

COLUMN

UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: MAKING HEADWAY TOWARDS REAL CORPORATE ACCOUNTABILITY?

NICOLA JÄGERS*

During the June 2011 session of the Human Rights Council, the United Nations Special Representative to the Secretary General on Business and Human Rights (Special Representative), professor John Ruggie, is expected to get his 'Guiding Principles on Business and Human Rights' adopted.¹ The Guiding Principles,² which are an operationalisation of the Special Representative's 'Protect, Respect and Remedy Framework', are intended to provide practical advice to governments, companies and other stakeholders on how better to protect individuals and communities from adverse human rights impacts of business activities.

The Principles are the culmination of six years of work by the Special Representative on the issue of business and human rights.³ The significance of the work of professor Ruggie must be underlined. In the patchwork of disconnected regulatory initiatives that have sprung up in this field over the years, his work has already become an authoritative focal point embraced by many of the stakeholders involved. He has produced a slew of important reports fleshing out many aspects of the role of business in human rights violations. He has rightly been applauded for the *momentum* his work has brought to the debate on the role of corporations in human rights. Indeed, the discussion had come to a virtual halt after an earlier attempt to draw up human rights norms applicable to corporations failed. These so-called 'UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with

* Nicola Jägers is associate professor at Tilburg University, the Netherlands and member of the executive editorial board of the Netherlands Quarterly of Human Rights.

¹ When this issue went to press, the deliberations in the Human Rights Council were yet to take place. At the time of writing, generally, the expectation is that the Guiding Principles of the Special Representative will be accepted.

² HRC, *The Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/17/31, 21 March 2011. The Guidelines can be found in the appendix of this issue.

³ Documents relating to the work of the SRSG can be found at the special portal of the website www.business-humanrights.org.

regard to Human Rights' caused great controversy. Facing vehement opposition from businesses and States, which argued that the UN Norms were flawed from a doctrinal point of view placing State-like obligations on corporations, the then Commission on Human Rights refused to take action. It is against the backdrop of this charged debate that the Special Representative ventured out on his mission to move beyond the stalemate and clarify the duties and responsibilities of States and companies in the business and human rights sphere.

The 'Protect, Respect, Remedy, Framework,' which the Special Representative first put forward in 2008, rests on three pillars: the State obligation to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation, and adjudication; the responsibility of corporations to respect human rights which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and, greater access to remedies, both judicial and non-judicial, for victims.⁴ Unanimously adopted by the Human Rights Council, the mandate of the Special Representative was extended in order to develop guidelines intended to assist States and companies operationalise the 'Protect, Respect and Remedy Framework'. From November 2010 until the end of January of this year, Draft Guiding Principles were posted online for public consultation. Paragraph-by-paragraph changes could be submitted on a specially created forum that attracted visitors from over 120 countries. The final text of the Guiding Principles (and Commentary) for consideration by the Human Rights Council was issued by the Special Representative on 24 March.

Overall the 'Protect, Respect and Remedy Framework' and the operationalising Guiding Principles have been well received. To be sure, Professor Ruggie's activities have been characterised by broad consultations involving many different stakeholders, an approach which he himself has often labelled 'principled pragmatism'. This pragmatic approach has, however, resulted in a rather minimalist take on the issue of corporate responsibility for human rights reflected in the Guiding Principles. Thus, notwithstanding the achievements, the final outcome is also somewhat a missed opportunity and several weaknesses can be discerned.

From the very beginning professor Ruggie has steered determinedly away from the concept of human rights obligations for corporations and instead placed exclusive emphasis on the State as the sole duty-bearer. This is perhaps understandable in light of the deadlock that followed after the rejection of the previously mentioned UN Norms. However, the outright dismissal of the notion of corporate duties is regrettable and seems somewhat at odds with the intention that the Guiding Principles are to become 'a common global platform for action on which cumulative progress can be built (...) *without foreclosing any other promising longer-term development*'.⁵ The decisive

⁴ UNGA, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc. A/HRC/8/5, 7 April 2008.

⁵ UN Doc. A/HRC/17/31, *supra* note 1, para. 13 (emphasis added).

language adopted by the Special Representative closes the door to developments that can be detected trending towards more direct applicability of human rights obligations to corporations. Corporations are already legally obliged not to perpetrate, aid or abet international crimes. No entity may commit international crimes such as genocide or crimes against humanity. Moreover, the State's duty to protect presupposes legal obligations of other actors such as corporations to respect human rights. Without this, the first pillar of the Framework, the obligation of States to protect, would be meaningless.

In light of the exclusive focus on the duties of States to regulate corporations, it is of the utmost importance that the obligations on the part of the State are strongly worded. This is, however, disappointing in professor Ruggie's Guiding Principles. The weak language, such as the frequent use of the word 'encourage' and phrases such as 'where appropriate', is unsettling. In fact, the State's duty to protect as formulated by the Special Representative can, to a certain extent, be considered a step backwards as it actually weakens existing human rights obligations.

This diminishing of obligations especially comes to the fore regarding the issue of extraterritorial obligations of States, which is pivotal in the quest to fight impunity in the sphere of transnational corporations and human rights. The language used by professor Ruggie contradicts and weakens established obligations for States. For example, the Special Representative claims 'at present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction'.⁶ This statement is however not correct. Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) States have the duty to protect which includes preventing third parties from violating human rights abroad as long as this does not infringe on the rights of other States to protect and fulfil human rights in their own territories. Nevertheless, the Commentary to the Guidelines merely mentions that there are strong policy reasons for home States to 'set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses'.⁷ However, acts of a company in which the State is involved, under international law clearly are attributable to that State, which in turn is under a legal obligation to respect human rights abroad. The choice for such a soft formulation is undesirable as the reader is left with the mistaken belief that hardly anything can be expected from the home State.

The decision of the Special Representative to steer far away from the notion of direct obligations for corporations is clearly reflected in the language used in the

⁶ *Ibidem*, Commentary to Guiding Principle 2.

⁷ *Idem*. In all fairness it should be mentioned that the draft guidelines contained even weaker language stating that States should *encourage* business enterprises to respect human rights throughout their global operations. After the public consultation round in December 2010 and January 2011 this was changed to States should *set out clearly [this] expectation*. However, the language fails to reflect the obligation on businesses to respect human rights.

2008 Framework. In the Framework States have an *obligation* to protect as opposed to the corporate *responsibility* to respect. This responsibility to respect (R2R), the second pillar in the framework, is, according to the Special Representative, a self-standing responsibility independent from actions of States. R2R is a reflection of the ‘do-no-harm’ principle, which boils down to a responsibility to take due diligence steps to, firstly, become aware of, and, secondly, to prevent or remedy adverse human rights impacts. The R2R baseline applies to all corporations, ranging from large, complex multinational corporations to small enterprises. Moreover, the R2R can also engage the core company. In other words, parent companies must become aware of any adverse human rights impact caused by the operations of their affiliates and do something about it.

Many human rights advocates have in particular welcomed this part of the Framework. A responsibility to conduct due diligence beyond the core company, down the supply chain, including the conduct of all kinds of affiliates and subsidiaries, would indeed be a major step forward. However, operationalisation of this sweeping notion of corporate responsibility in practice will prove very problematic. The Special Representative does, for example, not address how this responsibility relates to the important legal principle of separation of legal entities. Why should a parent company exercise due diligence concerning affiliates in the case in which they are a mere bystander? Given the importance attached to the principle of limited liability, a principle common to all advanced legal systems, R2R is likely to be reduced to an entirely voluntary notion, the implementation of which will utterly depend on the willingness of the company involved. This is a very real danger as R2R, according to the Special Representative, can only be derived from soft law sources and a societal norm. This shaky foundation will easily be swept away when confronted with hard and fast rules like that of limited liability. It is certainly a missed opportunity on the part of the Special Representative that he did not further elaborate on the legal foundations of R2R.⁸ Most likely, this is the result of an effort to remove R2R from the realm of the law. The weak approach to corporate responsibility in the second pillar of the Framework necessitates a strongly worded first pillar dealing with the State duty to protect. However, as discussed above, this is where the Framework clearly falls short. The Framework does not provide for a strongly worded obligation on the part of States to ensure that corporations take the required due diligence steps.

Finally, in the third pillar of the Framework the Special Representative deals with the access to remedies. NGOs have been critical of this section due to its strong emphasis on non-judicial grievance mechanisms, fearing that this will obscure the need to also invoke judicial means. However, in light of the dizzying array of voluntary regulatory initiatives it should be deemed very useful that the Special Representative

⁸ See for a lucid analysis of this issue, see Mares, Radu, ‘A gap in the corporate responsibility to respect human rights’, forthcoming in *Monash University Law Review*, Vol. 36, [No.2], 2011.

has developed benchmarks in his Guiding Principles regarding what a grievance mechanism should actually look like in order for it to be effective.⁹

It can generally be concluded that the work of the Special Representative has revitalised the debate on corporations and human rights. The future can tell what the exact impact of the Guiding Principles will be. It is possible that, despite the lack of obligatory language, the Guiding Principles will gain legal authority by a process of redeployment where corporations implement the Principles into contracts with suppliers, giving the Principles legally binding force. However, companies that are not willing to be guided by the Principles do not yet have much to fear. As a result of the desire to keep everyone at the table, the Guiding Principles on Business and Human Rights lack the teeth needed to bring to account those corporations and States unwilling to respect human rights. It is therefore desirable that further development in this area builds upon the work done by professor Ruggie towards a higher standard for both States and corporations when it comes to the protection of human rights.

⁹ UN Doc. A/HRC/17/31, *supra* note 1, Principle 29 according to which non-judicial grievance mechanisms should be: legitimate; accessible; predictable; equitable; transparent; rights-compatible; a source of continuous learning and based on engagement and dialogue.