a complete list of such materials, see <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative> (18 September 2008).

<sup>6</sup> See *supra* note 2.

## 2 SRSg: background, mandate and the progress made

Before looking at the original and revised mandate of the SRSg, it might be useful to understand briefly the context in which the SRSg was invited to break the stalemate in the UN's quest to establish some sort of regulatory framework for TNCs.<sup>7</sup> Putting in place such a framework is fundamental to fulfilling a central mandate of the UN<sup>8</sup> and also keeping it relevant in an era of globalization when non-state actors are playing an important role in the international sphere.

### 2.1 Background of SRSg's appointment and his mandate

The quest to establish a human rights code for TNCs gained a new momentum in August 1998 when the Sub-Commission on the Promotion and Protection of Human Rights decided to establish a five-member Working Group on the Working Methods and Activities of Transnational Corporations.<sup>9</sup> In mid-2003, the Working Group presented to the Sub-Commission the final draft of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms).<sup>10</sup> The UN Norms attracted, though not unexpectedly, criticism from several leading TNCs and business organizations. The criticisms ranged from lack of adequate consultation during the drafting stage to the Norms laying down a too vague or overly inclusive list of human rights, not properly allocating the extent of responsibilities between states and corporations, having a questionable legal basis for proposed human rights obligations purported, and recommending impractical implementation measures.<sup>11</sup>

<sup>7</sup> Even the SRSg considers 'the history that preceded its creation' an important variable. Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises', E/CN.4/2006/97 (22 February 2006), para 3 (hereinafter SRSg, 'Interim Report').

<sup>8</sup> One of the purposes of the UN is to achieve international co-operation 'in promoting and encouraging respect for human rights and for fundamental freedoms for all'. UN Charter, art 1(3).

<sup>9</sup> David Weissbrodt & Muria Kruger, 'Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97, *American Journal of International Law*, 901, 903–04.

<sup>10</sup> Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003) (hereinafter UN Norms).

<sup>11</sup> See Justine Nolan, 'With Power Comes Responsibility: Human Rights and Corporate Accountability' (2005) 28, *UNSW Law Journal*, 581, 585–605; David Kinley, Justine Nolan & Natalie Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25, *C&SLJ*, 30,

Although the Sub-Commission approved the UN Norms,<sup>12</sup> the Commission on Human Rights in its 2004 session resolved, much to the liking of the business community, that the UN Norms had 'no legal standing'.<sup>13</sup> The Commission also requested the Office of the High Commissioner for Human Rights (OHCHR) to prepare a report setting out, among others, the scope and legal status of existing initiatives and standards relating to the human rights responsibilities of TNCs.

In its 2005 session, the Commission welcomed the report of the OHCHR<sup>14</sup> and requested the UN Secretary General to appoint a Special Representative on the issue of human rights and transnational corporations.<sup>15</sup> In July 2005, Kofi Annan appointed Professor John Ruggie as the SRSg for an initial period of 2 years. Later on, the term of the SRSg was extended for one more year and in June 2008, the HRC extended the mandate further for another 3 years.<sup>16</sup>

The original mandate of the SRSg, as adopted by the erstwhile Commission on Human Rights, was quite wide.<sup>17</sup> The SRSg was requested to 'identify and clarify standards of corporate responsibility and accountability' for TNCs with regard to human rights and also elaborate on the role of states in effectively regulating TNCs. Professor Ruggie was also requested to search and clarify the implications for TNCs of concepts such as 'complicity' and 'sphere of influence'. In addition, the SRSg was requested to 'develop materials and methodologies for undertaking human rights impact assessments' of the activities of TNCs and to compile a compendium of best practices of states and TNCs.

The objective of the mandate, in the words of the SRSg, was 'to strengthen the promotion and protection of human rights in relation to transnational corporations and other business enterprises but that governments bear

34–37 (hereinafter Kinley et al., 'The Politics of CSR'); SRSg, 'Interim Report', *supra* note 7, paras 58–69.

<sup>12</sup> Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2003/16 (13 August 2003), E/CN.4/Sub.2/2003/L.11, 52–55.

<sup>13</sup> Commission on Human Rights, 60th Session, Agenda Item 16, E/CN.4/2004/L.73/Rev.1 (16 April 2004), para (c).

<sup>14</sup> Commission on Human Rights, 61st Session, 'Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights', E/CN.4/2005/91 (15 February 2005).

<sup>15</sup> Commission on Human Rights, 'Promotion and Protection of Human Rights', E/CN.4/2005/L.87 (15 April 2005).

<sup>16</sup> Human Rights Council, 'Mandate of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises', Resolution 8/7 (18 June 2008), para 4.

<sup>17</sup> *Supra* note 15.



principal responsibility for the vindication of those rights'.<sup>18</sup> The SRSG considered, among others, his mandate to be 'highly politicised' in that it was 'devised as a means to move beyond the stalemated debate' over the UN Norms.<sup>19</sup>

On 18 June 2008, the HRC renewed the SRSG's term for another 3 years with a revised mandate and a request to report annually to the Council as well as the General Assembly.<sup>20</sup> The focus of the revised mandate is on operationalization of the conceptual and policy framework canvassed by the SRSG in the 2008 Report, that is, on providing 'concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by or involving' TNCs. It is also expected that the SRSG will provide further guidance 'on the scope and content of the corporate responsibility to respect all human rights'.

What is notable in the revised mandate of the SRSG is an acknowledgement that TNCs' activities might affect vulnerable groups such as women and children more. The SRSG is, therefore, invited to pay 'special attention' to persons of such groups. It is hoped that Professor Ruggie will not limit himself to women and children because tribal and indigenous populations in many jurisdictions have suffered the most from TNCs' operations, which are often underpinned by investment-driven development policies of developing states.<sup>21</sup>

Another notable aspect of the revised mandate is that it requests the SRSG to 'explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities'.<sup>22</sup> A reference to the access to 'effective remedies' serves at least three important purposes. First, this will caution scholars against asserting any more that the issue of implementing corporate human rights obligations is premature.<sup>23</sup> It is trite that 'rights' and 'remedies' go hand-in-hand, one

<sup>18</sup> SRSG, 'Interim Report', *supra* note 7, para 7.

<sup>19</sup> Ruggie, *supra* note 1. Some commentators, however, argue that the polarization of the debate about the UN Norms into two camps (pro-Norms and anti-Norms) was 'a largely artificial division'. Kinley et al., 'The Politics of CSR', *supra* note 11, 34.

<sup>20</sup> *Supra* note 16.

<sup>21</sup> See Surya Deva, 'The Sangam of Foreign Investment, Multinational Corporations and Human Rights: An Indian Perspective for a Developing Asia' [2004] *Singapore Journal of Legal Studies*, 305; 'Human Rights Realisation in an Era of Globalisation: The Indian Experience' (2006) 12, *Buffalo Human Rights Law Review*, 93, and the materials cited therein.

<sup>22</sup> A footnote could be added about the use of the word 'impacted' in the resolution of the HRC. Was it really necessary to use a neutral, politically correct phrase when it is not a moot point that TNCs 'violate' human rights and that effective remedies are required only when rights are violated or infringed?

<sup>23</sup> Professor Ruggie made this remark in 2006. See *supra* note 1.

is redundant without the other. Moreover, the evolution of rights and remedies is a dynamic and evolutionary process and therefore, no attempt should be made to isolate or divide into phases the discussion on rights with remedies.

Second, the focus on remedies reminds us the important direction that the UN Norms provided to the business and human rights project by incorporating specific implementation provisions. The UN Norms had proposed implementation mechanisms, even if preliminary and tentative, not only at the national and international levels but also at the local (corporate) level.<sup>24</sup> Moreover, the Norms did mention the types of civil and criminal remedies that could be employed.<sup>25</sup>

Third, 'access' to remedies which are effective could also fill in one of the gaps which existed in the UN Norms, that is, the failure to respond to the challenges that procedural rules such as the doctrine of *forum non conveniens* pose to the victims of corporate human rights abuses.<sup>26</sup> One could also add here the procedural challenge which the requirement of *locus standi* raises and the financial constraints that poor victims often face in fighting the legal battle against resourceful TNCs. One could hope that the SRSG will consider means to overcome these procedural hurdles which effectively deny any access to legal remedies in order to make TNCs accountable for violations of human rights.<sup>27</sup>

## 2.2 Progress made by the SRSG

The SRSG has submitted various reports which (along with commentaries on these by various stakeholders) document the progress made during his 2005–2008 mandate term. In early 2006, the SRSG submitted its first Interim Report to the Commission on Human Rights.<sup>28</sup> Among others, the Interim Report found a correlation between alleged corporate human rights abuses and a situation of conflict coupled with bad or weak governance.<sup>29</sup> It also

<sup>24</sup> UN Norms, *supra* note 10, paras 15–17. See Surya Deva, 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?' (2004) 10, *ILSA Journal of International & Comparative Law*, 493, 500, 519–520 (hereinafter Deva, 'UN Norms').

<sup>25</sup> UN Norms, *supra* note 10, para 18.

<sup>26</sup> I had pointed out this lacuna in the UN Norms in 2004. Deva, 'UN Norms', *supra* note 24, 520–22.

<sup>27</sup> In September 2008, the SRSG opened a Consultation Forum on Access to Remedies to be held in November 2008: <http://www.business-humanrights.org/Documents/Ruggie-consultation-forum-access-to-remedies-Sep-2008.pdf> (2 October 2008).

<sup>28</sup> SRSG, 'Interim Report', *supra* note 7.

<sup>29</sup> *Id.*, para 27. It concluded: '[T]here is clearly a negative symbiosis between the worst corporate-related human rights abuses and host countries that are characterised by a combination of relatively low national income, current of recent conflict exposure, and weak or corrupt governance.' *Id.*, para 30.

offered a brief review of various existing regulatory responses.<sup>30</sup> However, the two strategic directions of the Interim Report – a critique of the UN Norms<sup>31</sup> and the notion of 'principled pragmatism'<sup>32</sup> – proved to be controversial and attracted a lot of criticism from human rights scholars and NGOs.<sup>33</sup> Although this chapter is not the right place to evaluate the SRSG's critique of the UN Norms, it seems that the adverse comments were not always objective.<sup>34</sup> For instance, the SRSG has been quite critical of the UN Norms for imposing higher human rights responsibilities on corporations than on states<sup>35</sup> or for including rights – such as the precautionary principle – which 'states have not recognised or are still debating'.<sup>36</sup> But at the same time, the SRSG apparently seemed comfortable with similar provisions embodying the precautionary principle in the Global Compact<sup>37</sup> or the OECD Guidelines.<sup>38</sup> So, perhaps there might be more reasons for rejecting the UN Norms than the conceptual or doctrinal excesses inherent therein.<sup>39</sup>

The Interim Report was followed by the Main Report, a Companion Report and four addenda in 2007. Whereas the Companion Report dealt with potential methodologies for undertaking human rights impact assessment of business activities,<sup>40</sup> the Main Report mapped international

<sup>30</sup> *Id.*, paras 31–54.

<sup>31</sup> *Id.*, paras 56–69.

<sup>32</sup> *Id.*, paras 70–81. Principled pragmatism is defined as follows: 'an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.' *Id.*, para 81.

<sup>33</sup> See, for example, David Weissbrodt, 'International Standard-Setting on the Human Rights Responsibilities of Business' (2008) 26, *Berkeley Journal of International Law*, 373 (hereinafter Weissbrodt, 'International Standard-Setting'); Misereor & Global Policy Forum Europe, 'Problematic Pragmatism: The Ruggie Report 2008: Background, Analysis and Perspectives' (June 2008); 'Comments to the Interim Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, 22 February 2006' (442/2, 15 March 2006), FIDH. But see the reply of the SRSG to the FIDH (letter of 20 March 2006) and to Misereor/GPF (letter dated 2 June 2008).

<sup>34</sup> See, e.g., Weissbrodt, 'International Standard-Setting', *supra* note 33, 383–90.

<sup>35</sup> SRSG, 'Interim Report', *supra* note 7, para 66.

<sup>36</sup> John Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101, *American Journal of International Law*, 819, 825 (hereinafter Ruggie, 'Business and Human Rights').

<sup>37</sup> UN Global Compact, Principle 7.

<sup>38</sup> OECD Declaration and Decisions on International Investment and Multinational Enterprises, DAF/IME(2000)20, reprinted in 40 *ILM* 237 (2001), 243 (para V.4).

<sup>39</sup> The SRSG is likely to reject this suggestion, though: 'I did not reject the Norms on political grounds.' John Ruggie, 'Response to Misereor/GPF' (2 June 2008).

<sup>40</sup> Human Rights Council, 'Report of the SRSG – Human Rights Impact Assessments: Resolving Key Methodological Questions', A/HRC/4/74 (5 February 2007).

standards related to corporate responsibility or accountability for human rights abuses.<sup>41</sup> The 2007 Main Report offered a brief summary and analysis of existing standards and practices by dividing them under the following five clusters:

- states' duty to protect human rights, including against abuses by non-state actors;
- corporate accountability for selected international crimes;
- corporate responsibility for other human rights violations under international law;
- soft-law mechanisms; and
- self-regulation by corporations and/or business organizations.<sup>42</sup>

On reviewing the Main Report, one cannot help but ask if this has made any significant progress or contribution other than providing 'a succinct mapping'<sup>43</sup> of the existing state of affairs.<sup>44</sup> Such a critical review, compilation and classification of existing standards or practices for corporations have been done before on too many occasions to be cited here. In defence of the Report, one could argue that such a background analysis was required to present a conceptual and policy framework which the 2008 Report offered.<sup>45</sup> To avoid duplication, a critical analysis of this report is done in the next section.

On 22 September 2008, the SRSG constituted a Leadership Group to advise him 'on how best to ensure that businesses worldwide respect internationally recognised human rights standards'.<sup>46</sup> A comment at least about the composition of the Group is appropriate. The SRSG deserves credit for inviting to the Leadership Group people like Mary Robinson and Guy Ryder. Similar credit could be given for being gender-sensitive in that 6 out of 15

<sup>41</sup> Human Rights Council, 'Report of the SRSG – Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', A/HRC/4/35 (19 February 2007) (hereinafter SRSG, 'The 2007 Main Report').

<sup>42</sup> *Id.*, paras 10–81.

<sup>43</sup> John Ruggie, 'Presentation of Report to United Nations Human Rights Council' (3 June 2008), 2.

<sup>44</sup> Ruggie justified this as follows: 'my first task under the mandate... was... essentially, to "restate" existing standards and indicate emerging trends.' Ruggie, 'Business and Human Rights', *supra* note 36, 827.

<sup>45</sup> SRSG, 'The 2008 Report', *supra* note 2. The Main Report was supplemented by a Companion Report and two Addenda.

<sup>46</sup> 'Global Leadership Group to Advise on Business and Human Rights', <http://www.reports-and-materials.org/Leadership-group-22-Sep-2008.pdf> (26 September 2008).



members of the Group are women.<sup>47</sup> The commendations end here, though. Of course, it was not possible to include everyone in the Group and one could argue that those who were excluded could still participate in deliberations through other consultation processes. Nevertheless, it is indefensible that the list had no place for even one leading human rights or corporate social responsibility scholar. Also missing from the list are the representatives of NGOs such as Greenpeace, Amnesty International, Human Rights Watch, EarthRights International, Centre for Constitutional Rights, and Corporate Watch.<sup>48</sup> One wonders if these constituents are not there in the Leadership Group merely because they disagree (or might disagree) with the vision of the SRSG.

Apart from the above major omissions, it could not be ignored that out of 15, 6 members come from the corporate world – from Neville Isdell of Coca Cola to Narayana Murthy of Infosys to the former BP Chief Executive John Browne. Although these members are participating in their 'personal capacity' and not as 'representatives of any organisation or constituency',<sup>49</sup> this over-corporatization of the Leadership Group might not augur well for the civil society and victims of corporate human rights abuses.

On a positive side, it should be noted that the SRSG has taken initiatives to reach out to various stakeholders and to organize world-wide consultations.<sup>50</sup>

### 3 The 2008 report of the SRSG: a critical evaluation

This section offers a critical evaluation of the 2008 Report submitted by the SRSG to the HRC. The Report claims to present 'a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors'.<sup>51</sup> The critique here focuses on the following two aspects: first it highlights a few flawed premises and one major omission of the report and then explores problems with the concept of 'differentiated but complementary responsibilities'.

The critique below should not be taken to mean that the Report provided no useful suggestions. The SRSG deserves credit for recognizing that

<sup>47</sup> It is possible that this gender-sensitiveness was triggered by the revised mandate which requested the SRSG to 'integrate a gender perspective throughout his work', *supra* note 16, para 4(d).

<sup>48</sup> It should be noted that the SRSG, under the revised mandate, is expressly requested to consult 'civil society, including academics', *supra* note 16, para 4(g).

<sup>49</sup> *Supra* note 46.

<sup>50</sup> See <http://www.business-humanrights.org/Updates/Archive/UNSpecialRep-Consultationsworkshops> (12 May 2009).

<sup>51</sup> SRSG, 'The 2008 Report', *supra* note 2, summary.

developing countries lack capacity or will to regulate TNCs' activities,<sup>52</sup> that extraterritorial regulation of TNCs' activities could be a legitimate option,<sup>53</sup> that governments should work to change the corporate culture of doing irresponsible business,<sup>54</sup> and that the notion of 'sphere of influence' conflates two different meanings of influence (impact and leverage).<sup>55</sup> Professor Ruggie also deserves praise for pointing out that 'defining a limited set of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights' is probably the better approach.<sup>56</sup> The objective of the critique is to contribute to the ongoing discussion in this complex area.

#### 3.1 Flawed premises and one major omission

Before I highlight two major and some minor flaws underpinning the 2008 Report, let me flag one major omission of the Report. The Report maps a range of judicial and non-judicial mechanisms, operating at different levels, which could be employed to address breaches of human rights obligations by corporations.<sup>57</sup> However, it does not even acknowledge the important role that international institutions such as the World Bank, IMF and WTO could play in ensuring that business complies with its human rights responsibilities.<sup>58</sup> It is possible that the SRSG might consider these institutional options in future because the revised mandate specifically requested him to 'work in close coordination with United Nations and other relevant international bodies, offices, departments and specialised agencies'.<sup>59</sup>

\* First major flaw of the 2008 Report lies in a suggestion that '[t]he root cause of the business and human predicament today lies in the governance gaps created by globalisation'.<sup>60</sup> At best, governance deficits could be one of the

<sup>52</sup> *Id.*, para 14.

<sup>53</sup> *Id.*, para 19. See also Human Rights Council, 'Report of the SRSG – Corporate Responsibility under International Law and Issues in Extraterritorial Regulation: Summary and Legal Workshops', A/HRC/4/35/Add.2 (15 February 2007).

<sup>54</sup> *Id.*, paras 29–32.

<sup>55</sup> *Id.*, para 68.

<sup>56</sup> *Id.*, para 51.

<sup>57</sup> *Id.*, paras 88–101.

<sup>58</sup> See Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish Publishing, 2001); David Kinley & Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44, *Virginia Journal of International Law*, 931.

<sup>59</sup> SRSG, 'The 2008 Report', *supra* note 2, para 4(f). The Canadian Network on Corporate Accountability (CNCA) has also requested the SRSG to consider the role of international financial institutions. CNCA, 'Submission to the UN Secretary General's Special Representative on Business and Human Rights' (21 July 2008).

<sup>60</sup> SRSG, 'The 2008 Report', *supra* note 2, para 3 (emphasis added).

reasons, but hardly 'the' root cause of why the UN has been grappling with this issue for almost the last four decades now. Such an analysis underestimates, for example, the significance of the fact that international (human rights) law was traditionally concerned with protecting human rights against state action and not against private corporate actors.<sup>61</sup> It also ignores the fact that corporate law historically did not allow corporations to serve the interests of other than their shareholders,<sup>62</sup> or that a parent company is not generally liable for actions of its subsidiaries, suppliers or contractors. One should not try, as the Report does, to explain all such major conceptual hurdles by a broad brush of governance gaps.

Moreover, the governance gaps thesis is too general to be the root cause of the specific issues that have been and are central to the business and human rights project.<sup>63</sup> For example, one could employ the governance gaps thesis to explain any current or past problem – from child pornography to violence against women, cold war to invasion of Iraq, financial crisis to AIDS, corruption to terrorism, and from poverty to global warming. Will it help much if we say that the root cause of all of these problems is the governance gaps created by globalization? One should not also assume that globalization has merely created gaps in governance; in fact, globalization

<sup>61</sup> 'International law – and human rights law in particular – has traditionally concerned itself with state responsibility, rather than the responsibility of non-states actors such as companies.' Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11, *Australian Journal of Human Rights*, 33. 'International law and human rights law have principally focused on protecting individuals from violations by governments.' David Weissbrodt, 'Business and Human Rights' (2005) 74, *University of Cincinnati Law Review*, 55, 59. See also Henry Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals*, 3rd edn (Oxford: Oxford University Press, 2008), p. 1385.

<sup>62</sup> Redmond writes: 'Corporate law does not explicitly address the problem of corporate compliance with human rights standards; indeed, its systemic orientation aggravates the problem of standard setting and compliance... Human rights concerns are, for the most part, extraneous to corporate regulation, culture, and doctrines.' Paul Redmond, 'Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance' (2003) 37, *International Lawyer*, 69, 73, and generally 73–75. The Companies Act 2006 of UK, for example, now imposes a specific duty on company directors to consider 'the impact of the company's operations on the community and the environment' while promoting the success of the company. Companies Act 2006 (UK), s172(1).

<sup>63</sup> I do not want to go into the critique that the good governance thesis has received on another count, that is, a tool of Western hegemony. See Chantal Thomas, 'Does the "Good Governance Policy" of the International Financial Institutions Privilege Markets at the Expense Of Democracy?' (1999) 14, *Connecticut Journal of International Law*, 551; James T. Gathii, 'Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes between Markets and States' (2000) 45, *Villanova Law Review*, 971.

has also filled gaps in governance through information sharing and capacity building.

To support the governance gaps thesis, the SRSg makes a reference to the findings of the 2006 Interim Report and writes that corporate human rights abuses 'occurred, predictably, where governance challenges were greatest: disproportionately in low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high'.<sup>64</sup> However, as pointed out above, these governance gaps are not unique to the business and human rights quandary and they could be connected to world's many other problems as well. This linkage also ignores the reality that good governance and sound legal systems do not always ensure robust protection of human rights.<sup>65</sup>

In short, it is too simplistic to identify one variable as the root cause of a complex problem which is caused by several factors. Making such an assumption is problematic because this might result in all remedial efforts focusing on something which is not the sole or even main contributing cause of the problem.<sup>66</sup>

The second major flaw in the 2008 Report is that instead of squarely dealing with the difficult question of precise human rights responsibilities of corporations that operate in diverse business environments, the report debunks any need for cataloguing human rights responsibilities of corporations. The justification runs like this: because 'business can affect virtually all internationally recognized rights... any limited list [as attempted in the UN Norms] will almost certainly miss one or more rights that may turn out to be significant in a particular instance, thereby providing misleading guidance'.<sup>67</sup>

This justification is unsound, in my view, for several reasons. It is, of course, not necessary to create a separate, special list of human 'rights' applicable to corporations. In fact, no one is asking for this – what human rights NGOs are demanding and what the UN Norms tried to do was to outline 'responsibilities' of corporations corresponding to human rights laid down

<sup>64</sup> SRSg, 'The 2008 Report', *supra* note 2, para 16. See also SRSg, 'Interim Report', *supra* note 7, para 27.

<sup>65</sup> One could, for example, refer to the human rights struggle faced by the Guantanamo Bay prisoners in the US and the asylum seekers in Australia.

<sup>66</sup> In fact, it seems that Professor Ruggie is already following this trap: 'Insofar as governance gaps are at the root of the business and human rights predicament, effective responses must aim to reduce those gaps.' SRSg, 'The 2008 Report', *supra* note 2, para 17. And again: 'our focus should be on ways to reduce or compensate for the governance gaps created by globalisation.' *Id.*, para 11.

<sup>67</sup> *Id.*, para 6, and also paras 51–52.



in the International Bill of Rights.<sup>68</sup> One might disagree with the nature and extent of corporate responsibilities proposed by the UN Norms, but they were not a limited list of rights by any means.<sup>69</sup>

It is, nevertheless, critical that responsibilities of corporations vis-à-vis rights (defined originally with reference to states) are identified. Professor Raz argues that 'there is no closed list of duties which correspond to the right. ... A change of circumstances may lead to the creation of new duties based on the old right.'<sup>70</sup> So, a change in circumstances – for example, a shift in powers and functions from states to corporations – justifies that appropriate duties for corporations are identified. This does not mean, however, that the responsibilities of states and corporations should be the same, as explained in the next section. The 2008 Report also sets this out clearly.<sup>71</sup> But the very fact that the responsibilities of corporations should be different from those of states requires that we should catalogue these responsibilities rather than deducing these responsibilities on a case-to-case basis with reference to a general principle.

An identification of corporate responsibilities, which will provide a better guidance to all concerned, is also desirable because corporations are unlikely to abridge all human rights, even though the SRSG takes a different stand.<sup>72</sup> For example, Jägers argues that it 'is difficult to imagine a corporation having a great deal of influence on the right to seek and enjoy asylum or the right to a nationality'.<sup>73</sup> A few other similar examples could be given.<sup>74</sup> One more issue that has not received much attention from the SRSG is: given that

<sup>68</sup> Rights (as claims) and responsibilities (duties) are jural correlatives, but still these are two distinct concepts.

<sup>69</sup> From a different perspective, in addition to specific responsibilities, the UN Norms also contained a general provision on human rights obligations. UN Norms, *supra* note 10, para 1.

<sup>70</sup> Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 171 (emphasis added).

<sup>71</sup> 'While corporations may be considered "organs of society", they are specialised economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of states.' SRSG, 'The 2008 Report', *supra* note 2, para 53.

<sup>72</sup> The report notes: 'there are few if any internationally recognised rights business cannot impact ... in some manner.' *Id.*, para 52.

<sup>73</sup> Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerpen: Intersentia, 2002), 59.

<sup>74</sup> Consider also, for example, Article 11 of the UDHR and Article 14(2) of the ICCPR (right to be presumed innocent when charged for a penal offence) and Article 12 of the ICCPR (liberty to leave and enter his own country). Ratner, however, contemplates the situations in which corporations could be involved in violation of even such rights. Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111, *Yale Law Journal*, 443, 493.

TNCs operate under diverse social, political, economic and cultural environment, which standards of human rights should they follow? To illustrate: what constitutes freedom of speech in the US is different from the meaning that this right has in India. Similarly, corporations would need to identify in each state what constitutes a fair wage. For this reason also, cataloguing responsibilities of corporations is desirable not only at the international level but also at domestic levels.

The 2008 Report also suffers from several minor flaws in that it contains general, unqualified or unsupported assertions. For example, it says that the 'business and human rights debate currently lacks an authoritative point'.<sup>75</sup> Is it possible, or even desirable, to reach such an authoritative point? Does the SRSG expect to achieve this point after completion of the current mandate? Similarly, the report posits that corporations have a responsibility to 'respect [human rights] because it is the basic expectation society has of business'.<sup>76</sup> Is this a theoretical basis, or has it some empirical support? Who represents society: business organizations, civil society, or governments? How do we know what society wants? Could we gather a consensual view from society on this issue? More importantly, will the SRSG and corporations be willing to accept more extensive responsibilities if the expectations of society do change in future?

### 3.2 Notion of "differentiated but complementary responsibilities": problems and limitations

The 2008 Report proposes an overarching concept of 'differentiated but complementary responsibilities', which has three principles: the state duty to protect human rights; the corporate responsibility to respect human rights; and an access to remedies. The first principle is by and large non-controversial. The only problem is the known limitations of the state's duty to protect human rights from abuses by private corporate actors,<sup>77</sup> which operate at a transnational level and have the capacity to disappear or move from one jurisdiction to another. That is why the quest has been on for some time now to find regulatory alternatives which are not state-focal but are effective at the same time.

The third principle (the access to remedies) is also a welcome step; the only irony being that while the SRSG was critical of the non-voluntary character or implementation provisions of the UN Norms, the 2008 Report itself outlines a range of mechanisms – from judicial to non-judicial, state-based non-judicial, company-led and multi-stakeholder or industry initiatives.

<sup>75</sup> SRSG, 'The 2008 Report', *supra* note 2, para 5.

<sup>76</sup> *Id.*, para 9.

<sup>77</sup> Commentators have suggested that the SRSG shares this 'traditional view' of regulating corporations. Kinley et al, 'The Politics of CSR', *supra* note 11, 39.

It is, in fact, critical to employ various mechanisms and strategies to make TNCs accountable in view of limitations inherent in any given mechanism or strategy.

The nature of TNCs' human rights responsibilities need not, and should not, be identical or as extensive as those of states.<sup>78</sup> The SRSG, I think rightly, also points out that the human rights responsibilities of states and corporations should not be identical because 'as economic actors, companies have unique responsibilities'.<sup>79</sup> In order to differentiate the responsibilities of states and TNCs, the 2008 Report proposed that unlike states, TNCs have merely a responsibility to 'respect' human rights: 'To respect rights essentially means not to infringe on the rights of others – put simply, to do no harm'.<sup>80</sup> However, this 'baseline responsibility',<sup>81</sup> which exists independently of states' duties,<sup>82</sup> has an exception, that is, situations where corporations 'perform certain public functions'.<sup>83</sup>

There are, however, a number of problems with the above formulation of the second principle: corporate responsibility to respect human rights. Let me highlight a few here. First of all, the principle has used the term 'responsibility' to respect rather than the 'obligation' to respect human rights. This seems a conscious decision given the distinction that the SRSG has previously maintained between corporate *responsibility* and corporate *accountability*.<sup>84</sup> If states have a duty to respect,<sup>85</sup> why should corporations have merely a responsibility to respect? No explanation has been offered for this difference in terminology. It seems that this conscious distinction is made to dilute further the corporate obligation to respect human rights. An evidence of this dilution is provided by the Report itself: 'Failure to meet this responsibility can *subject companies to the courts of public opinion* – comprising employees, communities, consumers, civil society, as well as investors – and

<sup>78</sup> Shue writes: '... for every basic right – and many more other rights as well – there are three types of duties, all of which must be performed if the basic right is to be fully honoured *but not all of which must necessarily be performed by the same individuals or institutions*.' Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd edn (Princeton, NJ: Princeton University Press, 1996), 52 (emphasis added). Zerk also notes that 'if human rights law obligations are extended to corporate actors they will need to reflect the different roles and capacities of companies vis-à-vis states.' Jennifer A. Zerk, *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006), 79. See also Kinley & Tadaki, *supra* note 58, 961–66; Thomas Donaldson, *The Ethics of International Business* (New York: Oxford University Press, 1989), 83–4.

<sup>79</sup> SRSG, 'The 2008 Report', *supra* note 2, para 6. See also *supra* note 71.

<sup>80</sup> SRSG, 'The 2008 Report', *supra* note 2, para 24.

<sup>81</sup> *Id.*, para 54.

<sup>82</sup> *Id.*, para 55.

<sup>83</sup> *Id.*, para 24.

<sup>84</sup> SRSG, 'The 2007 Main Report', *supra* note 41.

<sup>85</sup> Ruggie, 'Business and Human Rights', *supra* note 36, 828, footnote 46.

*occasionally to charges in actual courts*'.<sup>86</sup> Are we then really talking about legally enforceable human rights obligations?

Second, it is clear that the SRSG's conception of corporate responsibilities is trying to turn back the clock in terms of the evolving responsibilities of corporations. For instance, as early as in 1932, Professor Dodd wrote: 'There is a widespread and growing feeling that industry owes to its employees *not merely the negative duties* of refraining from overworking or injuring them, *but affirmative duty of providing them so far as possible with economic security*'.<sup>87</sup> In more recent times, one could easily find provisions in the OECD Guidelines and the ILO Declaration – neither of which has been dismissed by the SRSG – which go far beyond the corporate responsibility to only respect human rights.<sup>88</sup>

Third, it is doubtful if the responsibility of corporations to merely *respect* human rights will prove adequate, for human rights cannot be fully realized unless 'multiple kinds of duties' are imposed on all those actors which could abridge rights.<sup>89</sup> Moreover, the scope of duties should be coterminous with possible ways in which rights could be breached by TNCs. If human rights law could obligate states to ensure that their agents as well as private actors within their respective jurisdictions do not violate human rights,<sup>90</sup> why

<sup>86</sup> SRSG, 'The 2008 Report', *supra* note 2, para 54 (emphasis added). See further the following memorandum: 'we have been assured by the Special Representative himself that the distinction between duties/obligations on the one hand, and responsibilities based on expectations on the other, is generally accepted UN terminology; and that his use of the term "responsibility" in the Report refers to the moral obligations and social expectations – *not binding law*.' Weil, Gotshal & Manges LLP, 'Memorandum – Corporate Social responsibility for Human Rights: Comments on the UN Special Representative's Report Entitled "Protect, Respect and remedy: A framework for Business and Human Rights"' (22 May 2008), 2 (emphasis in original).

<sup>87</sup> E. Merrick Dodd, Jr, 'For Whom Are Corporate Managers Trustees?' (1932) 45, *Harvard Law Review*, 1145, 1151 (emphasis added).

<sup>88</sup> The OECD Guidelines, for example, provide that enterprises should '[c]ontribute to economic, social and environmental progress with a view to achieving sustainable development' and '[c]ontribute to the effective abolition of child labour'. OECD Guidelines, *supra* note 38, paras II.1 and IV.1(b).

<sup>89</sup> 'The complete fulfillment of each kind of rights involves the performance of multiple kinds of duties.' Shue, *supra* note 78, 52. Even regarding those rights which are labelled as 'negative', positive duties must be fulfilled: 'It is impossible for any basic right – however "negative" it has come to seem – to be fully guaranteed unless all three types of duties are fulfilled.' *Id.*, 53.

<sup>90</sup> '[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.' Human Rights Committee, 'General Comment No. 31 on Article 2: The Nature of General Legal Obligation Imposed on States Parties to the Covenant', 26/05/2004, para 8. See also SRSG, 'The 2008 Report', *supra* note 2, para 18.



cannot we impose an obligation on a parent company to ensure that its de facto agents (subsidiaries, affiliates, contractors and suppliers) respect human rights obligations? In fact, if the responsibility of corporations is limited to respecting human rights, this might encourage them to contract out human rights abuses to their business partners and supply chain participants, over which they often exercise effective control but at the same time keep distance by design.

The fourth problem lies in how the responsibility to respect has been expanded to cover what goes beyond the generally understood meaning of 'respect'. Although the distinction between positive and negative rights may be illusory and misguided, a 'useful distinction', as Shue points out, among the following three duties correlative to rights does exist: (1) duties to *avoid* depriving, (2) duties to *protect* from deprivation, and (3) duties to *aid* the deprived.<sup>91</sup> It seems that the corporate responsibility to respect human rights will correspond to the first category. However, probably being aware of the limitations of the 'respect only approach' highlighted above, the SRSG tries to expand the ambit of responsibilities that respecting human right will entail. This the Report does with the help of concepts such as due diligence, sphere of influence, and complicity.<sup>92</sup> For instance, the 2008 Report mentions that 'where the company's activities or relationships are causing human rights harm ... [this is] squarely within the responsibility to respect.'<sup>93</sup> So, if the entry of Wal-Mart in India will affect the right to livelihood of small retailers or farmers, Wal-Mart should probably help these poor people. If that is the case, such responsibilities are more akin to the third category (i.e., duties to aid the deprived) than the first category. The framework is thus not rooted in a clear/coherent duty typology vis-à-vis human rights.

Fifth, the SRSG's 2008 Report suggests that those corporations which perform certain 'public functions' may have additional responsibilities. It is not made clear what these additional responsibilities would be in such exceptional situations. More importantly, what is meant by public functions? A corporation managing a detention centre or a hospital might arguably be performing public functions. But what about a corporation selling milk which was found to contain melamine, or a corporation manufacturing AIDS drugs or carpets?

In short, the corporate responsibility to respect principle is not only inadequate but also presents several problems, which together undermine the usefulness of this principle.

<sup>91</sup> Shue, *supra* note 78, 35–46, 52.

<sup>92</sup> See SRSG, 'The 2008 Report', *supra* note 2, paras 56–58, 68–69, and 73–81.

<sup>93</sup> *Id.*, para 68.

#### 4 Conclusion

The aim of this chapter was to examine critically the 2008 Report of the SRSG submitted to the HRC. I have tried to demonstrate that although the Report contains several useful suggestions, it still falls short of what is required to anchor an effective regulatory framework to make corporations accountable for human rights abuses. The three major lacunae of the Report are in particular notable. First, the Report's suggested approach to deal with an important but complex question – the precise human rights responsibilities of corporations – is flawed. It is crucial to identify these responsibilities in advance and with a reasonable certainty (so as to guide the behaviour of all concerned) rather than leaving these to be determined on a case-to-case basis with reference to a given principle. Second, one principle of the concept of 'differentiated but complementary responsibilities' (namely, the corporate responsibility to respect) is not only problematic but also inadequate to meet the societal expectations in the twenty-first century. Third, the conceptual and policy framework outlined in the Report lacks a theoretical foundation; it is critical to identify explicitly an appropriate theory which could underpin any such framework.

In my view, if the business and human rights project has to move forward to a decisive level, a broad consensus (if not agreement) among key stakeholders is necessary on the following issues: *why* corporations should have human rights responsibilities; *what* these responsibilities are, both in abstract and in practical terms; and *how* these responsibilities could be implemented and enforced. However, such a consensus could only be reached if not only states and international institutions but also business leaders and civil society show a strong will to rise above the myopic vision of acting to protect only their respective interests.

During the current mandate, the SRSG should aim to provide not only a concrete theoretical basis on which corporate human rights responsibilities (or perhaps obligations) could be grounded but also the framework to outline precise responsibilities of corporations which operate under vast differences in legal systems, socio-economic conditions, political environments, religions, and cultures. But most critically, the SRSG should aim to propose a clear mechanism to implement and enforce the human rights obligations. The proposed mechanism should encompass multiple regulatory tools and techniques: from voluntary to self-regulatory, non-voluntary, and obligatory. An explicit attempt should also be made to manage societal expectations, for at this point of time we should not expect corporations to deliver everything that we expect from states.

It is also important that principles or underlying objectives are not lost in a desire to achieve consensus. Similarly, it is critical that the above issues should not be settled by the likes or dislikes of corporations (or even

NGOs),<sup>94</sup> but by what would ensure an effective remedy to the victims of corporate human rights abuses. Otherwise, the SRSG would disappoint not only victims but also himself by coming up with another un-enforced or empty declaration. The human rights discourse has not been merely about what was 'politically feasible'<sup>95</sup> at any given point of time but also about what ought to be feasible in the near future.<sup>96</sup>

<sup>94</sup> 'Business typically dislikes binding regulations until it sees their necessity or inevitability.' Ruggie, 'Business and Human Rights', *supra* note 36, 822.

<sup>95</sup> Misereor & GPF, 'Problematic Pragmatism', *supra* note 33, 2.

<sup>96</sup> Professor Ruggie asked the question: 'what purpose would be served by making recommendations that are not feasible?' John Ruggie, 'Response to Misereor/GPF' (2 June 2008).

## Part II

### Regional Perspectives