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# PRESENTATION



It is a great pleasure for us to present the 12 issue of the Sur Journal. As previously announced, this edition is the beginning of our collaboration with **Carlos Chagas Foundation (FCC)** that will support the Sur Journal in 2010 and 2011. We would like to thank FCC for this support, which has guaranteed the maintenance of the printed version of the Journal.

This issue of Sur Journal is edited in collaboration with Amnesty International.\* On the occasion of the UN High-level Summit on the Millennium Development Goals (MDGs) in September 2010, this issue of Sur Journal focuses on the MDGs framework in relation to human rights standards. We are thankful to Salil Shetty, Amnesty International Secretary General, who prepared an introduction to this discussion. The first article of the dossier, also by Amnesty International, **Combating Exclusion: Why Human Rights Are Essential for the MDGs**, stresses the importance of ensuring that all efforts towards fulfilling all the MDGs are fully consistent with human rights standards, and that non-discrimination, gender equality, participation and accountability must be at the heart of all efforts to meet the MDGs.

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\* *Disclaimer.* With the exception of the foreword and 'Combating exclusion: Why human rights are essential for the MDGs', the opinions expressed in this collection of articles are those of the authors and do not necessarily reflect Amnesty International policy.

**Reflections on the Role of the United Nations Permanent Forum on Indigenous Issues in Relation to the Millennium Development Goals**, by Victoria Tauli-Corpuz, examines the relationship of the MDGs with the protection, respect and fulfillment of indigenous peoples' rights as contained in the UN Declaration on the Rights of Indigenous Peoples.

Alicia Ely Yamin, in **Toward Transformative Accountability: Applying a Rights-based Approach to Fulfill Maternal Health Obligations**, examines how accountability for fulfilling the right to maternal health should be understood if we seek to transform the discourse of rights into practical health policy and programming.

Still addressing the issue of MDGs, Sarah Zaidi, in **Millennium Development Goal 6 and the Right to Health: Conflictual or Complementary?**, explores how MDGs fit within an international law framework, and how MDG 6 on combating HIV/AIDS, malaria, and tuberculosis can be integrated with the right to health.

This issue also features an article by Marcos A. Orellana on the relationship between climate change and the MDGs, looking into linkages between climate change, the right to development and international cooperation, in **Climate Change and The Millennium Development Goals: The Right to Development, International Cooperation and the Clean Development Mechanism.**

We hope that this issue of the Sur Journal will call the attention of human rights activists, civil society organisations and academics to the relevance of the MDGs for the human rights agenda. The articles included in this edition of the Sur Journal show not only a critique of the MDGs from a human rights perspective, but also several positive proposals on how to integrate human rights into the MDGs.

Two articles discuss the impact of corporations on human rights. The first, by Lindiwe Knutson (**Aliens, Apartheid and US courts: Is the Right of Apartheid Victims to Claim Reparations from Multinational Corporations at last Recognized?**), analyses several cases brought before U.S. courts that have alleged that major multinational corporations were complicit in and benefited from human rights violations committed by agents of foreign governments. The article examines the most recent decision of *In re South African Apartheid Litigation* (commonly referred to as the *Khulumani* case) in the Southern District Court of New York.

The second article, by David Bilchitz (**The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?**), seeks to analyze the John Ruggie framework in light of international human rights law and argues that Ruggie's conception of the nature of corporate obligations is mistaken: corporations should

not only be required to avoid harm to fundamental rights; they must also be required to contribute actively to the realization of such rights.

There are two more articles in this issue. The article by Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Bárbara Schreiber, examines the functioning of the Inter-American System of Human Rights Protection in, **The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions**. The article presents the results of a quantitative study focused on the degree of compliance with decisions adopted within the framework of the system of petitions of the American Convention on Human Rights (ACHR).

Finally, Richard Bourne's paper, **The Commonwealth of Nations: Intergovernmental and Nongovernmental Strategies for the Protection of Human Rights in a Post-colonial Association**, discusses how membership rules for the Commonwealth became crucial in defining it as an association of democracies and, more cautiously, as committed to human rights guarantees for citizens.

We would like to thank Amnesty International's team for its contribution. Their timely input in the selection and edition of articles has been vital.

The editors.

# FOREWORD



Amnesty International's recently released report, *Insecurity and indignity: Women's experiences in the slums of Nairobi, Kenya* (July 2010) documents how women and girls living in informal settlements are particularly affected by lack of adequate access to sanitation facilities for toilets and bathing. Many of the women told Amnesty International that they have experienced different forms of physical, sexual and psychological violence, and live under the ever-present threat of violence. The lack of effective policing and due diligence by the government to prevent, investigate or punish gender-based violence and provide an effective remedy to women and girls results in a situation where violence goes largely unpunished.

We also recorded testimonies from a high number of women and girls who have experienced rape and other forms of violence directly as a result of their attempt to find or walk to a toilet or latrine some distance away from their houses. Women's experiences show that lack of adequate access to sanitation facilities and the lack of public security services significantly

contribute to the incidence and persistence of gender-based violence.

Yet, Kenya has committed to the international Millennium Development Goal (MDG) target on sanitation to reduce by half, between 1990 and 2015, the proportion of people without sustainable access to basic sanitation. The country adopted water and sanitation policies that aim to fulfill MDG targets and also the rights to water and sanitation. These policies do reflect many human rights principles. But our research shows that there are still key gaps between Kenya's MDG policies and ensuring consistency with Kenya's international human rights obligations. It also starkly illustrates how the MDG policies of governments cannot ignore gender-based violence or the specific barriers faced by women and girls living in informal settlements in accessing even basic levels of sanitation.

This is why the discussion in this issue of *Sur - International Journal on Human Rights* is so important and timely. These concerns are not unique to Kenya and around the world there are examples

illustrating how MDG efforts are most effective when they address underlying human rights issues and are truly targeted at groups facing discrimination and marginalization.

In September 2010, UN Member States will meet to agree an action plan to ensure the realization of the MDGs by 2015. With only five years left to go, it is more important now than ever that human rights are put at the centre of this action plan, in order to make the MDG framework effective for the billions striving to free themselves from poverty and to claim their rights.

The articles in this issue focus on a range of issues related to the MDGs. They illustrate the gap between the current MDG targets and existing requirements under international human rights law. They also briefly outline some of the essential elements that must be incorporated into any revised or new global framework to address poverty after 2015. I hope it will contribute to discussions on the relationship between human rights and the MDGs and be a useful resource for human

rights practitioners and others who are concerned with these issues.

Another great challenge facing governments across the world is human rights abuses committed by or in complicity with corporations. Two articles in this issue address some of the challenges as well as opportunities related to human rights in the context of corporate activities.

The issue also includes two general articles, which examine the role of the Inter-American System of Human Rights and the Commonwealth of Nations in the promotion and protection of human rights.

I had the privilege of speaking at the International Human Rights Colloquium, organized by Conectas, in 2004 and of contributing to the second issue of the SUR journal. I am extremely pleased to have the chance to collaborate again with Conectas and that they agreed to produce this edition of SUR jointly with Amnesty International.

We would like to thank them for giving us this opportunity and also thank all the authors who have contributed to this issue.

I hope you enjoy reading it.

Salil Shetty  
Amnesty International  
Secretary General



DAVID BILCHITZ

Prof. David Bilchitz is an Associate Professor at the University of Johannesburg, and Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law. He has a BA (Hons) LLB from the University of the Witwatersrand and an MPhil and PhD from the University of Cambridge. His book *Poverty and Fundamental Rights* was published by Oxford University Press in 2007 and he has published widely in other fields relating to fundamental rights including business and human rights.

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## ABSTRACT

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John Ruggie, Special Representative to the Secretary-General of the United Nations on Business and Human Rights, has released a framework in which he contends that the key responsibility of corporations is to respect human rights. This paper first seeks to analyse this contention in light of international human rights law: it shall be argued that whilst Ruggie's conception of the responsibility to respect effectively includes a responsibility to protect as well, the nature of the responsibility remains largely 'negative' in nature. The second part of this paper argues that Ruggie's conception of the nature of corporate obligations is mistaken: corporations should not only be required to avoid harm to fundamental rights; they must also be required to contribute actively to the realisation of such rights. A normative argument will be provided for this contention. This understanding of the nature of corporate obligations is of particular importance to developing countries and will be illustrated by considering the duties of pharmaceutical companies to make life-saving drugs available at affordable prices to those who need them.

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## KEYWORDS

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Ruggie Framework – Corporations – Human rights – Positive obligations – Obligations to respect, protect and fulfil – Developing countries



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This paper is available in digital format at <[www.surjournal.org](http://www.surjournal.org)>.

## THE RUGGIE FRAMEWORK: AN ADEQUATE RUBRIC FOR CORPORATE HUMAN RIGHTS OBLIGATIONS?

David Bilchitz

Human Rights advocates are increasingly realising the importance of ensuring that responsibility for the realisation of such rights is not the responsibility of states alone (see HUMAN RIGHTS WATCH, 2008; PAUST, 2002, p. 817-819).<sup>1</sup> The traditional focus of international law has been upon states as the primary subjects of international law: yet, in recent years, greater focus is being placed both in academia and in the United Nations ('UN') upon the legal obligations of non-state actors such as non-governmental organisations, liberation organisations, and corporations (ALSTON, 2005, p. 4-6). In particular, given the power of corporations to impact upon the realisation of fundamental rights, there have been a range of initiatives, mostly voluntary ones, seeking to outline the responsibilities of corporations in this regard.<sup>2</sup>

In 2005, the United Nations Human Rights Council asked the UN Secretary-General to appoint a Special Representative ('the SRSG') to investigate a number of important issues relating to business and human rights. The mandate of the SRSG arose from the failure by the Council a year earlier to adopt a document known as the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (henceforth, 'Norms').<sup>3</sup> The appointee – Prof John Ruggie of Harvard University – has conducted wide-ranging research in this area and released a series of important reports.<sup>4</sup> In April 2008, he made public his proposed framework for the imposition of human rights responsibilities upon corporations (what I shall term 'the Ruggie framework'). This article seeks to evaluate Ruggie's conception of the nature and extent of the responsibilities of corporations for the realisation of fundamental rights.<sup>5</sup>

Part I of this paper is concerned with recognising the importance of this

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*Notes to this text start on page 224.*

issue within the work of the Ruggie mandate as well as with capturing accurately what Ruggie in fact envisages as being the nature of the responsibilities of corporations in relation to fundamental rights. First, a brief history of the mandate is outlined which, as is suggested in the concluding section of this article, may provide some explanation for the conservative positions that Ruggie adopts. After outlining the key components of Ruggie's 2008 framework, the focus is shifted on to Ruggie's claim that corporations essentially have only a 'responsibility to respect' fundamental rights. Principles of international human rights law are used to help clarify what Ruggie means by the 'responsibility to respect' which, it shall be argued, includes a 'responsibility to protect' as well. Despite Ruggie's wider interpretation of this responsibility, it is argued that the core of Ruggie's position is that corporations generally only have 'negative obligations' to avoid harming the fundamental rights of others either through their own actions or those they are associated with.

Part II of this paper critically evaluates Ruggie's conception of the scope of corporate obligations. A normative argument is provided for the claim that corporate obligations should not only involve 'negative' obligations to avoid harm but also include a 'duty to fulfil': obligations to contribute actively to the realisation of fundamental rights. The argument involves engaging with Ruggie's claims concerning the differential responsibilities of states and corporations. Whilst sympathetic to the need for such a distinction, I argue that this difference does not track the distinction between positive and negative obligations. I go on to consider an example which highlights the importance of recognising that corporations have positive obligations for the realisation of fundamental rights. The example relates to the duties of pharmaceutical companies to make life-saving drugs (such as anti-retroviral treatments) available at an affordable price and provides a clear illustration of the large impact that corporate positive obligations may have upon individuals, particularly those in developing countries.

The concluding part of this paper considers a possible explanation for the key problem that I have identified in Ruggie's work. Many of his conclusions, I argue, are motivated by a desire to achieve consensus in the global community which ultimately has entailed making a number of pragmatic compromises to achieve this end. Whilst human rights advocates should be sensitive to the difficulties of attaining a global consensus, Ruggie's framework goes too far in sacrificing principle for the purposes of achieving agreement. As it stands, the flaws in Ruggie's framework – particularly his reduction of corporate obligations to a 'responsibility to respect' – could threaten the realisation of fundamental rights (particularly in the developing world) and imperil the development of a more adequate framework for the protection of fundamental rights in the longer term. Accepting Ruggie's minimalist framework as it stands would mean reducing widely our expectations of business and the very possibility of transforming our world from the current status quo of vast differentials in well-being into one that offers the possibility of realising the rights of all.

## Part I

### The Ruggie Mandate and the Nature of Corporate Responsibilities

#### (i) Context

In 2003, the United Nations Sub-commission on Human Rights adopted a document known as the ‘*UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*’ (henceforth, ‘the Norms’). These Norms sought “definitively to outline the human rights and environmental responsibilities attributable to business” (NOLAN, 2005, p. 581). Those responsibilities were designed to be mandatory obligations imposed upon corporations by international law.<sup>6</sup> The rights which the Norms identify as being applicable to corporations include a number of unsurprising candidates such as labour and environmental rights as well as a general catch-all provision that corporations may be responsible for the full range of human rights within their ‘sphere of influence’ (UNITED NATIONS, 2003a, para. 1). As such, the Norms went beyond the voluntary initiatives that had until this point been the dominant framework in which corporate responsibility for the realisation of human rights had been articulated. They imposed wide-ranging responsibilities upon business for the realisation of fundamental rights whilst also outlining the contours of an international legal regime that would govern transnational corporations and other business enterprises in this area. The Norms, it was claimed, derived their legal authority ‘from their sources in treaties and customary international law, as a restatement of international legal principles applicable to companies’ (WEISSBRODT; KRUGER, 2003, p. 915).<sup>7</sup>

The reaction to the Norms was mixed. Many international human rights nongovernmental organisations (NGOs) endorsed the draft Norms (RUGGIE, 2007, p. 821). However, the business community, represented by the International Chamber of Commerce and International Organisation of Employers, was strongly opposed. The Norms were submitted to the Commission on Human Rights where they received a largely hostile reception from a range of states (BACKER, 2006, p. 288). The Commission eventually declared that the Norms had ‘no legal standing’ and that the Sub-Commission ‘should not perform any monitoring function in this regard’ (UNITED NATIONS, 2004b).

Though the Norms were divisive and failed to garner wide-ranging support, many states still felt that the responsibilities of business for the realisation of human rights were important and required further investigation. A year after the resolution on the UN Draft Norms, the UN Human Rights Commission asked that the UN Secretary-General appoint a Special Representative (the SRSG) to investigate further some of the outstanding issues relating to business and human rights (RUGGIE, 2007, p. 821). The appointee – Prof John Ruggie of Harvard University – was initially appointed for a two year period and was given a mandate that defined the terms of reference for his activities.

## *(ii) The Mandate and its Key Features*

The mandate of the SRSG required that he was to present his views and recommendations for consideration by the Commission on the following issues:

- (a) to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- (b) to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights including through international co-operation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as ‘complicity’ and ‘sphere of influence’;
- (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises (UNITED NATIONS, 2005, para. 1).

It is clear that the mandate is a wide-ranging one and is meant to engage with a number of key questions in the field of business and human rights. Clearly, in many ways, the mandate emerged from the discussions surrounding the UN Draft Norms which provided the impetus for the consideration of certain key issues.<sup>8</sup> Considering the various components of the mandate, its work can conceptually be divided into two key areas: first, the SRSG must seek to clarify what may be termed the ‘content question’: what in fact are the obligations that corporations have (or should have) for the realisation of human rights?; secondly, there is the institutional question: what institutions and forms of control can best ensure that corporations realise the responsibilities that they have concerning fundamental rights? The latter question raises a further issue as to who bears the responsibility for ensuring that corporations meet their responsibilities: the mandate is required to investigate the role of the state in this regard as well as the role of corporations themselves in this process.<sup>9</sup>

Whilst some of the tasks of the mandate are evidence-based and require descriptive research, the ultimate import of the mandate – at least in relation to the ‘content question’ - must be normative. Its starting point is that there is a lack of clarity concerning the responsibilities of corporations for human rights protection and the task of the SRSG is to provide clarification in that regard. The notion of clarification suggests that existing standards are unclear and lacking in definition. Yet, the process of clarifying standards is not simply a descriptive process: rather, it requires interpretation of the existing international legal position as well as choices to be made concerning the standards that ‘ought’ to govern a particular area.<sup>10</sup> This is something that has been recognised by the SRSG in his very first report where, describing his mandate, he states that “insofar as it inevitably will entail assessing difficult situations that are themselves in flux, it inevitably will also entail making normative judgements” (UNITED NATIONS, 2006, para. 81).

### *(iii) The Execution of the Mandate and the Framework*

Since the beginning of his mandate, Ruggie has stimulated much discussion in this area and produced a number of important documents. He has, together with his team of researchers and advisors, organised consultations with the most important stakeholders in this area and has conducted wide-ranging academic research in this field (RUGGIE, 2007, p. 822). He has also produced four important reports that have been placed before the Commission on Human Rights each year. The focus of this paper will be on the Ruggie framework, a report released in 2008, which contains a proposed ‘conceptual and policy framework, a foundation on which thinking and action can build’ (UNITED NATIONS, 2008a, para. 8). To the extent that his prior and subsequent reports have influenced the nature of the framework, these too will be considered.

Ruggie’s framework rests upon what he terms ‘differentiated but complementary responsibilities’ (UNITED NATIONS, 2008a, para. 9) and comprises three main principles. First, the report emphasizes the state’s duty to protect individual rights against abuse by non-state actors.<sup>11</sup> To this end, states are encouraged to introduce regulatory measures to strengthen the legal framework governing human rights and business, as well as to provide mechanisms for the enforcement of such obligations (UNITED NATIONS, 2008a, para. 18).

Secondly, businesses are said to have the responsibility to respect human rights. Ruggie claims in his framework that corporate responsibility extends to all internationally recognised human rights. He also contends that it is necessary to focus on the specific responsibilities of corporations in relation to fundamental rights and to distinguish these from the responsibilities of states. “To respect rights essentially means not to infringe on the rights of others – put simply to do no harm” (UNITED NATIONS, 2008a, para. 24). The report proposes a ‘due diligence’ approach whereby companies are expected to ensure that the impact of their activities does not cause adverse human rights impacts.

Finally, the third principle is that there must be access to remedies where disputes arise concerning the impact of corporations upon fundamental rights (UNITED NATIONS, 2008a, para. 26, 82). This involves ensuring that investigative processes take place where violations are alleged, as well as making provision for redress and punishment where required. The report proposes a variety of judicial and non-judicial mechanisms to improve and strengthen enforcement.

Despite Ruggie’s presentation of the three prongs of the framework as equally important components thereof, it is important to consider whether this is so and the relationship between them. When we consider the state duty to protect, it becomes evident that this forms part of the state’s function as an enforcement agent at international law: this means that the state is itself tasked with ensuring that other entities understand and comply with their responsibilities concerning fundamental rights. The actual detail of the state duty to protect – what enforcement measures it must take, for instance – will be guided by the obligations that non-state actors have and the ways in which they can impact upon fundamental rights. These obligations are dealt with in the second part of Ruggie’s framework which outlines the corporate responsibility to respect.

A similar point can be made about the third part of the framework - dealing with access to remedies - which is not about the content of the obligations that corporations have but the remedies that must be provided if such obligations are not met. The first and third parts of the framework thus work together: if the state is the primary enforcement agent, then it will be responsible for ensuring that remedies are available when fundamental rights are violated. In fact, the third part of the framework can be seen largely as a sub-section of the state duty to protect, determining what remedies the state must create in the case of a violation (though the remedies need not be the sole preserve of the state).

This analysis of the various parts of the Ruggie framework indicates that the conceptual heart of the mandate must relate to clarifying the obligations of corporations for the realisation of human rights. The first and third parts of the framework are dependent upon achieving an adequate conception as to the ambit of corporate obligations. It is to this question that I now turn.

#### *(iv) The Corporate Responsibility to Respect*

The key normative part of Ruggie's framework is, in many ways, his claim that corporations have the specific responsibility to respect human rights. The scope of this duty he claims is defined largely by 'social expectations' and the notion of a company's 'social license to operate' (UNITED NATIONS, 2008a, para. 54). The responsibility to respect involves effectively 'doing no harm'. This goes beyond a passive responsibility and can entail taking positive steps.<sup>12</sup> Discharging the responsibility requires reference to the notion of due diligence.<sup>13</sup> "This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts' (UNITED NATIONS, 2008a, para. 56). The scope of the duty can be highlighted by three sets of factors. First, consideration must be given to the contexts in which business activities take place and the particular human rights challenges that may arise. Secondly, the impact of business upon human rights within these specific contexts must be taken into account. Finally, the potential for business activities to contribute to abuse through relationships with other agents – such as business partners, suppliers, State agencies, and other non-State actors – must be considered. The substantive content of the due diligence process involves reference to the International Bill of Rights and conventions of the International Labour Organisation which embody the benchmarks against which 'social actors judge the human rights impacts of companies' (UNITED NATIONS, 2008a, para. 58).

In order to grasp what he means by the responsibility to respect, it is important to distinguish the language Ruggie uses from that employed in the Norms. It is noticeable that the Norms place a much wider range of obligations upon corporations to 'promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognised in international as well as national law' within their sphere of activity and influence (UNITED NATIONS, 2003a, para. 1). Ruggie begins his discussion of the nature of corporate obligations by criticising

the approach taken by the Norms. The Norms, he claims, attempt to identify a specified list of rights for which corporations may be responsible. In relation to those rights, the Norms extend the entire range of duties that States have with the proviso that corporations only have such duties where they fall within a corporation's 'sphere of influence' and that such duties are 'secondary' rather than 'primary'. Ruggie criticises this framework for attempting to define a 'limited list of rights linked to imprecise and expansive responsibilities' rather than 'defining the specific responsibilities of companies with regard to all rights' (UNITED NATIONS, 2008a, para. 51).<sup>14</sup> In order to capture accurately the differences between Ruggie's position and that outlined in the Norms, it is necessary to investigate in particular the technical meaning of the obligations to respect, protect and fulfil in international human rights law.

Henry Shue (1996, p. 52) famously criticised attempts to distinguish between 'negative rights' and 'positive rights' on the grounds that the former give rise largely to obligations to avoid infringing the rights of others whilst the latter give rise to obligations actively to take steps to realise the rights of others.<sup>15</sup> According to Shue, it is more accurate to recognise that the 'complete fulfilment of each kind of right involves the performance of multiple kinds of duties' (SHUE, 1996, p. 52). Thus, each right – whether a civil and political right or a socio-economic right – does not have only one type of correlative duty but rather can be seen to have at least three types of derivative duties emanating from it, if the right is to be successfully realised.<sup>16</sup> These duties include duties to avoid depriving an individual of a right (these are largely 'negative' in character); duties to protect individuals from the deprivation of their rights (these arise largely in order to ensure that duties to avoid depriving and to aid are enforced); and duties to aid the deprived (these are largely 'positive' in character and require active steps to be taken to fulfil the rights) (SHUE, 1996, p. 52-55).

Shue's typology of duties has influenced the analysis of the obligations imposed by the human rights treaties upon State parties.<sup>17</sup> It has thus been mirrored in international human rights language by recognising that states have a duty to respect (avoid depriving); a duty to protect (protect from deprivation); and a duty to fulfil (aid the deprived). In recent years, some of the treaty bodies have expanded upon this framework to take account of further obligations that may be necessary for the effective implementation of a right.<sup>18</sup>

Seen in this light, Ruggie's claim that corporations only have a responsibility to respect would appear *prima facie* to involve a severe contraction of the obligations that corporations may be required to perform in comparison to those imposed by the Norms.<sup>19</sup> Indeed, the comparison would seem to suggest that, on Ruggie's account, corporations largely have responsibilities to refrain from violating rights but are not required actively to contribute towards their realisation. Some of Ruggie's statements concerning the responsibility to respect, however, cast some ambiguity as to whether it is to be understood in the restrictive manner that international human rights law would suggest. The next section attempts to gain further clarity on the nature of the responsibility to respect in Ruggie's work prior to engaging critically with it.

### *(v) The 'Negative' Core of the Responsibility to Respect*

The key element of the responsibility to respect does appear to be the negative duty to avoid infringing the rights of others, 'put simply, to do no harm' (UNITED NATIONS, 2008a, para. 24). Ruggie claims that this is the 'baseline expectation for all companies in all situations' (UNITED NATIONS, 2008a, para. 24). Yet, he claims that there may be additional responsibilities that corporations have in particular circumstances: Ruggie recognises that these may arise where companies perform certain public functions or have undertaken additional commitments voluntarily. These responsibilities do not, however, apply in all situations: it is only the negative responsibility to respect that applies across the board (UNITED NATIONS, 2009c, para. 48).

Moreover, in exploring the ambit of the responsibility to respect, Ruggie does state that 'doing no harm' can require that positive steps be adopted to ensure that negative consequences do not result from corporate action (UNITED NATIONS, 2008a, para. 24).<sup>20</sup> How does this impact on the nature of the duties that are encompassed by the responsibility to respect?

The example Ruggie uses is important in helping to understand the ambit of the responsibility to respect: a workplace anti-discrimination policy, he claims, might require that a company adopt specific recruitment and training programmes (UNITED NATIONS, 2008a, para. 55). If we try to draw out what he could mean by this statement, presumably, the training component of such programmes would be designed to shift discriminatory attitudes within a firm.<sup>21</sup> Recruitment programmes would, it seems, at least have to be based upon equal opportunity principles and could perhaps also involve some form of affirmative action to redress past discriminatory practices. This example, however, highlights the fact that any positive steps that a company must take are ultimately designed to prevent violations of fundamental rights: in the example Ruggie gives, the violation would involve the infringement of equality rights through discriminatory practices. The positive duties of a company in this context simply flow from its general 'negative' obligation to avoid violating rights and essentially are designed to guard against any such violations.

Corporate obligations for Ruggie are also not simply confined to taking positive steps to avoid violating rights through its own actions. In the due diligence enquiry that he proposes, Ruggie supports the position that a corporation must also consider how it could contribute to human rights violations through the abuses of third parties.<sup>22</sup> He is clear that the corporate responsibility to respect would involve avoiding 'complicity' which 'refers to the indirect involvement by companies in human rights abuses – where the actual harm is committed by another party, including governments and non-State actors' (UNITED NATIONS, 2008a, para. 73).

What Ruggie says here can be likened to the positive duties a state would have to protect individuals against the abuse of their rights by third parties. Take, for instance, its obligations in relation to the right to freedom and security of the person. In fulfilling this right, the state would be required, amongst others things, to protect individuals against violent criminal activity. This would entail the state setting up proper enforcement agencies, seeking to understand the causes of crime and addressing these through carefully designed policies. The state could also be

required to educate its citizens about ways of avoiding criminal activity as well as to provide advice on how to avoid becoming the victim of crime.<sup>23</sup>

In the context of the state, such a duty would usually form part of what is referred to in international human rights law as the ‘duty to protect’. In relation to corporations, it would seem then that Ruggie envisages moving beyond the traditional meaning of a responsibility to *respect* in human rights law. In fact, his views seem to imply that corporations also have a responsibility to *protect* individuals against abuses by third parties with whom they have some form of contact.

His conflation of these two duties within the responsibility to respect framework is likely to lead to confusion given the different taxonomy in human rights law. Given his views on this matter, it would have been desirable thus to recognise explicitly that corporate responsibilities include both duties to respect and protect as they are conceived of currently in human rights law. However, even with this deeper analysis of what Ruggie’s framework envisages for corporate obligations, it is still evident that his framework narrows the focus of corporate obligations to the largely ‘negative’ task of avoiding harm to fundamental rights – whether it is the corporation’s own actions or those it is associated with – rather than requiring that corporations assume positive obligations actively to take steps to assist in the realisation of human rights.<sup>24</sup> In the next part of this article, this contention about the distinctive ambit of corporate obligations for the realisation of rights is examined critically and a normative argument provided for expanding the range of these responsibilities to include a ‘duty to fulfil’.

## Part II

### Developing Corporate Duties Beyond the Responsibility to Respect

#### *(i) The Role of the State and the Role of the Corporation*

One of the central criticisms that Ruggie lodges against the Draft Norms is the fact that they ‘extend to companies essentially the entire range of duties that States have’ (UNITED NATIONS, 2008a, para. 51). Whilst the Norms recognise that certain rights may not pertain to companies, they ‘articulate no actual principle for differentiating human rights responsibilities based on the respective social roles performed by states and corporations’ (UNITED NATIONS, 2006, para. 66). Whilst corporations may be ‘organs of society’, Ruggie claims they are ‘specialised economic organs, not ‘democratic public institutions’ (UNITED NATIONS, 2008a, para. 53). The differing nature of corporations and states thus means that corporate ‘responsibilities cannot and should not simply mirror the duties of States’ (UNITED NATIONS, 2008a, para. 53). Consequently, Ruggie asserts, ‘by their very nature, corporations do not have a general role in relation to human rights like states but a specialised one’ (UNITED NATIONS, 2006, para. 66). Ruggie thus attempts in his framework to identify the ‘distinctive responsibilities of companies in relation to human rights’ (UNITED NATIONS, 2008a, para. 53). His claim that corporations have only a responsibility to respect reflects this attempt to capture the particular role they should play in relation to fundamental rights.<sup>25</sup>

The argument here is of central importance in determining the role that corporations should play in realising fundamental rights. It is uncontroversial that the state and the corporation are distinctive entities with differing roles in the social order. Yet, recognising this point does not entail that the obligations of corporations are limited to the largely ‘negative’ duties encompassed by the responsibility to respect. In order to understand the nature of the obligations that corporations should have in relation to fundamental rights, we need a normative theory that is capable of relating the distinctive nature of the corporation to the forms of obligation that they should be subject to. I shall now attempt to provide a brief outline of such a theory which provides support for the view that corporate obligations are not confined to the responsibility to respect but also include positive obligations to promote and fulfil fundamental rights.<sup>26</sup>

### *(ii) Rooting Obligations in the Social Function of the Corporation*

Businesses are conducted through a range of legal forms: however, the dominant structure in the modern world has been the corporation.<sup>27</sup> The major distinctive feature of the corporation has been what is often termed its ‘separate legal personality’ which allows the company to be the bearer of its own rights and liabilities.<sup>28</sup> This is clearly a construct as the corporation cannot in reality act other than through the individuals who make it up and are the brains behind it. Nevertheless, conceiving of a corporation as a separate legal person has a number of legal advantages, foremost amongst which is the notion of limited liability (MILLER; JENTZ, 2005, p. 519): the corporate form separates out the shareholders from bearing full responsibility for the fate of the company and thus “the risk carried by the contributors of capital extends no further than the loss of the amount which they have contributed to the venture as capital” (CILLIERS, 2000, p. 66).<sup>29</sup> Corporations also gain the benefit of perpetual succession in that they continue to exist irrespective of changes in their shareholding (or for that matter their staff). These legal benefits clearly were developed to attain a number of social advantages: they encourage people to take more risk, stimulate innovation and provide a catalyst for greater competition.<sup>30</sup> Much of corporate law has evolved so as to ensure that these benefits are obtained and that the risks that arise out of the creation of a structure such as the corporation do not materialise (BACKER, 2006, p. 298-300).

It is clear therefore that corporations are essentially entities created and regulated through law in order to attain a number of social and individual benefits that flow from their separate legal personality.<sup>31</sup> Clearly, should the advantages of corporate personality be accompanied by grave social harms, then there would be a need for legal restrictions to be placed on corporations to guard against those harms.<sup>32</sup> Such harms may in fact arise from the very fact that the focus of corporate activity has often been upon achieving value for its shareholders without imposing full responsibility for its actions upon those very shareholders: some have argued that “this creates a structure which is pathological in the pursuit of profit” (CORPORATE WATCH, 2006; BAKAN, 2004). The need for regulation to guard against harms that arise from the creation of a corporate structure could provide

a normative basis for the obligations that would flow from Ruggie's responsibility to respect. Since every individual must have his or her rights respected and the corporate form could function as a method through which responsibility for such violations could be avoided, it is of critical importance to ensure that corporations are required at least to avoid harming such fundamental rights.

However, once we conceive of the aim of providing corporations with separate legal personality as being the creation of certain social advantages, the question is why we need to confine our conception of such benefits to the traditional ones outlined above. If corporations may be able to attain these benefits and yet be capable of contributing to other social goods of vital importance, why should we not require that they actively promote such goods as well?<sup>33</sup> Moreover, given that the existence of separate legal personality provides many advantages to those who invest in the corporation, why should society not require that corporations pay a form of social dividend in order to attain those very advantages?<sup>34</sup> Seeing that law effectively creates the corporate form for social purposes, it is unclear why it may not impose obligations upon corporations actively to realise certain social goods, provided this does not fundamentally prevent the corporation from realising its economic purposes.<sup>35</sup> Moreover, the realisation of fundamental rights is not just any type of social good. It is (or should be) a central norm of the international legal order as well as the national legal systems in which corporations are registered. It plays such an important role in legal systems for a very good reason: fundamental rights are about the protection of the most vital interests of individuals, without which the possibility of living a decent life becomes meaningless.<sup>36</sup>

As it stands, Ruggie's framework seems to give expression to what might be termed a 'libertarian vision' of the corporation. Ultimately, the social role he has articulated for the corporation is a limited one focused on the benefits of having an entity oriented towards profit maximisation without creating strong social harms. Libertarianism is generally only in favour of regulation and the imposition of obligations by the state where this is necessary to prevent the violation of individual rights (typically conceived of as 'civil rights') and where this is necessary to protect individuals against such harms as force, fraud and theft (see, for instance, NOZICK, 1972, p. 26-28). In relation to business, this view was defended strongly by Milton Friedman who famously stated that 'there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.' (FRIEDMAN, 1972, p. 133). The rules of the game for Ruggie would go further than those envisaged by Friedman and involve respecting human rights.<sup>37</sup>

However, it is unclear what grounds of principle we have for limiting the rules within which corporations are required to operate only to negative obligations. The harms individuals may suffer are not limited to ones where their rights are actively violated by corporations: indeed, lack of access to food, water, health-care, and legal representation may severely impact upon the lives of individuals.<sup>38</sup> Corporations may have the capacity to assist with the realisation of these rights for a large number of individuals. If the point of enabling corporations to function

as separate legal persons through law is to create certain social benefits, then it seems that corporations may be required to play their part in helping to fulfil these important social goods.

Most societies do not seem to consider it illegitimate for states to tax corporations on the basis of their activities for wider social purposes, and, indeed, Ruggie at no point appears to question the validity of taxation.<sup>39</sup> If this is so, then why could we not regard positive obligations upon corporations for the realisation of fundamental rights as a form of tax on their activities that require certain active contributions to realise fundamental rights in both money and in kind?

The reasoning I have proposed here can be seen to take further the notion that Ruggie employs in his framework, namely, that companies require a 'social license' in order to operate (UNITED NATIONS, 2008a, para. 54). When as a society we grant a company the license to operate, it is not simply a license to create as much wealth for its shareholders as possible. It can also involve the requirement that the company actively assist in the fulfilment of the fundamental rights of individuals. Understanding the social context in which corporations operate shows that they cannot be considered in purely individualistic terms but need to be considered as part of a co-operative social order.<sup>40</sup>

Yet, does this not confuse the social roles of the corporation and that of the state? Whilst the state should be under no illusion concerning its responsibility to realise the rights of individuals, I have attempted to show in the argument presented above that the reasons underlying the creation of the corporation in law do not provide any strong justification for excluding positive obligation being placed upon corporations actively to contribute to the realisation of fundamental rights.<sup>41</sup> When we consider the power of corporations to impact upon fundamental rights and their having been created in order to achieve benefits for society, a case begins to emerge for the imposition of positive obligations upon corporations. This does not mean that corporations must assume the same range of responsibilities as the state in realizing fundamental rights: we thus need some principled basis upon which to determine the allocation of responsibilities between corporations and the state.

Henry Shue provides a plausible account of what the criteria should be for determining who should be the bearers of positive obligations. In his view, two factors must be considered in this regard: first, means-end reasoning must establish what needs to be done in order for a right to be fulfilled and, in light of this, it must be determined who best can perform those tasks (SHUE, 1996, p. 164).<sup>42</sup> Secondly, the allocation of duties also depends upon what burdens are reasonable and fair to place upon specific agents. In relation to the first factor, it is clear that, in many instances, corporations will be able to play an important role in helping to realise fundamental rights.<sup>43</sup> This appears to provide an important justification for the allocation of obligations to corporations where particular interventions that could have a large potential impact upon fundamental rights fall within their area of speciality, and their capacity to assist. The second factor identified by Shue provides a justification for limiting the role of corporations in this regard: it would require, for instance, that the burden of positive obligations be spread equally amongst corporations and require that corporations still be able to realise their economic

goals. The second factor does not, however, provide any general reason in principle why corporations cannot have positive obligations for the realisation of rights.

No doubt it will be important for these factors to be developed so as to specify the guiding principles that will determine the positive obligation that corporations have in particular circumstances. The Norms attempted to use the vague concept of 'sphere of influence' to try and capture some of these complexities. Ruggie has successfully highlighted a number of the inadequacies of this notion and done much to try and disentangle various elements of the concept.<sup>44</sup> There is clearly still much work needed to flesh out the ambit and scope of the positive obligations that corporations have.

Nevertheless, the absence of a fully worked out theory in this regard does not mean we can reach the conclusion that there are no general positive obligations that corporations have for the realisation of fundamental rights. Nor does it provide a justification for omitting such obligations from an international framework that is designed to be the point of reference for determining the ambit of corporate obligations. As has been argued, there are in fact strong reasons to recognise the existence of such positive obligations even if we do not as yet have a full understanding of their exact scope.<sup>45</sup> If we accept this point, then the Ruggie framework is fundamentally incomplete. It also forecloses the possibility of achieving an adequate allocation of legal duties to fulfil fundamental rights by creating a general exclusion for corporations in relation to these obligations. Given the large capacity that corporations have in our current world to help states realise fundamental rights, this exclusion can be seen seriously to undermine the possibility of realising a wide range of human rights. In particular, this is of great importance in the developing world, where placing positive obligations upon corporations has the potential to assist these societies to meet the fundamental interests of individuals living therein.<sup>46</sup> I now provide an example that seeks to illustrate this point in a more concrete manner.

### *(iii) Positive Obligations and their Impact on Fundamental Rights in the Developing World*

The example in question concerns whether pharmaceutical companies have obligations to make anti-retroviral drugs available at affordable prices to those suffering with HIV. According to United Nations statistics, at the end of 2007 there were 33.4 million people living with HIV.<sup>47</sup> The main treatment that has been developed for HIV is in the form of anti-retroviral drugs which are largely effective in increasing life expectancy and the quality of lives of individuals who suffer from the disease.<sup>48</sup> In terms of the law of many countries, and more recently in terms of the international trade regime established by the World Trade Organisation, pharmaceutical companies are allowed to obtain strong intellectual property rights known as patents for a limited period that allows them exclusively to profit from the development of drugs such as these.<sup>49</sup> Until recently, these drugs were extremely expensive and largely accessible only within developed countries (CULLETT, 2003, p. 143). Due to a range of initiatives, the price of these drugs has come down and, these

drugs have become more accessible within a wider range of developing countries (SLEAP, 2004, p. 170). The United Nations Declaration of Commitment on HIV/AIDS, has clearly recognised that pharmaceutical companies are central to reducing the cost of ARV drugs and increasing the availability thereof.<sup>50</sup> The question, thus, arises as to whether there should be any *obligation* upon pharmaceutical companies to make such drugs available to individuals at an affordable rate.<sup>51</sup>

It is important to analyse what the nature of any such obligation would be. The corporation here is not actively creating the harm in this instance: whether actively engaging in risky behaviour or accidentally being infected, it is an individual's contraction of HIV that may lead to his or her illness and death.<sup>52</sup> It also clearly seems possible for an ethical corporation to manufacture and develop these drugs without causing any harm to other human beings.<sup>53</sup> Thus, in producing anti-retroviral drugs, a corporation may avoid doing harm and so comply with the responsibility to respect individual rights in terms of the Ruggie framework. Yet, this framework effectively fails to address the most pressing and relevant question in this context which concerns whether a corporation that produces life-saving medication such as anti-retroviral drugs and has a patent covering such medication actively has a duty to help ensure that individuals are able to have access to it at an affordable rate.<sup>54</sup> To recognise such a duty would require that we place an obligation upon corporations in this field actively to promote and fulfil individual health rights rather than simply having to respect such rights.<sup>55</sup> By limiting the ambit of corporate obligations to his 'responsibility to respect' framework and asserting that this responsibility is sourced in societal expectations, Ruggie would essentially be claiming that, in the context of the current example, our societal or moral expectations of pharmaceutical companies do not extend to a duty to help render such life-saving medicines affordable to those who need them.

It is important to recognise, as has been argued above, that pharmaceutical companies are allowed to operate and make profits for the purpose of creating certain social benefits: the traditional argument is that the possibilities of financial reward would lead to innovation and large investment in the production of new and more effective drugs which will ultimately make all individuals better off.<sup>56</sup> Yet, once life-saving medicine is developed and patented, it may be that only the wealthiest individuals can afford it, at least in the short-term whilst the company's patent is in force. The existence of the drug may benefit humanity in the abstract sense that a treatment to a life-threatening illness is available; however, a large number of people who cannot afford the drug may be in no better position than if the drug had not existed at all. In order to ensure that all individuals are equally able to access the very social benefits that are meant to flow from enabling corporations to profit from new medications that they develop,<sup>57</sup> it is necessary to place positive obligations upon them to ensure that the life-saving treatments that result from their research are made available to individuals at an affordable rate.<sup>58</sup> The point is that medicine should not be treated like a commodity in the same way as other goods (COHEN; ILLINGWORTH, 2003, p. 46):<sup>59</sup> this industry has the potential to affect the most vital fundamental rights of individuals to life and to health. Given the critical nature of these interests and the capacity of corporations to impact upon such interests, there is a strong reason to impose positive obligations

upon corporations operating within this industry to ensure that life-saving medication is made available to individuals at a reasonable rate.<sup>60</sup>

The example provided demonstrates the large number of people whose lives may be improved through positive obligations being placed upon corporations for the realisation of fundamental rights.<sup>61</sup> It also provides a good instance in which reliance on philanthropy from corporations would not have been enough: strong social pressure and potential harm to their good-will have been critical in ensuring that corporations reduce the costs of ARVs. During 2001, for instance, 39 pharmaceutical companies took the South African government to court for adopting legal measures that would have increased the availability of anti-retroviral drugs and reduced the price thereof.<sup>62</sup> The case provoked large demonstrations around the world against the action of these companies, suggesting that many people are of the view that such life-saving medicines – even if they had been developed by a private company – should be made available to individuals in the developing world at an affordable rate.<sup>63</sup> Companies left to their own devices focused upon defending their own commercial interests without regard to the human cost: a large number of people around the world helped to pressure corporations into reducing the price of drugs.<sup>64</sup> But, what happens in the case of many other drugs, where there is a lack of such widespread mobilisation?

The principled case for access to life-saving drugs does not differ between HIV/AIDS and medications designed to treat other life-threatening illnesses. To ensure that individual rights are realised, it would be entirely ineffective to rely on the contingencies of social pressure or corporate good-will. It is thus of great importance that the international framework governing corporate responsibility for human rights allow for the recognition of binding positive obligations that can render corporations obligated to ensure the availability and affordability of life-saving medicines that they develop.

#### *(iv) Objections to Imposing a 'Duty to Fulfil' upon Corporations*

Whilst illustrating the great importance that placing positive obligations upon corporations can have, and the critical gap that currently exists in Ruggie's framework, the example also provides a real-life context in which to engage with certain of the objections that Ruggie has raised against the imposition of such obligations. First, he raises the problem that the imposition of positive obligations may, he suggests, 'undermine corporate autonomy, risk taking and entrepreneurship' (RUGGIE, 2007, p. 826). Quoting Philip Alston, he asks '[w]hat are the consequences of saddling [corporations] with all the constraints, restrictions and even positive obligations which apply to government?' (RUGGIE, 2007, p. 826). The question is itself a misnomer as the imposition of *some* positive obligations upon corporations would not saddle them with *all* of the obligations (or even the same obligations) that apply to government.

Nevertheless, the example I have given does highlight some concerns in this regard and suggests a number of competing tensions that may exist in relation to the social benefits that flow from the corporation being recognised as a separate legal person. For instance, it may be that wider social benefits – such as increasing the availability of life-saving medication to all – may conflict with the social benefits

that result from allowing a relatively free market in drugs – which, it is claimed, include a large investment in research and development.<sup>65</sup> At a certain point, a corporation may claim that it has no reason to continue to invest in research and development (or even to operate) if it is faced with overly onerous positive obligations that force them to lessen their profits through a reduction in pricing.

However, this argument does not provide a case against imposing positive obligations upon pharmaceutical corporations for the realisation of health-care rights. Instead, what it shows is that if we wish to gain the traditional benefits of the market-place as well as additional social advantages for the realisation of fundamental rights, it is necessary to balance a number of factors that determine the extent of the positive obligations we can impose upon a corporation. Such balancing is not unique to this context and would involve many of the factors often used to determine the tax rate, for instance, applicable to corporations.<sup>66</sup>

Consider, for instance, the fact that most companies produce a wide-range of drugs. In certain circumstances, the benefits of such medicines – such as a new pain-killer with fewer side-effects - are important yet they are not critical.<sup>67</sup> In other cases, the medicine that is produced – such as in the case of ARVs – has the potential to improve the life expectancy and quality of lives of millions of people. Considering the differential impact that the different types of drugs have on fundamental rights, it is clear that there is a stronger case for the imposition of hard positive obligation upon corporations to ensure that the life-saving medication is made available to individuals at an affordable rate. The case is weaker for such an obligation to exist in the case of the new pain-killer. This could allow such a company to make large profits from the new pain-killer, whilst placing stronger positive obligations upon corporations in respect of life-saving medication.

Some may claim, however, that imposing strong positive obligations in the case of life-saving medication would create a perverse incentive for corporations to focus their efforts upon less important types of drugs from which they can make large profits.<sup>68</sup> However, to avoid such effects, a range of policy options exist including ‘push programmes’ through which government may help subsidize such research and ‘pull programmes’ which reward developers for producing a product with strong social benefits (JOHRI et al., 2005). If stricter measures were required, it could also be possible to regulate pharmaceutical companies through provisions that required that they invest a certain percentage of their profits made from drugs like the pain-killer into the production of life-saving medication. There would thus be various methods of ensuring that there remain incentives to produce life-saving drugs even though it would be recognised that unrestricted profit maximisation would not be permissible in this area.<sup>69</sup> It thus seems eminently possible to impose some positive obligations whilst still retaining the benefits of a more limited but still significant degree of corporate autonomy, risk-taking and entrepreneurship.

Ruggie is also clearly worried about the possibility that weak governments will attempt to shift their positive obligations for the realisation of rights onto corporations. He claims that the recognition of corporations as co-equal duty bearers for the broad spectrum of human rights obligations ‘may undermine

efforts to build indigenous social capacity and to make governments responsible to their own citizenry' (UNITED NATIONS, 2006, para. 68). It is important to recognise that the imposition of positive obligations upon corporations need not render them equal duty bearers with the state and it could still be of importance to differentiate between their respective obligations. Nevertheless, whether Ruggie's fears are realised is not a necessary consequence of positive obligations being imposed upon corporations but an empirical matter that will depend upon the institutional setting for the co-ordination of government and corporate initiatives. For instance, it could be argued that, with a co-operative approach, corporations could indeed help increase indigenous social capacity and aid governments in responding to their citizenry in many areas. Arguably, for instance, the provision by Boehringer Ingelheim of free ARVs to the government in South Africa for the prevention of mother-to-child transmission of HIV helped to highlight the existing inadequacies in public provision. It was also instrumental in the outcome of the *Treatment Action Campaign* case in which the Constitutional Court eventually ordered the government to make the drug available across the public health care system (SOUTH AFRICA, *Minister of Health vs Treatment Action Campaign*, 2002, para. 135). What is needed is thus a movement away from the traditional assumption embedded in the Ruggie framework that only governments are responsible for the realisation of rights and the recognition that, in many cases, it will be necessary to involve wider social actors - that often will include corporations - in this task. Ruggie's mandate could assist in developing principles according to which such co-operation can take place that would minimize the problems he raises: to do so, however, would mean first recognising that corporations do indeed have such positive obligations to assist in the realisation of fundamental rights.

## Conclusion: the Relationship Between Consensus and Principle

This article has sought to offer a detailed consideration and critique of the Ruggie mandate's conclusions concerning the ambit of the responsibilities that corporations have for the realisation of fundamental rights. Some may argue that the critical appraisal of his framework has failed adequately to take account of the difficult context in which his mandate came about and in which it operates. As has been outlined in Part 1, the mandate resulted from the failure of the Norms to command the support of the Human Rights Commission, and the virulent opposition of business as well as many states. In his 2006 interim report, after recognising the history that led to the creation of his mandate, the SRSG expressed his desire to adopt an approach that would involve consensus building: he has as a result held many workshops and extensive consultations. Moreover, at the end of that report, the SRSG refers to his approach in dealing with the normative claims he is required to determine as involving a 'principled form of pragmatism: 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.' (UNITED NATIONS, 2006, para. 81).

The framework of the SRSG could thus be understood as an attempt to create a compromise between what principle dictates and the pragmatic demands of achieving a world-wide consensus on the ambit of corporate obligations.<sup>70</sup> The SRSG has indeed had a number of important pragmatic considerations to contend with. First, the initial mandate was set up only for a very brief period of two years which was eventually extended for a further year. With the release of the framework for business and human rights in 2008, the Commission has decided to extend the mandate for another three years. The SRSG thus had a short period of time in which to show sufficient progress to justify the extension of his mandate by the Commission.

Secondly, should the mandate have failed to function in a consensual manner and made recommendations that were clearly inimical to the views held by members of Commission, it could easily have been terminated. The continuation of the mandate was of importance not for its own sake but, amongst other reasons, in order to keep the whole issue of business and human rights on the agenda of the United Nations ('UN'), to ensure discussion on the issue at the elevated level of the Human Rights Commission and to assist in the development of standards in this area.

Finally, much work had gone into preparing the Norms which had taken five years to complete and yet they had not succeeded in being adopted by the Commission. Their status and very relevance were placed in question by the Commission and thus their possible impact seemed to be severely curtailed. If the SRSG mandate was to succeed in having an impact and developing the responsibilities of business at an international level, then it needed to be concerned with garnering as wide a consensus around its work as possible. The reaction to his proposed framework indicates that the SRSG's consultative approach has indeed been largely successful in achieving a greater degree of consensus on the issue of business and human rights.

Human rights advocates cannot afford to ignore the importance of real-politik in the development of international law and normative standards.<sup>71</sup> The mere assertion of standards and responsibilities that rest in a vacuum and have no possibility of being enforced may reflect certain utopian ideals but in the end may have no real-life impact if they are not widely accepted. Yet, at the same time, it should be recognised that, as has happened in relation to the Norms, business will naturally resist any attempt to assert binding international human rights obligations upon them or, where such obligations are accepted, they will want to restrict them to the minimum degree possible.<sup>72</sup>

Consequently, the attempt to achieve consensus in such circumstances may lead to an acceptance of standards that represent the lowest common denominator and could lead to concessions that undermine the basic normative commitments involved in accepting fundamental rights.<sup>73</sup> It may be popular, for instance, at the international level to ignore the rights of lesbian and gay people given the virulent controversy this may cause in certain countries: yet, to do so, for a human rights advocate would be to give up on a foundational commitment to respect the interests and dignity of all individuals equally.<sup>74</sup> Moreover, international actors may be tempted to accept a minimalist framework that can achieve consensus in the short-term, yet in the longer term this may imperil the possibility of achieving substantive improvements in the realisation of fundamental rights.

Unfortunately, in Ruggie's quest for consensus, it appears that he has fallen into some of these traps and made compromises of principle that human rights defenders should refuse to accept. One of the most controversial elements of the Norms was its assertion of binding legal responsibilities upon corporations for the realisation of human rights. Ruggie attempts to assuage corporate concern in this regard by denying that corporations have international legal obligations to realise human rights and by providing that any responsibilities that they do have are only a matter of social expectation. He then goes even further and holds that the responsibilities that corporations have are severely curtailed and involve only a requirement that they avoid harming fundamental rights.

Understood in light of the desire to achieve consensus, Ruggie's minimal proposal may be likely to garner more support than would a recognition of binding and more expansive duties, such as were contained in the Norms.<sup>75</sup> Yet, the costs involve accepting a very serious reduction in what we can expect of corporations or hold them accountable for. And indeed, in respect of a world suffering from severe economic inequality and deprivation, this can impact negatively on the human rights and well-being of millions of individuals. This is a cost that human rights defenders should not assent to.

This article has sought to focus upon Ruggie's assertion that corporations only have a responsibility to respect fundamental rights. Yet, it has been argued that corporations in fact should be subject to the full range of human rights obligations at international law, including obligations to protect and fulfil. The existence of positive obligations upon corporations is supported by the normative arguments that have been made as well as recognition of the importance of imposing such obligations in a world characterised by severe economic deprivation and vast corporate power.

Ruggie has at points suggested that his framework might constitute simply a starting point upon which to build wider obligations in time. He refers to the responsibility to respect as a 'baseline obligation' (UNITED NATIONS, 2008a, para. 24): this is ambiguous between the idea that this is simply a starting point or the main fundamental obligation. Ruggie often uses it in the latter sense with the notion that any further obligations are exceptional. Whilst it has been argued that Ruggie is mistaken in this regard, it is also important to recognise that focusing on the responsibility to respect alone is also a mistaken starting point. For it attempts to cast the division of labour between corporations and the state for the realisation of fundamental rights in terms of the distinction between 'negative' and 'positive' obligations. Yet, the allocation of duties for the fulfilment of fundamental rights to particular actors cannot convincingly be based upon the distinction between these two forms of obligation. Rather, such allocative decisions must be based on other factors which include the capacity of an actor to perform certain obligations, the importance of such obligations and the fairness of imposing such obligations upon them. Moreover, an obligation to respect is a very minimal one and could easily curtail the development of wider obligations upon corporations. At a time in which the international norms relating to the nature of corporate obligations for the realisation of fundamental rights are being developed and where such norms can have large implications for the rights of many individuals, the starting point

should be one that is more expansive and that could allow corporations to share some of the burdens of realising fundamental rights more equitably.

The starting point should thus be that businesses do not only have a responsibility to avoid harming fundamental rights but are actively required to assist in their realisation. There is no strong principled reason why a society should not require that corporations do business on condition that they play a part in realising fundamental rights where they are able to. Ruggie is currently busy working on developing the concrete implications of the responsibility to respect. Given the argument in this paper, it is important that his mandate be widened to include an investigation into corporate obligations to protect and fulfil as well and to develop guiding principles for the determination of the exact scope and nature of corporate obligations in this regard. Through recognising the full range of human rights obligations that can fall upon corporations, it will be possible to allocate responsibilities for the realisation of rights to those often in the best position to meet them. It will also hopefully provide the basis for re-shaping the nature of corporations so that they are not simply regarded as entities focused upon the self-interested maximisation of profit but that they are structures whose activities are designed to advance and benefit the societies and individuals with whom they interact.

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## Jurisprudence

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## NOTES

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1. Human Rights Watch, for instance, has released a report that outlines the impact that corporations can have on a whole range of fundamental rights. In order to deal with these abuses, the report stresses the need for global intergovernmental standards on business and human rights.
2. The voluntary initiatives include the following: the Organisation for Economic Development and Co-operation (OECD) Guidelines for Multinational Enterprises; the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; and the United Nations (UN), The United Nations Global Compact. The focus of this article will be on the attempts to assert more binding obligations upon corporations.
3. For a fuller description of the process leading to the mandate, see John Ruggie (2007, p. 821.).
4. The central reports under consideration in this article are the 'Interim Ruggie Report'; the '2007 Ruggie Report'; the 'Ruggie Framework'; and the '2009 Ruggie Report' (UNITED NATIONS, 2006, 2007, 2008a, 2009c).
5. Ruggie's mandate, as is outlined below, is expressed to cover 'transnational corporations and other business enterprises'. Business is in fact conducted through a range of different structures including sole proprietors, partnerships and corporations. Given the fact that the corporation has certain particular features and has become the most important structure for conducting business in the modern world, the focus of this article is upon the responsibilities of corporations for the realisation of fundamental rights. Given the focus of this paper, I often use the responsibilities of 'business' for human rights realisation and the responsibilities of 'corporations' in this regard interchangeably. The extension of these responsibilities to other structures through which business is conducted lies beyond the scope of this paper.
6. Weissbrodt and Kruger (2003, p. 913) explain that the Norms were not simply a 'voluntary initiative of corporate social responsibility' though they recognize that determining the exact source of the legal authority of the Norms is complex. See also, Campagna (2003).
7. Weissbrodt and Kruger make this statement but add the qualification that 'they have room to become more binding in the future'. Considering the way in which the Norms could have been binding in more detail lies beyond the scope of this paper.
8. For instance, the mandate requires the SRSO to examine the concept 'sphere of influence' which was used in the Draft Norms and which required further specification. See, in this regard, Olivier De Schutter (2006, p. 12-13).
9. The mandate at paras (d) and (e), appears to envisage some form of corporate self-regulation as well. Ruggie has in his 2007 Report also considered models of corporate self-regulation though that will not be the focus of this article.
10. Indeed, at international law, the process of clarification of norms generally leads to their development at the same time. See, for instance, Malcolm Shaw (1997, p. 89) on the confusion between 'law-making, law-determining and law-evidencing'.
11. A good example of the violation of a state duty to protect occurred in Nigeria where the government apart from actively violating human rights, allowed oil companies to degrade the environment, impacting on the right to health, the right to housing and the right to food of the Ogoni people in this area. This was found to be a violation of Nigeria's duties under the African Charter in *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*.
12. The example given is of anti-discrimination policy which might require the company to adopt specific recruitment and training programmes: see (UNITED NATIONS, 2008a, para. 55).
13. Ruggie's mandate has been renewed for three years with one of the tasks he has been set being to 'elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders' (see UNITED NATIONS, 2008c, para. 4(b)). In fulfilling this mandate, Ruggie has released a preliminary work plan in which he expresses the intention to develop 'a set of guiding principles on the corporate responsibility to respect and other accountability measures': see Special Representative of the Secretary-General, Preliminary Work Plan (UNITED NATIONS, 2009c, p. 3).
14. Ruggie's comments are though in some ways puzzling for, whilst the Norms do identify a limited set of rights that are mentioned directly, there is a general recognition therein that corporations can have obligations in relation to the full range of human rights. The Preamble acknowledges 'the universality, indivisibility, interdependence, and interrelatedness of human rights, including the right to development that entitles every person and all peoples to participate in; contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised'. In the first substantive section of the Norms relating to general obligations, as quoted in the text, the obligations appear to relate to all human rights in 'international as well as national law'. Ruggie seems to overstate the case against the Norms: this could be, as is suggested in the concluding part of this paper, for purposes of distinguishing his work from the Norms so as to achieve greater consensus on his framework even where the similarities between the two are evident.
15. Often civil and political rights were seen to be largely 'negative' in nature and socio-economic rights 'positive' in nature. Shue attempts to show that each right – whether civil and political or socio-economic – involves both 'negative' and 'positive' duties if it is to be realised effectively.

16. For a way in which to retain the correlativity of rights and duties in Shue's framework, see Bilchitz (2007, p. 90-91).
17. His analysis has, in large measure been adopted by the treaty bodies charged with oversight of the treaties: see, for instance, Human Rights Committee, General Comment No 31 (UNITED NATIONS, 2004a, para. 6), where the committee recognises that the obligations under the ICCPR are both 'negative and positive in nature'. The Committee on Economic, Social and Cultural Rights has expressly recognised this in The Right to Water, General Comment no 15 (UNITED NATIONS, 2002, para. 20) where it states that '[t]he right to water, like any human right, imposes three types of obligations on State parties: obligations to respect, obligations to protect, and obligations to fulfil'.
18. The UN Committee on Economic, Social and Cultural Rights, for instance, in its General Comment no. 14 (UNITED NATIONS, 2000) has further divided the duty to fulfill into a duty to facilitate, a duty to promote and a duty to provide.
19. Indeed, Ruggie seems actively to support such a reduction in the range of duties and sees this as a virtue of his framework (RUGGIE, 2007, p. 825-827). See also Ratner (2001, p. 517-518) who argues for a limitation of corporate responsibility to negative obligations to avoid harm.
20. See also Ratner (2001, p. 517) who is also prepared to allow that positive measures may be required to give effect to these negative duties.
21. An additional example could be the one given by Ratner (2001, p. 516) who seems to think that there is a positive duty upon a company to train its security personnel such that they do not infringe the prohibitions against torture.
22. In the Ruggie Framework (UNITED NATIONS, 2008a, para. 81), it is stated that 'the relationship between complicity and due diligence is clear and compelling: companies can avoid complicity by employing their due diligence processes described above – which, as noted, apply not only to their own activities but also to the relationships connected with them'.
23. For an example of where a state body has been required by a court to take positive steps to protect individual safety, see South Africa, Rail Commuters Action Group vs Transnet Ltd t/a Metrorail (2005).
24. Indeed, in his Report (UNITED NATIONS, 2009c, para. 62), he persists in contending that activities that go beyond the responsibility to respect may be 'desirable for companies to do' but 'should not be confused with what is required of them'. This is a strange statement given that the whole of the Ruggie framework rests upon 'social expectations' rather than law and so the notion that corporations are 'required' to do something seems to involve the notion of being morally bound rather than being legally bound.
25. Ruggie (2007, p. 826) lays out certain additional policy reasons against placing further responsibilities on corporations. I shall consider some of these later on in this article.
26. I shall argue for the existence of such positive obligations without specifying the exact scope or extent thereof: this enables me to support the claim that the Ruggie framework as it stands is an inadequate one for capturing the nature of corporate obligations. In the same way that Ruggie proposes to develop guidelines concerning the responsibility to respect in his coming work (UNITED NATIONS, 2008d) there will be a need to go beyond the position in this paper and develop more determinacy surrounding the positive obligations that corporations have in specific circumstances. This is a large project and one of great import for political philosophy and both international and domestic human rights law which I shall seek to develop in forthcoming work.
27. Janet Dine (1999, p. 221-229) outlines a number of theories concerning the nature of the corporate entity that she employs to reach certain conclusions about governance models for corporations. Instead of proceeding from an analysis of these theories, I shall instead attempt to derive a conception of corporate obligation from a consideration of what I take to be a distinctive feature of the corporation: separate legal personality. The argument here might be extended to other legal forms through which business is conducted by considering the way in which law facilitates their operation though a detailed consideration of this lies beyond the scope of this paper.
28. The most important contribution of corporate law has been said to be the creation of a legal person, 'a contracting party distinct from the various individuals who own or manage the firm, or are suppliers or customers of the firm' (HANSMANN; KRAAKMAN, 2004, p. 7). See also Stephens (2002, p. 54).
29. As Stephens (2002, p.54-55) points out, limited liability only became widespread in the early nineteenth century in the United States and some fifty years later in England but is currently seen to be a 'core element of the corporate form'.
30. This view of the function of business and corporations is linked to the broader justification concerning the benefits arising from free market capitalism and private property: see, for instance Nozick (1972, p. 177). In relation to the rationale behind limited liability, in particular, see Easterbrook and Fischel (1985, p. 93-97). Of course, in recent years, the corporate form has been changed and is often used by non-profit organisations to create separate legal personality as well. This often occurs to encourage individual involvement in such organisations without the risk of personal liability if things go wrong. The corporate form here again assists as a way of shielding individuals from full liability for problems that may occur with the organisation. The focus of this piece, however, shall be on corporations that are formed for the purposes of conducting business and thus have economic aims at their root.
31. Lewis Kornhauser (2000, p. 88) states that 'a conception of corporate and commercial law unconnected to increasing the general level of well-being is completely implausible'.
32. Indeed, the current global financial crisis is

leading to calls for greater regulation of corporations – particularly banks – to prevent a recurrence of the problems that are affecting millions of lives. See, for instance, IMF (2008)) where Dominique Strauss Kahn, managing director of the International Monetary Fund, stated that ‘it’s because there were no regulations or controls, or not enough regulations or controls that this situation was born. We must draw conclusions from what has happened – that is to say regulate, with greater precisions, financial institutions and markets’.

33. Backer (2006, p. 298-302) traces this kind of reasoning back to the views of E. Merrick Dodd in the 1950s that he expressed in an engagement with Adolph Berle in the Harvard Law Review concerning corporate social responsibility. According to this school of thought, corporations are created to serve a social purpose and for the public good and, as such, ‘corporations might be made to serve other constituencies, or might seek to serve such constituencies within a broader context than that of mere shareholder profit maximization’ (Backer, 2006, p. 299).

34. In the English case of *Re Rolus Properties & Another*, the judge recognised, for instance, that ‘[t]he privilege of limited liability is a valuable incentive to encourage entrepreneurs to take on risky ventures without inevitable personal total financial disaster. It is, however, a privilege which must be accorded upon terms...’. The question is why those very ‘terms’ need be focused only upon the regulation of shareholder interests and do not also involve the creation of wider social benefits. See also Parker (2002, p. 3-4) who refers to a ‘concession theory’ of the corporation that sees ‘the legal qualities of limited liability and/or separate legal personality as a privilege granted from the state and therefore inherently justifying state intervention’. This rationale would essentially be rooted in the notion of reciprocity.

35. I shall deal with the objection that such wider social obligations cannot co-exist with the traditional free market benefits of the company when I engage with objections to the example I provide in part II (iv) below.

36. Shue (1996, p. 19) states that ‘[b]asic rights, then are everyone’s minimum reasonable demands upon the rest of humanity. They are the rational basis for justified demands the denial of which no self-respecting person can reasonably be expected to accept.’

37. Indeed, Weissbrodt and Kruger (2003) say that ‘[i]t is doubtful, however, that even Friedman would argue that corporations could pursue profit by committing genocide or using slave labour’.

38. Part of the critique of libertarianism would involve asserting that it fails to capture why it is only ‘freedom rights’ that matter and not rights to the resources necessary to enjoy this freedom: Rawls (1999, p. 179), for instance, distinguishes between ‘liberty’ (the system of liberties available within a state to individuals) and the ‘worth of liberty’ (the capacity of individuals to advance their ends within this system of liberties).

39. Murphy and Nagel (2002, p. 6) state that ‘[i]t is

now widely believed that the function of government extends far beyond the provision of internal and external security through the prevention of interpersonal violence, the protection of private property, and defence against foreign attack’. I cannot in this piece provide a detailed critique of libertarianism but the above authors locate the fundamental mistake of libertarianism in the idea that individuals’ (and by extension corporations’) ‘pretax income and wealth are theirs in any morally meaningful sense. We have to think of property as what is created by the tax system, rather than what is disturbed or encroached on by the tax system. Property rights are the rights people have in the resources they are entitled to control after taxes, not before’.

40. Backer (2006, p. 299) states the school of thought originating with Dodd, ‘sees the corporation as embedded in the social and political fabric of society, in which corporations are expected or permitted to participate’.

41. This view thus seeks to rebut the claim made by Ratner (2001, supra note 68 at 518) that ‘to extend their duty away from a dictum of “doing no harm” – either on their own or through complicity with the government – towards one of proactive steps to promote human rights outside their sphere of influence seems inconsistent with the reality of the corporate enterprise’. Sadly, Ratner does not develop this point any further.

42. Bilchitz (2007, p. 92) also states that ‘[e]ffectiveness would require that duties be allocated within a society to those particular individuals and institutions most suitably placed to fulfil these duties’.

43. Tomuschat (2003, p. 91) states that ‘[i]t is true that, particularly in developing countries, transnational corporations bear a heavy moral responsibility because of their economic power which may occasionally exceed that of the host state’.

44. See Ruggie Sphere of Influence Report (UNITED NATIONS, 2008b). His researchers have also published a brief but interesting piece in which they attempt to separate out various elements that are conflated within the ambit of this concept: see Lehr and Jenkins (2007).

45. Indeed, it is widely accepted in international human rights law that the state has positive obligations even though the exact scope thereof, particularly under the ICESCR, is still being developed. Ruggie also outlines the responsibility to respect though he proposes to provide more detail on the nature of this responsibility in the forthcoming work of his mandate. A similar position could have been taken in relation to positive obligations.

46. See Ssenyonjo (2007, p. 111) who states that ‘by virtue of the increasing powers of NSAs (non-state actors), they are uniquely positioned to affect, positively and/or negatively, the level of enjoyment of ESC (economic, social and cultural) rights’) (my explanation of abbreviations inserted).

47. These statistics are drawn from the 2009 United Nations report on the HIV/AIDS epidemic (UNITED NATIONS, 2009a).

48. For a short description of anti-retroviral drugs, see Slep (2004, p. 154-155). See also <<http://www.unaids.org/en/PolicyAndPractice/HIV/Treatment/default.asp>>. Last accessed on: 31 Mar. 2010.
49. The agreement in terms of which intellectual property rights are protected by the World Trade Organization is the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round vol.31, 33 I.L.M. 81 (1994) (hereinafter, TRIPS). See also, Ferreira (2002, p. 1138-1148).
50. The UN Declaration of Commitment on HIV/AIDS was passed unanimously by the General Assembly in 2001 and is available at: <<http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html>>. Last accessed on: 31 Mar. 2010. Its Preamble recognises that 'there is a need to reduce the cost of these drugs and technologies in close collaboration with the private sector and pharmaceutical companies'. Article 55 that deals with treatment is vague but again recognises the importance of affordability and pricing of anti-retrovirals and the role of the private sector in this regard. Whilst it stops short of imposing an obligation upon corporations to reduce drug prices, it is clear that they are key players in rendering drugs more accessible to people in the developing world.
51. For a discussion of whether a moral responsibility rests upon corporations in this regard, see Resnik (2001, p. 11-32) and Brock (2001, p. 33-37). This is relevant to Ruggie's framework as he does not claim that the responsibility to respect is a legal duty but one sourced in social expectations or morality.
52. There are good reasons to provide access to anti-retroviral treatment for individuals who contract HIV/AIDS even if we accept that they have some degree of responsibility for their contraction of the virus: see the useful analysis in Metz (2008).
53. There may be harms caused to certain animals if drugs are tested upon them which generally happens in the development process but I leave aside here the debate concerning the permissibility of violating the rights of animals in these instances.
54. This important question has recently been addressed in the report of Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Health (UNITED NATIONS, 2009b). The Special Rapporteur, Paul Hunt, recognises a number of extensive positive obligations upon corporations including conducting research and development of drugs for diseases of the developing world, ensuring prices are affordable (and putting in place differential pricing regimes), packaging material differently for different climates, and making information concerning drugs easily accessible to all.
55. Of course, it could be argued that harm is not only caused by actions but also by omissions: allowing an individual to die where one can save them could, in some sense, be said to 'cause' them harm. Ruggie could potentially increase the ambit of the responsibility to respect by including omissions in this way. However, although we may recognize moral culpability in such instances, most countries do not impose legal liability upon someone for harming another where one was not under a special duty to care for them and one omitted to provide them with what they needed: see Feinberg (1984, p.126-186). Moreover, the widening of the responsibility to respect to include omissions to fulfill rights would simply reproduce all the questions relating to the ambit of duties to fulfill under the responsibility to respect. It would also essentially blur the difference in human rights law between obligations to respect, protect and fulfill. As I have argued above, the thrust of Ruggie's work suggests that he does not envisage such a broadening of the responsibility to respect nor does he see this as desirable. However, if this is not done, then the responsibility to respect framework cannot include an obligation upon corporations to ensure that life-saving medicine is affordable and accessible to poorer individuals. For, in such instances, it is not that companies must refrain from actively causing harm to individuals who are ill but rather that they must actively do what is within their power positively to promote their right to life and to health.
56. These financial rewards would usually flow from the patents that are placed on new drugs, allowing the corporation a monopoly for a set period over production of the drug and which allows them to charge higher prices for these drugs: see Ferreira (2002, p.1138). The problem, however, is that the financial incentives produced by the operation of the market may be of the wrong kind or inadequate to cover the full range of human illnesses. Thus, companies may invest large amounts in dealing with ailments of the rich in which they believe they can maximise profit rather than innovating in an area which may have maximum social benefits: see Resnik (2001, p. 16).
57. The United Nations Committee on Economic, Social and Cultural Rights has used similar reasoning to address the question of the relation between intellectual property rights and fundamental rights: '[u]ltimately, intellectual property is a social product and has a social function. The end which intellectual property protection should serve is the objective of human well-being, to which international human rights instruments give legal expression': (UNITED NATIONS, 2001).
58. This would apply particularly in the case of a strong system of intellectual property rights though, even if such rights did not exist, it might still be necessary to impose some positive obligation upon a drug inventor to disclose the composition of a drug in order for it to be produced by others.
59. This point was essentially accepted in a declaration issued by the WTO's Ministerial Council in Doha in 2001 where it was asserted that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 'can and should be interpreted and implemented in a manner supportive of WTO Member's right to public health and, in particular, to promote access to medicines for all':

see Declaration on the TRIPS Agreement and Public Health (WTO, 2001).

60. Ferreira (2002, p. 1177) argues that there is a 'soft' law obligation upon corporations not to 'obstruct the efforts of developing countries to promote and fulfil human rights to health, life, medical treatment, development and an equitable distribution of the benefits of scientific progress'. Since this involves drug companies not interfering with the policies of their host countries and not challenging measures that limit their patents in order to render the medicine more accessible, effectively, this will entail an obligation upon corporations at least to allow prices in drugs to reduce to a level where they are affordable. She does explicitly say at p.1176 that 'the drug companies may also violate their obligation to respect and cooperate with state policies to promote the right to medical treatment when they charge prices so high that only one-tenth of one percent of worldwide HIV/AIDS sufferers can buy their drugs'. Resnik (2001, p. 20) also provides arguments for his conclusion that in general, 'pharmaceutical companies have moral responsibilities to develop drugs that benefit society and to make such drugs available to participant populations at a reasonable price'.

61. Of course, this is not the only example that can be given: private hospitals in developing countries may have positive obligations to assist in the provision of medical care where they have available beds; private law firms may have a duty to assist in the realisation of the right to have adequate legal representation and so on.

62. For a more in-depth discussion of this case and its ramifications, see Ferreira (2002, p. 1148-1158). The measures the legislation would have allowed the government of South Africa to adopt included compulsory licensing (the government granting a license to third parties to manufacture generic versions of medicines under patent without the patent holder's authorisation) and parallel importing (where the government imports patented drugs from other countries where those same patented drugs are cheaper).

63. Sleaf (2004, p. 166) states that '[j]ust as significant as the legal implication of the South African victory is the fact that it showed that public opinion was not prepared to accept that these lifesaving drugs be priced out of the reach of those who need them most in order to ensure that pharmaceuticals maintain their profit margins'. The effect of the government action would have been to force the company to reduce prices.

64. That this resulted from public pressure can be gathered from comments such as those of J.P. Garnier, Chief Executive of GlaxoSmithKlein (one of the litigants) who when asked about this case, said 'We don't exist in a vacuum. We're a very major corporation. We're not insensitive to public opinion. This is a factor in our decision-making': quoted in Swarns (2001).

65. Critics of the industry claim that the industry inflates its research and development costs and that this often takes place through publicly-funded institutions: see Cohen and Illingworth (2003, p. 46).

66. See Murphy and Nagel (2002, p. 135-139) for a brief discussion of the economic literature on the setting of optimal tax rates and their relation to social justice.

67. Cohen and Illingworth (2003, p. 46) state that '[m]any of the drugs the industry spends money on have little to do with saving lives and much to do with improving quality of life'.

68. Indeed, it appears that just such incentives currently exist for corporations to focus their energies on drugs for the developed world: see De Feyter (2005, p. 178).

69. Resnik (2001, p. 26) distinguishes between 'morally reasonable profits' (the profit a company should be allowed to realize) and 'economically reasonable profits' (the profit a company can realize).

70. Indeed, in Ruggie's defence, it could be said that even courts that are often seen to be the most important fora of principle often act pragmatically at times: see, for instance, the recent analysis of the record of the South African Constitutional Court in Roux (2009).

71. Donnelly (1989, p. 205-228) in his analysis of the development of international human rights regimes, recognises the role of politics and power in this process. Kennedy (2006, p. 132) argues, in the context of international humanitarian law, for humanitarians to be 'pragmatic': '[d]espite a century's work of pragmatic renewal, humanitarianism still wants to be outside of power, even if the price is ineffectiveness'. Some argue that a recognition of pragmatic factors relating to our global world places in question the usefulness of international law as a means of securing the realisation of fundamental rights: see Evans (2001, p. 55).

72. As George (1999, p. 29) states '[t]he system's chief beneficiaries cannot be expected or, under present circumstances, forced to act against their immediate interests, against the very principles of profit and self-advantage upon which the free market and their own success are founded. To imagine that these beneficiaries might, in large or even significant numbers, recognise in time the need for external regulation is to deny all the known laws of human behaviour. This contradiction must be underscored and faced'.

73. This is not only a problem raised in the context of corporations but also surfaces in relation to states taking on further human rights responsibilities themselves. As Evans (2001, p. 53) points out, treaties are often drafted in accordance 'with the principle of the "lowest common denominator"', which attracts the widest possible number of ratifications but avoids arduous obligations that might restrict future action'.

74. Persistence in this regard has in fact led recently to the adoption of a ground-breaking declaration by the UN General Assembly condemning human rights violations based on sexual orientation and gender identity: see International Lesbian and Gay Association (2008).

75. Indeed, Ruggie might point to the fact that even his minimal proposals have garnered some opposition from the business community.

## RESUMO

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John Ruggie, Representante Especial do Secretário Geral das Nações Unidas para Empresas e Direitos Humanos, divulgou um marco no qual defende que a principal responsabilidade das empresas é respeitar os direitos humanos. Na primeira parte, este artigo procurará analisar a afirmação à luz do direito internacional dos direitos humanos: argumentar-se-á que, embora o conceito de responsabilidade de respeitar elaborado por Ruggie inclua também a de proteger, sua natureza é preponderantemente “negativa”. A segunda parte do artigo demonstrará que o conceito da natureza das obrigações das empresas elaborado por Ruggie está enganado: as empresas não deveriam apenas evitar violações dos direitos fundamentais, mas também ser obrigadas a contribuir ativamente para sua concretização. Um argumento normativo será utilizado para fundamentar esta afirmação. Esta interpretação da natureza das obrigações das empresas tem importância especial para os países em desenvolvimento e será exemplificada pela análise dos deveres das indústrias farmacêuticas de disponibilizar drogas que salvam vidas a preços acessíveis àqueles que delas necessitam.

## PALAVRAS-CHAVE

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Marco Ruggie – Empresas – Direitos humanos – Obrigações positivas – Obrigação de respeitar, proteger e realizar – Países em desenvolvimento

## RESUMEN

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John Ruggie, Representante Especial del Secretario General sobre la Cuestión de los Derechos Humanos y las Empresas Transnacionales, elaboró un marco en el que sostiene que la responsabilidad principal de las empresas es la de respetar los derechos humanos. El presente trabajo procura, en primer lugar, analizar esta afirmación a la luz del derecho internacional de derechos humanos. Argumenta que mientras que la concepción de Ruggie de la responsabilidad de respetar incluye efectivamente una responsabilidad de proteger, la naturaleza de la responsabilidad sigue siendo en gran medida ‘negativa’. En la segunda parte de este trabajo se sostiene que la concepción de Ruggie acerca de la naturaleza de las obligaciones de las empresas es errónea: se debe exigir a las empresas no sólo que eviten el daño a los derechos fundamentales sino que contribuyan activamente a la realización de tales derechos. Se presentará para esta aseveración un argumento normativo. Este entendimiento de la naturaleza de las obligaciones de las empresas es de particular importancia para los países en desarrollo y será ilustrado considerando las obligaciones de las empresas farmacéuticas de producir medicamentos que salven vidas a precios accesibles para quienes los necesitan.

## PALABRAS CLAVE

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Marco Ruggie – Empresas – Derechos humanos – Obligaciones positivas – Obligaciones de respetar, proteger y cumplir – Países en desarrollo

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