

Geneva Office



**Public Discussion with Professor John Ruggie,
Special Representative of the Secretary-General on
human rights and transnational corporations and
other business enterprises**

**Report of the FES Parallel Event on Business & Human Rights
26 September, 1-3 pm, UN Palais des Nations, room IX**

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Speaker: John Ruggie (Kennedy School of Government, Harvard University)
Welcome: Felix Kirchmeier (Friedrich-Ebert-Stiftung)
Moderation: Theodor Rathgeber (German Forum Human Rights)

The importance of transnational corporations (TNCs) and non-state actors in international politics and human rights issues was mentioned a number of times during the second session of the Human Rights Council (HRC) by various delegations and Special Rapporteurs. With this remark the meeting was opened, highlighting the importance and interconnectedness of Professor Ruggie's mandate. The discussion about states, being unable or unwilling to enforce their regulation concerning TNCs leads to the question what the HRC - and the UN in general for that matter – can do on this issue. This opening question, put forward by the moderator, opened the floor for an introductory statement by Professor Ruggie and questions from the audience.

Thanking the audience for their interest and numerous presence, Professor Ruggie pointed out that his role was different from those of the NGOs. To give a common ground for the discussion he explained again his understanding of the mandate given to him by the Commission on Human Rights. He said he was approaching it with normative concern but without the idea of advancing pre-existing norms. With this he clarified again his opposition to the UN Norms drafted by the Subcommission, explaining his rejection on the grounds of their legal basis and his understanding of the mandate that was given to him. This reinforced what he had mentioned in his address to the Human Rights Council, saying the last thing victims needed were unenforceable norms.

He also referred to his work plan, which he had laid out in his statement given at the HRC shortly before. According to this, the accomplishments that could be expected until the end of his mandate are:

- A thorough analysis of state responsibilities;
- A mapping of emerging legal standards for direct and vicarious corporate liability (or “complicity”) for grave breaches;
- A framework to help identify and clarify standards for corporations in other areas of human rights;
- An update on human rights impact assessments;
- A better understanding of what rights companies themselves recognize, and through what means, though it will fall short of detailed inventory of best practices;
- And we still require additional information from states before we can even begin a meaningful review of their best practices;
- Finally, you can expect a set of recommendations drawing on the empirical and analytical work we will have concluded.

The subsequent discussion focussed on the following issues: Human Rights Impact Assessments in trade agreements and company policies; The question of State Responsibility versus Sphere of Influence of TNCs; The problem of State Owned Enterprises; The question of a need for stronger standards, a possible set up of a monitoring body and other options for the HRC; The usefulness of establishing a Working Group for that issue; The possibilities of collaboration with other special procedure mandates (e.g. “Working Group on Mercenaries”) or UN Agencies (ILO); The possibilities for engagement of NGOs.

This report will neither refer to the persons who posed a question, nor go chronologically through the proceedings but rather sum up the different questions and answers grouped along topics.

Human Rights Impact Assessments in trade agreements and company policies

Dealing with Human Rights Impact Assessments (HRIAs) is a part of John Ruggie’s mandate. The main problem with existing mechanisms was found to be that they were rather social and environmental impact assessments containing human rights aspects, but not HRIAs in their own right.

For example, the new International Finance Corporation’s performance standards, which the SRSG complemented as a great step forward in the World Bank Group’s performance on assessing human rights impacts, were discussed as an example of a social impact assessment tool containing human rights aspects, while falling short of the human rights based approach and the targeted specificity that a HRIA would require.

As exceptions, BP’s impact assessment in the Tangguh project, Shell’s HRIA and a tool developed by the Danish Institute for Human Rights were pointed out. Yet, the corporate models seemed not be transferable to other situations.

As key issue in preparing any impact assessment disclosure of data was stressed. The SRSG referred to disclosure requirements as a tool with multiplier effect, and as being essential for the preparation of HRIAs.

The question of State Responsibility versus Sphere of Influence of TNCs

Asked about the role of state responsibility and work done by the team of the SRSG in this area, Lene Wendland (OHCHR) replied that she was conducting a research

for the SRSG on the references to due diligence and existing state obligations given in the 7 core human rights treaties and by their monitoring bodies. A first draft mapping out state responsibility under the existing treaties would be posted for comments by the end of November.

The SRSG voiced his concern about the use of the concept of “sphere of influence.” State obligations taken from the core human rights treaties could not just be transferred into obligations on companies. Also, the concept was an analytical, not a legal one and could therefore not be used to make the distinction between state responsibility and corporate responsibility. Talking of “sphere of influence”, at the one hand there were examples where basically everything was under the influence of a company (e.g. Shell / Niger delta), while the concept could on the other hand be misused by states and communities, asking companies to fulfil basic duties of the state (e.g. education and health services) which would necessarily lead into an unsustainable situation.

On companies’ obligations, he stressed that he wanted to look in to the “do’s” not the “do not’s.” It was clear what a company was required not to do. In relation to the “sphere of influence”, it was much more interesting what a company ought to do. This again, was justifying the emphasis that the SRSG puts on the collection of best practices in carrying out his mandate.

Apart from the debate on “sphere of influence”, the main problem seen by all participants was the lack of implementation of existing legislation by states.

The problem of State Owned Enterprises

Regarding the state responsibility/sphere of influence of State Owned Enterprises (SOE) the picture was even gloomier. The topic was mentioned by the audience, and, while acknowledging the great importance of SOEs and their often extremely poor human rights records, the SRSG had to admit that he did not have a solution in how to deal with this type of company. While representing a huge power e.g. in the extractive industry (the top 13 oil companies world wide by reserves are SOEs) SOEs are safe from claims under the US Alien Tort Claims Act and, due to their nature, protected from any persecution by the state.

The question of a need for stronger standards, a possible set up of a monitoring body and other options for the Human Rights Council

To the delight of NGO representatives, the desire for stronger standards was shared by the SRSG. Yet, he would not commit himself concerning the possible legal nature of those standards recalling that this was an issue to be determined by the HRC, not by him.

Concerning the specificity of those standards, he pointed out that an overarching framework of core principles was needed, while a sectoral approach would be necessary to gain a certain level of specificity – a view which was supported by the outcome of the regional consultations the SRSG had conducted focussing on specific industries in each region. Yet, within the time frame of his mandate, he would be satisfied to get to terms with the overarching framework.

The role of the Council he saw as being a focal point in the UN system, making suggestions to other UN bodies and mandating the OHCHR to reinforce their work on the issue of business and human rights.

The SRSG reiterated in this respect that it was not his job to decide on the political side of follow-up to his recommendations. While it was up to the Council to decide

further steps, he pointed out that it was premature to talk about the establishment of a monitoring body before even defining the rules and tools to be used for any kind of monitoring. Furthermore, he saw great importance in the aspect of capacity building as monitoring alone had proven not to yield the desired results.

The usefulness of establishing a Working Group for that issue

In order to advance the issue in a tight timeframe, The SRSG did not favour the idea of establishing a Working Group (WG). In view to other WGs he questioned their general effectiveness in delivering timely results. The NGO audience on the other hand saw in a WG ultimately the best tool to generate political will and to advance the issue in a state driven process that could result in the creation and adoption of a Declaration or Convention. A WG would be the only way to get to binding standards that states can agree upon and that they would really vote for.

The SRSG, it seems, looks rather for a faster approach which could change realities on the ground using whatever means work best.

The possibilities of collaboration with other special procedures mandates (e.g. Mercenaries) or UN Agencies (ILO)

The SRSG acknowledged that in the field of collaboration with other UN mechanisms or bodies there was a potential still to be explored. Following an offer of collaboration on the issue of private security forces, put forward by the Chairperson of the Working Group on Mercenaries, he promised to reach out to other mandate holders. So far, he informed that there was a workshop conducted by the Special Rapporteur on extrajudicial, summary or arbitrary executions for the purpose clarifying legal concepts related to the SRSG's mandate.

Cooperation with the ILO already existed in some parts of the work, and Professor Ruggie reiterated that he did not plan to reinterpret the ILO standards but rather wanted to "subcontract" a part of his mandate to the ILO and draw from work that had been done by the ILO.

The possibilities for engagement of NGOs

Asked about the engagement of NGOs, the SRSG asked them to pressure states to return the questionnaire he had sent out. Apart from this he only referred to the materials posted on his webpage*, and the invitation to everyone interested to respond to the discussion papers and submit their thoughts on the studies undertaken by the SRSG's team.

To the dismay of some, direct suggestions on how NGOs could promote the topic and get stronger involved in the SRSG's work were not given.

Closing the debate Professor Ruggie repeated that his approach to the mandate included normative elements but did not accept or build on previously established norms. Being asked whether he would continue with a normative approach risking to be "uncomfortable" to governments, he mentioned that he had no career ambitions in the UN or in business and therefore could freely choose to approach his mandate whichever way he chose. And in this case, his choice was an evidence-based approach, looking at best practices, "because I want to know what works."

About the author:

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* <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>