

Business and Human Rights:

Upholding the Market's Social Darwinism

*An assessment of Mr. John Ruggie's Report:
"Protect, Respect and Remedy:
a Framework for Business and Human Rights"*

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I. Introduction

In July 2005, Mr. John Ruggie was named Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises (SRSG-BHR), with an initial mandate of two years. Mr. Ruggie received a second mandate to carry out his duties until 2011. Until now, the SRSG-BHR has delivered an interim report in February 2006, the final report of his initial two-year mandate in February 2007 – including a series of addenda focusing on various subjects and other minor surveys– and the present report¹ that this paper assesses, with a series of addenda that include consultations with various stakeholders.

Last January I published a study in which I included a detailed evaluation of Mr. Ruggie's work, as part of a comprehensive assessment of the debate on the responsibilities of business regarding human rights. This work continues the same approach by assessing the vision and arguments that Mr. Ruggie advances in his new paper in pursuit of a framework that civil societies across the world can implement and observe in their respective communities to regulate the impact of business on their human rights.

In his previous reports Mr. Ruggie makes an effort to clarify key concepts necessary to develop a framework to govern the impact of business on human rights. Yet his work was essentially misguided for the context of his entire rationale is anchored on the market as the overriding principle under which societies supposedly should function. His insistence on soft-law and voluntary market mechanisms, which is likely due to his inability to break with the market context – instead of parting from true democracy as the only ethos where we can aspire to a fair social contract– was overly naive. His insistence in the market context –predatory by nature– is in direct conflict with the basic purpose of true democracy, which is –on the basis of an implicit social contract– to procure the welfare of every rank of society and especially of the dispossessed.²

To be sure, although Mr. Ruggie himself acknowledged the unsustainability of the current system, it was notoriously evident in his previous reports the absolute absence of

reference to the democratic context. In this way, considering that the mandate of Mr. Ruggie was extended until 2011, the vast majority of civil society would hope that –regardless of realpolitik– he would gradually see his duty to advocate for a legally-binding framework as the only form to reconcile the business interest with true democracy and human rights.

Unfortunately, as I will elaborate, Ruggie's vision in the current report continues to be in open conflict with the basic concept of democracy and of true long-term sustainability, for he continues to uphold the market as the principle that reigns supreme over the lives of societies across the world; never mind the customary and systemic violation of a wide range of human rights that the market exerts over billions of people every second of our time.

My specific commentary on each section of his report is conveyed in *italics*.

¹HUMAN RIGHTS COUNCIL Eight Session. PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT. Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie A/HRC/8/5. 7 April 2008.

² Álvaro de Regil. Business and Human Rights. Towards a New Paradigm of True Democracy and the Sustainability of People and Planet or Rhetoric Rights in a Sea of Deception and Posturing. The good old formula of changing so that everything remains the same...The Jus Semper Global Alliance, TLWNSI Issue Study, January 2008.

II. General Vision of the SRSG-BHR on a principles-based conceptual and policy framework to govern the impact of business on human rights

❖ Governance gaps – the root cause

Mr. Ruggie upholds from inception that markets can be very efficient allocators of scarce resources and make important contributions to the realisation of many human rights. Yet, he acknowledges that they can only work optimally if they are embedded within rules, customs and institutions. Indeed, he acknowledges that, without rules, markets constitute the greatest risks to society in producing the public goods that it expects, when their power exceeds the institutional underpinnings that allow them to function in a politically-sustainable manner. He qualifies the present time as one where the escalating charges of corporate abuse signal that all is not well with the markets (paragraph 2). He deems the governance gaps –created by market globalisation– between the markets' footprint on human rights and society's capacity to manage it, as the root cause of the increasing abuse of human rights, and regards bridging these gaps as our fundamental challenge (paragraph 3).

In his assessment, Mr. Ruggie considers that there is a clear lack of authoritative leadership in the current debate concerning business and human rights, and he perceives both States and companies as laggards that continue to fly "under the radar" (paragraph 5). As he has expressed in previous reports, he asserts that there is no silver bullet solution that will resolve adequately the gaps between the impact and governance of the business activity on human rights. However, in fulfilling his mandate, he envisions his aim as defining the right foundation of the framework addressing the specific responsibilities of business regarding all human rights by establishing its fundamental principles (paragraphs 6 and 7).

These core principles were partially explored in his previous report. Now he clearly defines them as 1) the States duty to protect against human rights violations by any business entity; 2) the business responsibility to respect all human rights; and 3) the need for effective access to remedies (paragraph 9).

Mr. Ruggie's general vision deserves the following commentaries:

☑ **Commentary: the root cause –the market supplanting democracy**

Contrary to Mr. Ruggie's argument, the governance gaps are not the root cause of the abuse of human rights but only the symptom as a consequence of the overwhelming dominance of the market over all aspects of human life including prominently the role of governments. Since the 1970s the role of governments has been systematically reduced in sync with neoliberal laissez-faire thinking. Accordingly, the great majority of business sectors have been vastly deregulated along with many public services that were customarily fulfilled by governments. The real cause, the market supplanting democracy, namely the mantra that claims that markets know best and, thus, –through their invisible hand– will make the most efficient allocation of resources, remains unquestioned in his argumentation. Evidently, Mr. Ruggie does not see in the major economic powers' decision, taken four decades ago, to deregulate the world's capitalist system a complete break with the social obligations that are inherent in the mandate of so-called democratic governments. How can governments fulfil their democratic mandate if they allow market mechanisms to determine how resources would be allocated? This is an absolute contradiction. Markets will never consider allocating resources from the perspective of democratic principles, such as opportunity, equality, solidarity and the dignified welfare of all ranks of society. Markets simply operate from the perspective of the most efficient practices for the reproduction and accumulation of capital, in pursuit of ever greater shareholder values. This is their nature. Markets will give no consideration whatsoever, unless they are harnessed by regulations, to achieving a sustainable ethos for people and planet; an ethos that would closely delimit and regulate the market's' realm of activity and practices.

☑ **Commentary: harnessing the market – the explicit challenge**

Mr. Ruggie's proposed principles would be adequate only if he would first agree that 1) markets must be made subservient to people and planet and must serve only as vehicles to produce material welfare for society; as well as 2) that the purpose of today's societies must be the sustainable welfare of people and planet and not of markets.

Parting from the assumption that we all aspire to build sustainable societies for future generations, the private interest embedded in the market cannot be above the public interest. In a truly democratic ethos, the responsibility of governments is to make markets

subservient to the welfare of society. Business cannot profit over people and the planet whatsoever.

Consequently, real democracy must be the central pivotal element –underpinning the three principles advanced by Ruggie– necessary to ensure that the long-term sustainable welfare of people is the sole raison d'être of the State. Accordingly, the market must be subject to the accountability necessary to ensure it only serves as an instrument available to fulfil the States' responsibility of procuring the welfare of people and planet. The private interest must be allowed to be pursued only insofar as it does not infringe on the human rights of any person. This must be the principle overriding all other considerations. Greed must be replaced by frugality where markets become vehicles generating material wealth in a sustainable manner for all ranks of society. This would constitute a new human rights paradigm, what I call the "true democracy for the sustainability of people and planet" paradigm (TDSPP paradigm).

Nonetheless, the SRSG-BHR upholds the market as the best allocator of resources, for he makes no mention of the State's duty to explicitly act as "the" regulator nor does he mention that we must move from a market-centred ethos into a truly democratic people and planet-centred ethos. In this way, it is reasonable to conclude that his entire vision is sturdily anchored on the market remaining as the fundamental paradigm overriding all other principles and considerations and ruling ubiquitously over the lives of societies. Such fixation on the market in Mr. Ruggie's rationale effectively supplants democracy and establishes a major and direct conflict between the State's duty to protect human rights and the business responsibility to respect them.

As he clearly acknowledges in his report (paragraph 2), markets undersupply the public goods expected by society. Indeed, the market supplies the public goods only as "unintended consequences" of its mechanisms and not as an end. Society expects the public goods (infrastructure, public security, full employment, health, education, fair labour endowments...), to be secured and delivered by the State, either directly or through various instruments including a socially and environmentally-sustainable market mechanism. Therefore, the first step towards an effective solution is to demand from States to harness the purpose of markets in such a way that, in pursuing their private interest, they must fulfil a social responsibility to not only not

infringe on human rights but to also contribute to the States delivering the public goods.

Making markets subservient to society is of fundamental importance and a sine qua non condition for the principles of "protect, respect and remedy" to work effectively. Thus as long as Ruggie's vision does not make this enunciation and parts from a real democracy context, he will maintain an inherent conflict in his entire dissertation that will not deliver a sound foundation for the framework governing the impact of business on human rights.

✓ Commentary: The reign of the market over the State

Although Mr. Ruggie does not address the fact that the market has de facto supplanted democracy, he clearly identifies hurdles generated by the market's dynamics that challenge his proposal to frame the business and human rights agenda. These hurdles clearly expose the power that markets have imposed on States and on their capacity to regulate how markets should function in order for States to fulfil their so-called democratic mandate.

Mr. Ruggie correctly identifies a number of structural hurdles created by so-called neoliberal globalisation that pose a real challenge for States to close the gap between the business activity and the regulatory framework required to effectively protect human rights. Among these hurdles he points at the fact that whilst the rights of multinationals have been significantly expanded over the last generation there have been no checks and balances to prevent imbalances between the prerogatives of States and the rights of companies. Such imbalances may be permissive of corporate human rights malfeasance.

Indeed, Ruggie cites the fact that companies can take States hostage and force them to binding international arbitration, including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards. There is an ever growing number of cases where companies forced States to compensate them for trying to carry out their duty to protect society. Ruggie mentions the case of a European mining company challenging South Africa's black economic empowerment laws. The case of Metalclad, a U.S. waste management company that –as a result of NAFTA– successfully forced Mexico's federal government to compensate it –because a municipality denied Metalclad the license to open a toxic waste management site– is another conspicuous example of this market hurdle.³ Mr.

³ Arturo Rafael Pérez García, Una nueva forma de valorar el Tratado de Libre Comercio de América del Norte, a partir de las controversias suscitadas de acuerdo con el capítulo once, Facultad de Derecho, Universidad La Salle, 27 de noviembre de 2002.

Ruggie also cites the fact that companies and their subsidiaries continued to be construed as legally separate entities in most cases, as well as the fact that the extra-territorial regulation by a given State of the activity of companies based in such State continues to be poorly addressed (paragraphs 12 - 14).

✓ Commentary: The State as the market's agent

These situations clearly illustrate the extent to which the market has been gradually imposed over a State's sovereign powers, effectively supplanting democracy and making governments subservient to the market. In practice governments have become agents "commissioned" with advancing the market's interest in direct conflict with their most primeval democratic responsibility.

The SRSG-BHR asserts that, as long as his so-called "root of the problem" of the violation of human rights by business entities are the governance gaps regulating business activity, the aim must be to reduce such gaps where the framework of "protect, respect, and remedy" can assist all social actors to reduce the adverse human rights consequences of these misalignments (paragraph 17).

Nevertheless, Ruggie's own arguments exhibit the pervasive prevalence of the market over the State. Ruggie makes clear that international law provides that States have a duty to protect against human rights abuses by non-State actors affecting persons within their territory. He explains that, parting from the UN human rights conventions, the treaty monitoring bodies generally recommend that States take all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access to redress (paragraph 18). Yet Ruggie asserts that, although further refinements of the legal understanding of the State's duty to protect are highly desirable, it is clear that States need to provide far more attention to the policy dimensions of their duty to protect (paragraph 21).

It is clear that even with the current deficient international legal framework governing the protection of human rights, there is no excuse for governments to not increase dramatically the protection of human rights from their customary violation by market actors. Yet, Mr. Ruggie fails to mention the obvious: all the prerogatives that international and domestic law provide governments to protect human rights and prosecute and punish corporate violators, require the political will to materialise them. The root of the problem is not the "misalignments" between business activity and the available regulatory frameworks, but the lack of political will from governments and business to respect human rights. Ruggie clearly conveys in his

report that both governments and business are human rights laggards who continue –premeditatedly– to fly under the radar. Why this does occur is rather evident. The global market players have gradually corrupted the halls of governments to the point where they have supplanted democracy with the rule of the owners of the market: the institutional investors and their corporations. They are the ones who enthusiastically contribute to the campaigns of their favourite political partners and, thus, dictate the governments' agendas. In this way, governments have increasingly become market agents and have abandoned, to a great extent, their most basic responsibilities in both so-called developed and developing countries worldwide.

✓ Commentary: Acknowledging the inherent dichotomy between true democratic practice and market deregulation

The SRSG-BHR may be in a difficult diplomatic position to acknowledge this publicly, but it is a moot point to advance solutions to the business and human rights conflict without openly asserting that there is no realistic possibility to propose effective solutions without addressing the true root of the problem: the mock democracy that the world is living in.

In all certainty, mock democracy will remain in place unless we denounce it and demand a shift of paradigm –from a market-centred ethos into the TDSPP ethos. Such paradigmatic change requires the abandonment of the laissez-faire approach imposed by business since the 1970s; an approach that only works for the benefit of shareholderism and admits no responsibility for its rather negative footprint on human rights. The new TDSPP paradigm would entail a comprehensive hard law regulatory framework provided with real teeth to take punitive actions commensurate with the damage inflicted on human rights by corporate malfeasance. The market must be harnessed to serve the public interest by pursuing its own interest while concurrently respecting human rights.

Parting from his own research during his first mandate, Ruggie expresses doubts about whether governments have got the balance right to close the so-called governance gaps (paragraph 22). He perceives that the business and human rights agenda is often segregated or heavily discounted from other policy domains that shape business practices, including commercial policy, investment policy, securities regulation and corporate governance.

Indeed, there is no better example than the capitalist implosion provoked by corporate greed and the sheer speculative culture of today's market-centred ethos. The implosion of the world's financial system at its very core,

which is occurring as I write, with dire implications for the human rights and sustainability of millions of people the world over, is the direct result of the supplanting of democracy by the interests of the global financial conglomerates who now want to be bailed out at the expense of U.S. Taxpayers⁴ –and of the rest of the world– from their casino-like investment schemes. With the enthusiastic cooperation of the U.S. executive and legislative branches, they want once again to socialise their losses whilst still protecting their golden parachutes. At the core of the U.S. financial crisis lies the deregulation of the financial sector –and of the entire economy. The Glass-Steagall Act of 1933 included banking reforms designed to control financial markets speculation.⁵ Yet, some of its provisions were replaced in 1980 by the neoliberal Depository Institutions Deregulation and Monetary Control Act. At the end of 1999, the Glass-Steagall Act was completely dismantled to allow what was previously expressly prohibited based on the experience gained during the 1929 debacle; namely prohibiting that a bank holding company could own other financial companies.⁶

We are only beginning to see the tsunami's outer rim for the "collateral damage" that the 2008 financial markets' implosion will engender the world over. The role played by virtually all governments in the capitalist system confirms the myth of representative "democracy" and unmask as never before the profound and historical connivance between capital and governments in capitalism. The motion to rescue the market at public treasuries' expense is passed through parliaments and congresses, which, for the nth time, confirm the role of governments as agents in partnership with the market. Governments rush to rescue their markets at citizens expense without even addressing the true systemic causes and how to eliminate them for good. To question capitalism in representative "democracy" is an oxymoron. To even consider the idea of the sustainability of people and planet paradigm, where the market is relegated to serve only as a closely-regulated vehicle to contribute to the general welfare is anathema, for governments and investors are partners of the same enterprise. In direct opposition to their most basic mandate, governments procure their own and their partners' welfare through the pauperisation of the greater part of society. The history of modern capitalism, from the times of Victorian chariots, the gilded age of the robber

barons and the crash of 1929, to today's rancid fundamentalism of the good invisible hand guided by the good offices of corporate captains repeats itself one more time. This reality exhibits once again that capitalism is absolutely incompatible with the true meaning of democracy and the sustainability of people and planet.

In this way, the true root of the problem clearly lies at the corruption of governments who have been systematically deregulating business practice since the 1970s. Consequently, there is no possibility of harnessing the market to provide real protection, respect and remedy against human rights violations, that is commensurate with its repercussions over millions of people, without first addressing the systemic conflict between a truly democratic ethos and the current reality overwhelmed by market forces. Accordingly, if Mr. Ruggie wants to make any meaningful contribution, the first thing he must do is to acknowledge such dichotomy and to propose reinstating the State's prerogatives by harnessing the market to truly serve the common good. Nonetheless, before we can even aspire to harness the market we need to make our governments truly democratic and not the mockeries that they currently constitute. We must reverse the governments' systemic betrayal of the democratic mandate. This is the real challenge.

⁴ Peter G. Gosselin, Richard Simon and Maura Reynolds. Bush issues direct appeal for support on bailout of financial system. Los Angeles Times Staff Writers September 25, 2008

⁵ Álvaro J. De Regil. The Neo-Capitalist Assault. The Birth of a New Paradigm. Essay Three of Part I: The Economics of Reference. A TLWNSI ISSUE ESSAY SERIES. The Jus Semper Global Alliance. April 2001.

⁶ Leon Bendesky, Miles de Millones, La Jornada, 22 de septiembre de 2008.

III. The State Duty to Protect

❖ Corporate culture

Mr. Ruggie's assessment of the State's duty to protect suggests that, as part of the State's duty, fostering a corporate culture that respects human rights is an urgent policy priority (paragraph 27). He then relates a number of actions that some governments are taking such as supporting sustainability reporting and denying corporate attempts to exclude the human rights issue from shareholders meetings agendas (paragraphs 29 - 32).

❖ Evident business-biased ethos

Mr. Ruggie subsequently relates the predicament faced by host States in vying for foreign direct investment that are excellent implicit illustrations of how the market has supplanted due democratic practice in the role of States (paragraphs 34 - 38). He correctly argues that many host States offer protection through bilateral investment treaties and trade agreements that have little or no regard for respecting human rights. Furthermore, these foreign investment agreements generally empower corporations to resolve disputes through binding arbitration outside of the governments' judicial jurisdiction. Many agreements also include exemptions from observing social or environmental standards; and if there is a dispute, arbitration processes are treated as commercial disputes in which human rights enjoy little or no consideration. Moreover, arbitration processes are usually handled in strict confidentiality away from the public opinion eye (paragraph 37).

In the case of home States, Ruggie uses the case of the Export Credit Agencies (ECA), which in most cases grant little attention to human rights in their export-credit policies. He suggests that there is little evidence that the ECAs, which perform a public service, require companies, under consideration for an export credit, to perform adequate due diligence on the social and environmental footprint of their planned investment (paragraphs 39 - 42).

The SRSG-BHR exposes once again the great incoherence between the State's duty to protect human rights and the way in which foreign investment policy and business practice are treated, which provided a powerful advantage to market forces over the governments' responsibility both in host and home countries. Ruggie explicitly asserts that the arena is evidently greatly imbalanced, for the protections demanded by investors' clearly offset the prerogatives of the State's duty to protect, effectively providing a clear advantage in favour of the former.

❖ Recommendations of the SRSG-BHR for the State's duty to protect

In order to improve such a negative situation, Ruggie makes several recommendations (paragraphs 43 - 46):

- ◆ Effective guidance and support at the international level to increase State policy coherence,
- ◆ The encouragement of States sharing information about challenges and best practices to increase consistency in approaches for protecting rights against corporate abuse,
- ◆ Assistance to States lacking technical and financial resources by States that can provide relevant experience and know how for protecting human rights against business activity,
- ◆ A revision of the OECD Guidelines for they are falling behind some of the available voluntary standards.

☑ **Commentary: Once again, the market reigns supreme**

It should be clearly evident that the ethos of great imbalance described by the SRSG-BHR is blatant proof of the overwhelming dominance of the market over States and their democratic responsibilities. Yet, Mr. Ruggie confines himself, as in his previous reports, to suggest a list of little more than best wishes for greater care in the "State's duty to protect" human rights within the existing "marketocracy".

The context of his arguments is always the laissez-faire, market-driven ethos. His recommendations are rather pathetic when he suggest fostering a human rights corporate culture, better co-ordination to improve coherence, increased sharing of "best practice" information to increase consistency, or upgrading the OECD Guidelines to put them at par with some voluntary initiatives.

☑ **Commentary: Demanding a universal legally-binding framework**

Lacking a comprehensive analysis, these suggestions implicitly endorse the continuation of the laissez-faire voluntary ethos. Instead, to address the root of the problem corporate culture must be shaped by legally-binding law that reflects the demands of society to make companies respect human rights and responsible for their violations. It is absolutely incongruent to expect the market to develop a corporate culture that is respectful of human rights when the market is fixated, by nature, on the unrelenting reproduction and accumulation of capital at the expense of all other stakeholders. Best practices is a business term that suggests the availability of a spectrum of business practices, some better than others, which may contribute –subject entirely to a companies good will– to "some" respect for human rights.

At no moment Ruggie recommends moving away from voluntary practice to develop a legally-binding framework with teeth to punish both companies and corporate officers who are perpetrating human rights violations. Indeed, in his interim report he regarded the "Draft of the UN Norms"⁷ as flawed for recommending that they become binding not only on States but also on corporations, and considered them a distraction from his mandate.⁸ In his view, increased human rights abuse signals that "not all is well with the markets", as if only some apples are rotten whilst not considering that the violations of human rights by business are massive, ubiquitous, systemic and customary.

His solutions are a pathetic encouragement for better behaviour but never considering the rule of law to harness companies so that they stop infringing on the rights of people. Effective coherence and consistency in human rights policy can only take place by developing a universal legally-binding framework applicable in the same way to all companies without exception. Any government that claims to be democratic is obliged to override any investment agreements and cancel them if necessary in order to fulfil their responsibility to protect human rights at the expense of any private interest. The State's interest to attract foreign investment cannot be done at the expense of customary human rights violations. Only because governments have become market agents they condone and protect the market-centred paradigm. Consequently, it should be rather evident that in order to address the real causes of the customary violations of human rights in the business arena, it is of the utmost necessity to have a universal framework, so that all countries are forced to present the same investment regulatory conditions and companies forced to accept them if they want to invest.

Mr. Ruggie is indeed correct when he argues that "the UN is not a centralised command-and-control system that can impose its will on the world" (paragraph 107). Yet the UN is perfectly capable, within the realm of its prerogatives, of recommending a legally-binding mechanism instead of a pitiful list of ambiguous suggestions.

Commentary: Aiming at the highest common denominator

Considering the current deeply corrupted ethos, the least that Ruggie can do, relative to the State's responsibility to protect, is to aim at the highest common denominator by recommending the development of a universal and legally-binding framework. Furthermore, this framework must be comprehensive and provide access to justice beyond the jurisdiction of "laggard" States.

In contrast with his vague recommendation of updating the OECD Guidelines, the new universal and legally-binding framework must have a comprehensive set of core standards to ensure they cover all instances of business abuse. Currently, the OECD Guidelines, or any voluntary standard, in addition to condoning the current Darwinian ethos, they conveniently avoid extremely important situations of human rights violations by business. The clearest example is that current human rights standards for business do not address at all the business responsibility to provide a living wage to all workers, including those in their supply chains, in line with article 23 of the Universal Declaration of Human Rights. Much less do they provide a mechanism to determine what should be a living wage in each country for each specific instance. Yet, labour exploitation is at the core of the system.

Equally important is that Ruggie recommends that this framework includes clear vehicles for civil society to take action against companies if governments are unwilling to act, and that these actions can be brought up to the International Court of Justice by civil society when "laggard" governments refuse to enforce the legal framework. It does not matter if governments, as could be expected, would reject such recommendations. It is critical to establish a moral benchmark and a precedent. It is the responsibility of civil society to force their national governments to ratify the universal legal framework and to incorporate it into appropriate national laws. By the same token, assuming that Ruggie believes in real democracy, it is his moral responsibility to lift the bar dramatically by pointing at the highest common denominator.

⁷ COMMISSION ON HUMAN RIGHTS. Sub-Commission on the Promotion and Protection of Human Rights. 55th session. Topic 4 of the programme. ECONOMIC, SOCIAL AND CULTURAL RIGHTS. Commentary on the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. E/CN.4/Sub.2/2003/38/Rev.1. 4th August 2003.

⁸ See: COMMISSION ON HUMAN RIGHTS. Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. E/CN.4/2006/97 22 February 2006 (paragraph 69); as well as: Álvaro de Regil. Business and Human Rights. Towards a New Paradigm of True Democracy and the Sustainability of People and Planet or Rhetoric Rights in a Sea of Deception and Posturing. The good old formula of changing so that everything remains the same...The Jus Semper Global Alliance, TLWNSI Issue Study, January 2008 (page 35).

IV. The corporate responsibility to respect human rights

Mr. Ruggie addresses the responsibility of business to respect human rights by rightly asserting that *there are few if any internationally recognised rights business cannot impact –or be perceived to impact– in some manner* (paragraph 52). He arguably asserts that the Draft of the UN Norms would have extended to companies essentially the entire range of duties that States have, relative to a limited list of rights linked to imprecise and expansive responsibilities. The SRSG-BHR argues that whilst companies are specialised organs of society and not public entities their responsibilities cannot simply mirror the duties of State. Ruggie in turn proposes to define the specific responsibilities of business regarding all human rights. (paragraphs 51 - 53).

Mr. Ruggie begins his argumentation for his proposal with a valuable point. He asserts that “in addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. This is because failure to meet this responsibility can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors - and occasionally to charges in actual courts. He argues that albeit governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations - as part of what is sometimes called a company's social licence to operate”. He feels that further guidance for business is needed but companies serious about human rights are finding ways to honour the spirit of international standards (paragraph 54).

Ruggie elaborates further explaining that the responsibility to respect exists at all times independently of the State's duties, and because the companies' responsibility to respect is a baseline expectation, they cannot compensate for their wrongdoing by doing good deeds elsewhere (paragraph 55).

Commentary

Consistent with his discourse throughout his report, Ruggie develops his entire elaboration on the responsibility of companies to respect human rights parting from the assumption that the current framework addressing human

rights and the market-centred context will prevail and, thus, the responsibilities of companies will largely remain a voluntary practice where no laws can harness their behaviour, unless they incur in explicit violation of labour or human rights legislation or when their practices fall in the realm of “worst crimes against humanity”.

Concerning the Draft of the UN Norms, Ruggie's failure to deliver a balanced assessment of the Norms is evident. By constraining himself to the legal angle and the current undemocratically imposed market order, at no point he acknowledges that corporations are customary and systematic perpetrators of daily violations of many human rights. The Draft of the Norms, which took four years of debate between civil society, business and governments, does not attempt to assign State responsibilities to business.⁹ It attempts straightforwardly to make corporations responsible for their own acts and to end the hypocrisy and cynicism vis-à-vis their systematic and customary violation of human rights worldwide. If companies are organs of society, then they are responsible for their own acts as everybody else. Consequently, they cannot go on a binge of stealing, swindling, exploiting or killing; even if such violations take place slowly, in a veiled way, in gradual doses, indirectly; even if these acts are not typified in the international and domestic legal frameworks. Corporations are organs of society composed of individuals, and they cannot demand, as they do, that society accepts that these individuals leave behind their moral values every time they cross the threshold of the place of work. If business entities are responsible for their own acts against humanity, then they cannot be allowed to be amoral in their business practices. What the Norms did was not assign State responsibilities to business but to compile, from relevant instruments, the norms addressing the human rights violations customarily perpetrated, directly or indirectly, by business, so they could be adopted with the intention of forcing corporations to accept responsibility for their own acts, and not for the responsibilities of governments, as Mr. Ruggie attempts to argue.¹⁰

❖ A company's due diligence for respecting human rights

Mr. Ruggie asserts that for companies to discharge their responsibility to respect human rights they must perform their due diligence, which is the process a company must follow to “become aware of, prevent and address adverse human rights impacts” (paragraph 56). He is of the opinion

⁹ Alejandro, Teitelbaum. EL TEMA DE LAS SOCIEDADES TRANSNACIONALES EN LA ONU. Agosto de 2006.

¹⁰ For a detailed assessment of the debate of the norms see: “III. The debate at the core of the UN and the European Union on the responsibilities of business with respect to HR”, in Álvaro de Regil. Business and Human Rights. Towards a New Paradigm of True Democracy and the Sustainability of People and Planet or Rhetoric Rights in a Sea of Deception and Posturing. The good old formula of changing so that everything remains the same...The Jus Semper Global Alliance, TLWNSI Issue Study, January 2008 (page 21).

that, in carrying out a due diligence, a company should consider three factors: 1) the country context of their business activities; 2) what human rights impacts their activities may have within the country context; and 3) whether their activities might contribute to abuse through the relationships in the country in question. He adds that how deep this process should go depends on circumstances (paragraph 57). Relative to what framework of reference companies should use, Ruggie recommends the Universal Declaration of Human Rights as well as the ILO "Core" Conventions for these are the references used as the benchmarks by the various stakeholders concerned with a company's human rights footprint. (paragraph 58).

Mr. Ruggie's research and consultation drew the following process to carry out a proper human rights due diligence (paragraphs 59 - 63):

- ◆ Human rights aspirational as well as specific operational policies,
- ◆ Specific human rights impact assessments of their existing and proposed operations,
- ◆ Integration of human rights policies throughout the companies structure,
- ◆ Monitoring and auditing processes to track the quality of the footprint of a company's activity on human rights.

Mr. Ruggie also suggests that as companies refine their due diligence, industry and multi-stakeholder initiatives can promote sharing of information, improvement of tools, and standardisation of metrics. He asserts that the Global Compact is well-positioned to play such a role, enjoying a wide reach into the corporate community (paragraph 64).

Commentary

Mr. Ruggie's recommendation to perform a due diligence process as a necessity for companies to discharge their human rights' responsibilities is correct only if it becomes part of a universal business and human rights legally-binding framework and not as an element of so-called best practices as he suggests. Thus, the due diligence process must be one standard process applicable to all companies universally. It should not depend on the country context or "depending on circumstances" as he suggests. Due diligence must not be carried out depending on a company's interpretation of human rights but on a specific set of standards anchored on a universal legally-binding framework. Otherwise, it remains voluntary and anchored

on market laissez-faire criteria. Consequently, his suggestion of using the Universal Declaration of Human Rights and the ILO's "core" conventions as the benchmark is misguided. These instruments must be part of a far more comprehensive and legally-binding framework –and not just a benchmark– that must cover specifically all possible impacts of business activity on human rights. A case in point, neither the ILO conventions nor its recommendations address at all the critical issue of living wages. Why should the due diligence process confine itself exclusively to look only at the eight ILO's core conventions, when systemic labour exploitation is the most ubiquitous and customary business practice of all? Such confinement to the instruments currently available endorses the status quo, which is overwhelmingly tilted to benefit the owners of the market and not the people and the planet.

Mr. Ruggie is still thinking on using a benchmark and competing by improving a company's best practices to place them above the benchmark. Respecting human rights must not be a reason to increase competitiveness by generating a better footprint. On the contrary, the goal must be to completely revamp human rights standards to incorporate every business impact and to make them a single body of international hard law. Companies must use this body to fulfil their responsibility and not as a voluntary option to improve their human rights performance.

Monitoring and tracking, through formal audits, must take place as part of the responsibilities of governments to ensure compliance with the new business and human rights body of law –or by civil society in case a government refuses to meet its obligation to enforce the law.

As to Ruggie's proposal that companies share information to refine their due diligence practices and use the so-called Global Compact as the medium for such interaction, his suggestion is plainly preposterous. The UN Global Compact is one of the most business-biased gimmicks designed for companies to look good without really behaving responsibly. As could be expected, the completely unbalanced Compact, which is ensnared in ambiguity and proposed to business for its voluntary adherence, is regarded in most sectors of organised civil society as a rhetorical instrument of public relations. Furthermore, contrary to the Compact's claims, it enjoys a very scarce participation of less than 10% of the 70.000 global companies, without even counting their almost 700.000

subsidiaries. To be sure, Ruggie's rationale clearly maintains the market as the supreme ruler of our lives.¹¹

❖ A company's sphere of influence

Mr. Ruggie then addresses as a company's sphere of influence the extent to which a company's activities impact human rights beyond the company's premises in all the countries where it operates (paragraph 67). Furthermore, he deems that sphere of influence has two very distinctive meanings: 1) impact: where the company's activities are causing human rights harm; 2) leverage: the influence a company may have over actors that are causing harm (paragraph 68).

Ruggie argues that companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because this would include cases in which they were not a causal agent, direct or indirect, of the harm in question. He considers that attributing responsibility to companies on the basis of their influence on other actors is incorrect. He also considers that the emphasis on proximity in the sphere of influence model can be misleading for he contends that proximity does not determine whether or not a human rights impact falls within the responsibility to respect, but rather the company's web of activities and relationships. Consequently, he asserts that the scope of due diligence to respect human rights does not depend on sphere of influence but rather on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities (paragraphs 69 - 72).

✔ Commentary

From the perspective of civil society—the “moral licenser of companies to operate”— companies are responsible for ensuring that their supply chains fully respect human rights and for not imposing on suppliers and governments conditions that will force them to violate human rights. This is something that companies have full control of within their sphere of influence, for supply chains and government permits are an integral part of a company's operational system. If a company has thousands of suppliers and these suppliers also work with other companies, each with a different business practice, it is still the company's responsibility to make sure that its suppliers meet universally-enacted human rights standards. This is

regardless of how much influence a company has with them or with governments of the countries in question. Companies are responsible for not doing business with human rights violators, business entities or governments. Accordingly, they must demand that their suppliers provide a clean slate. By the same token, they must ensure that the business they engage in –including the conditions demanded from suppliers or offered to potential clients if they are suppliers– fully respects human rights. Furthermore, regardless of a company's role as a buyer or supplier, a universally legally-binding framework for business and human rights would demand from all business entities to comply with its standard framework regardless of all other considerations. Consequently, under a universal framework, there is no excuse for any business for not complying with the law.

In a truly democratic ethos, the sphere of influence is delimited by the boundary reached by the impact of a company's entire activity, irrespective of having no direct control over it. This is all the more relevant under a legally-binding ethos, for companies are bound to ensure that all entities they engage, as part of their business activity, comply as well with the international legally-binding framework.

As the Business Leaders Initiative for Human Rights (BLIHR) rightly argues, the greater the company, the greater its sphere of influence.¹² Moreover, it should be recognised beforehand that each company has a distinctive sphere unlike all others. Nonetheless, companies cannot be judges of their own activity, self delimiting their own sphere of influence. Accordingly, any person influenced by a company's activity belongs to its sphere of influence. Thus, any person located in a company's sphere of influence is a stakeholder. In this way, in stark contrast with the current ethos, corporations do not choose their stakeholders as they deem convenient. Instead, all persons that regard themselves as affected –and, thus, as stakeholders– are those who determine the company's sphere of influence. Consequently, it should be governments –with the direct and democratic participation of civil society– who must determine and certify the sphere of influence of each company and maintain it up to date periodically.

Mr. Ruggie is right to say that there are instances in which the sphere of influence of companies is not clear. The

¹¹ For a more detailed assessment of the Global Compact see: “III.(c) Assessment of the Vision and Influence of the Global Compact”, in Álvaro de Regil. Business and Human Rights. Towards a New Paradigm of True Democracy and the Sustainability of People and Planet or Rhetoric Rights in a Sea of Deception and Posturing. The good old formula of changing so that everything remains the same...The Jus Semper Global Alliance, TLWNSI Issue Study, January 2008 (page 25).

¹² Business Leaders Initiative on Human Rights. Report 3: Towards a ‘Common Framework’ on Business and Human Rights: Identifying Components. London, June 2006.

government's own due diligence should clarify such instances on a case by case basis. Yet, companies must be liable for every contractual relationship in which they get involved and for performing a rigorous due diligence, including its subsequent verification to learn the extent of their business impact –their sphere of influence– accurately.

Lastly, if we enact a universal standard framework, an up-to-date verification and certification of compliance with human rights international law would provide each business actor clear assurance that all their business relationships meet the standard within their sphere of influence. This would significantly reduce risks and cost for all actors and dramatically increase respect for human rights. All the more reason to have a legally-binding universal standard framework.

❖ A company's complicity

Mr. Ruggie considers complicity in human rights violations an important issue and defines it as the indirect involvement by companies in human rights abuses –where the actual harm is committed by another party, including governments and non-State actors (paragraph 73).

Mr. Ruggie considers the interpretation of complicity a subjective one due to the relatively limited case history and the substantial variations in definitions and interpretations of complicity within and between the legal and non-legal spheres (paragraphs 77 - 80). Thus he considers that it is not possible to specify definitive tests for what constitutes complicity in any given context (paragraph 76). Nonetheless, the SRSG-BHR asserts that what is clear and compelling is the relationship between complicity and due diligence. Thus he suggests that companies can avoid complicity by employing the due diligence processes that he previously advances, which are applicable to both a company's own activities and to the relationships connected with them (paragraph 81).

✔ Commentary

Companies are responsible for all their acts and for their complicity in any human rights violations. If we create a universal business and human-rights framework, complicity would be precisely defined including the remedies and penalisation imposed on violators. A legally-binding impact assessment –as part of a rigorous due diligence– carried out by law by both companies and governments would determine impact, sphere of influence and complicity in each case if people and planet are put above the market. To be sure, it is precisely because it would be society in conjunction with governments –exercising truly democratic practice– and not the market who would determine both the extent of a company's responsibility and its actual performance that companies do all they can to maintain the market-centred *laissez-faire* ethos.

Building the new TDSPP paradigm¹³ inevitably requires conceptually redefining the purpose of business to make it congruent with an ethos of true democracy. Full respect for human rights and authentic sustainability require an equilibrium between the financial and social responsibilities of business. Although I am sure that many people will consider these postulates outlandish due to the lethargy with which they live in the capitalist logic, there are increasingly more voices advancing a new nature for business. Theodor Rathgeber points out the need for a coherent regulatory system for business ensuring a minimum of democratic, transparent and participative procedures. He aims at the idea of business practice becoming humanitarian and democratic in lieu of completely autocratic, where decision making becomes participative among all stakeholders.¹⁴ Other arguments coming from the heart of capitalism consider it necessary to redefine the purpose of business with the objective of moving the social good from the periphery to the core of business culture. To this endeavour, the Corporation 20/20 initiative advances six principles for corporate redesign:¹⁵

¹³ See: "VII. Towards a new human rights paradigm concerning the social responsibilities of business, , in Álvaro de Regil. Business and Human Rights. Towards a New Paradigm of True Democracy and the Sustainability of People and Planet or Rhetoric Rights in a Sea of Deception and Posturing. The good old formula of changing so that everything remains the same...The Jus Semper Global Alliance, TLWNSI Issue Study, January 2008 (page 65).

¹⁴ Theodor Rathgeber. UN Norms on the Responsibilities of Transnational Corporations. Dialogue Globalisation. OCCASIONAL PAPERS. N° 22. Friedrich-Ebert-Stiftung. Geneva April 2006. Geneva, page 12.

¹⁵ Corporation 20/20. Principles of Corporate Redesign. <http://www.corporation2020.org/> November 2007.

- ◆ *The purpose of the corporation is to harness private interest to serve the public interest,*
- ◆ *Corporations shall distribute their wealth equitably among those who contribute to its creation,*
- ◆ *Corporations shall accrue fair returns for shareholders, but not at the expense of the legitimate interests of other stakeholders,*
- ◆ *Corporations shall be governed in a manner that is participatory, transparent, ethical, and accountable,*
- ◆ *Corporations shall operate sustainably, meeting the needs of the present generation without compromising the ability of future generations to meet their needs,*
- ◆ *Corporations shall not infringe on the right of natural persons to govern themselves, nor infringe on other universal human rights.*

Another collection of similar ideas is advanced by the Great Transition Initiative, proposing a new program away from neoliberal globalisation and centred on people and planet.¹⁶ The same thing occurs with the assessments of French researchers Serge La Touche¹⁷ and Jean Marie Haribey.¹⁸ They openly question the current concept of development, given its unsustainability and unfairness, and argue in favour of a paradigm based on the rational and sustainable use of resources and of the efficient distribution of the wealth generated, without needing greater growth anchored on greater consumption per se. This is just a microcosm of the ample and growing social perceptions converging on the egregious unfeasibility of the current system, given its unsustainable and antidemocratic nature despite the unrelenting push by market fundamentalists to maintain the status quo.



¹⁶ Why a Great Transition? Great Transition Initiative: <http://www.gtinitiative.org/>. November 2007

¹⁷ Serge Latouche, Degrowth economics. Why less should be so much more?, Le Monde Diplomatique, November 2004

¹⁸ DO WE REALLY WANT DEVELOPMENT? Growth, the world's hard drug, Le Monde Diplomatique, August, 2004.

V. Access to Remedy

Mr. Ruggie argues that effective grievance mechanisms are fundamental in the State's duty to protect as well as in making companies respect human rights. He rightly asserts that State's regulations without accompanying mechanisms to investigate, punish, and redress abuses are futile. He deems to be equally important to provide a vehicle for people who believe they have been harmed to bring this to the attention of the company and seek remedy, without prejudice to legal channels available (paragraph 82). He then succinctly relates some of the mechanisms available and the trend towards increased oversight of the impact of business on human rights. Nonetheless, he asserts that what he regards as "a patchwork of mechanisms" remains incomplete and flawed, and, thus, must be improved in its parts and as a whole (paragraph 87).

❖ Judicial mechanisms

The SRSG-BHR regards these mechanisms as under-equipped to handle grievances and provide remedies for victims of corporate abuse. He relates some of the structural and political obstacles that mar the limited channels that complainants can access to seek remedy. Ruggie considers that the law is slowly improving in response to some of the obstacles. Yet he contends that States should strengthen judicial capacity to handle grievances, enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should also improve access to justice, including for foreign plaintiffs (paragraphs 88 - 91).

❖ Non-judicial and company-level grievance mechanisms

Mr. Ruggie deems that these mechanisms are a valuable vehicle to seek remedy against human rights grievances. Yet they must meet several principles to be credible and effective: legitimate, accessible, predictable, equitable, rights-compatible and transparent (paragraph 92). He asserts that currently the vehicles through which grievances against corporate malfeasance play out are litigation and civil society campaigns. Thus, he recommends that companies develop their own mechanisms, as long as they meet the aforementioned principles, in order to prevent the escalation of litigation and denunciation campaigns. Such mechanisms may include those directly and indirectly managed by a company or where management is shared with other companies, but ideally they should be designed and overseen jointly with representatives of the groups who may need to access them (paragraphs 93 - 95).

❖ State-based non-judicial mechanisms

This refers to the national human rights institutions (NHRIs) as well as to soft-law mechanisms, namely the National Contact Points (NCPs) of the OECD. The SRSG-BHR reports that, out of the 85 recognised NHRIs, at least 40 can handle some kind of human rights grievances against corporations. He regards the NHRIs to be particularly well-positioned to provide processes that are culturally appropriate, accessible, and expeditious. In this way, Ruggie would welcome plans on the part of the International Co-ordinating Committee of NHRIs, supported by OHCHR, to address the issue of how this work might be further strengthened. As for the NCPs, Ruggie considers that experience suggests that in practice they have not fulfilled their purpose, often due to lack of interest from governments or for being housed within the structure of business-promoting agencies, where direct conflicts of interest occur (paragraphs 96 - 99).

❖ Multi-stakeholder or industry initiatives and financiers

The SRSG-BHR considers that these kinds of initiatives –all voluntary– need to provide their own grievance mechanisms to accommodate complaints from stakeholders when a corporation relies on one or various of their standards to assess its human rights footprint. He suggests that as more initiatives emerge, collaborative models for their grievance mechanisms will likely become more important, including facilitating access for complainants by providing a single avenue for recourse to multiple organisations (paragraphs 100 and 101).

❖ Gaps in access

Mr. Ruggie acknowledges that the aforementioned grievance mechanisms constitute a patchwork at different levels of the international system, with different constituencies and processes. Yet many individuals seeking remedy lack access often due to lack of awareness about the availability of channels to file complaints. Thus, he recommends that the providers of such mechanisms expand the reach of their information flow (paragraph 102).

Mr. Ruggie reports that some actors have proposed the creation of a global ombudsman function that could receive and handle complaints. He considers that such a mechanism would need to provide ready access without becoming a first port of call; offer effective processes without undermining the development of national mechanisms; provide timely responses while likely being located far from participants; and furnish appropriate solutions while dealing with different sectors, cultures and political contexts (paragraph 103).

✓ Commentary. Mr. Ruggie acknowledges from inception that the access to remedy available is a patchwork of heterogeneous mechanisms that do not fulfil expectations. Thus, he asserts that this must be fixed. However, the solution is not encouraging governments to take –parting from his proposed three-principles framework– concrete steps to adjudicate human rights violations and develop their own laws, punishment and remedies. In a world undemocratically globalised, where companies are free to roam the world in pursuit of the most efficient method of capital reproduction and accumulation –by imposing their predatory business practices globally– the only true solution is the development of a global legally-binding framework that is applicable to all States. If investment and trading rules have been undemocratically globalised, what argument can the market's apologists pose against democratically globalising a legally-binding framework for the protection and respect for human rights and for the power to investigate, punish, and redress human rights abuses in the sphere of business?

This framework must have the power to force companies to replace their business practices to put people and planet above their very private interests. In a nutshell, companies must be allowed to pursue their own interest only insofar as such pursuit does not infringe whatsoever on the human rights of others. The massive, ubiquitous and customary violation of human rights in the sphere of business is a global systemic problem with profound consequences over the plight of billions of people in many nations, particularly in the countries of the euphemistically called “developing world”. Consequently we must demand a systemic and holistic solution that applies globally by becoming a core part of international law. Furthermore, States refusing to ratify business and human rights international law must be treated as pariah States and companies must be forced to stay away from these States.

✓ Commentary: National legislation must be anchored in a universal framework

To put his bets on States improving their own national legislation as they deem feasible is, if not plain rhetoric, completely naive. The very same rationale that Mr. Ruggie describes in his report as the customary policy criteria States use concerning trade and foreign investment (paragraphs 33 - 41) is completely immersed and ensnared in the market context and inherently in direct conflict with a truly democratic context respectful of human rights. In the paradigm that we are enduring the dices of public policy

are clearly loaded in favour of business and are oblivious to the primeval principle of respecting human rights in democratic societies. Of all the available instruments, the OECD is the only vehicle where civil society has the opportunity to raise complains. Nonetheless, it is still light years away from what is needed. Its standards do not address all the important issues, such as living wages, and they are all voluntary and subject to the whim of governments; hence, the sheer disregard with which most States handle the OECD's NCPs.

As for the NHRIs many are controlled by the State. Thus they fail to fulfil their duty and lack much credibility. There are thousands of documented cases of human rights victims of corporate malfeasance, including murder, where the NHRIs have kept completely quiet, even in OECD countries such as Mexico, with a human-rights record consistently worthy of a pariah State. Disregard for corporate abuse of human rights by governments occurs even in the so-called “mature democracies”. A conspicuous case was the U.S. State Department¹⁹ demand to a U.S. federal court to dismiss a human rights lawsuit by Indonesian villagers against Exxon Mobil, saying a trial could harm U.S. economic and political interests in Asia.²⁰ To be sure, the NHRIs are an excellent example of the futility of these so-called mechanisms, for they are subject to the Darwinian market logic that dominates public-policy thinking.

Consequently, for States to develop effective national business and human rights bodies of law, we –civil society– must first force them to create a universal regulatory framework applicable to all business activity worldwide.

✓ Commentary: the futility of company level and multi-stakeholder mechanisms

Relative to Ruggie's comments on these kind of mechanisms it is really a joke to consider them credible channels for access to remedy. It should be obvious that company-level mechanisms cannot address major human rights violations resulting from customary business practices such as the payment of misery wages, or the violation of the right to organise and collective bargaining, both directly or throughout a company's supply chain. The case of multi-stakeholder initiatives is even worse. Most, in line with the current market-driven ethos –and many partially supported by corporate funding– do not even address customary labour exploitation due to the lack of a standard requiring the payment of a living wage. Again, the problem is systemic. The living wage provision does not exist in the

¹⁹ The U.S. does not have an NHRI to oversee respect for human rights within its territory.

²⁰ U.S. Wants Suit by Indonesians Dismissed. Los Angeles Times, August 7, 2002.

ILO conventions. Accordingly, soft-law mechanisms and the vast majority of multi-stakeholder initiatives are oblivious to the right to a living wages upheld as a principle in article 23 of the UN Universal Declaration of Human Rights. If these frameworks do not even address such a critical right, how are they going to effectively provide a remedy mechanism for its customary violation? Furthermore, both soft-law as well as all other initiatives are voluntary, in full congruence with the dominant laissez-faire market-driven ethos. Thus, what leverage do they offer when the majority of companies envision them as public relations tools to increase market competitiveness and not as standards to comply with their social and environmental responsibilities?

In contrast, if we demand a universal legally-binding business and human rights framework, the entire array of “patchwork” mechanisms covered in Ruggie’s report –with the exception of domestic and international judicial mechanisms– would immediately become a moot point.

✓ Commentary: highest common denominator and direct access to justice

It may be argued that –given the current environment– it is all the more naive to insist on the need for a universal legally-binding framework. However, if we aspire to develop a truly democratic ethos that clearly places people and planet above the market, it is our responsibility to demand the highest common denominator. Regardless of the to-be-expected rejection by most governments of such a demand, we must establish a precedent and continue to denounce the current Darwinian ethos and insist on a legally-binding framework. We must also demand access to justice in the International Court of Justice to seek grievances against pariah States. That is the only congruent thing to do if we seek a truly democratic ethos. If we do not, then we are endorsing the prevalence of the completely unsustainable system by simply condoning –by omission– the status quo.

✓ Commentary: the myth of market fundamentalism

It is very clear that Mr. Ruggie is a staunch supporter of the myth of the neoliberal deregulated market-fundamentalism context and, consequently, of voluntary mechanisms. That is why he has never proposed a comprehensive and universal approach. That is why he attempts to provide credibility to the array of initiatives that he himself

denominates as “patchwork mechanisms”, which are all subject to the whim of governments and companies and do not ensure a global standard for due human rights protection, respect and remedy.

Consistent with all his previous reports he insists that the current economic paradigm has benefited many developing countries. This is completely false. The neoliberal-monetarist-speculative-supply-side economic paradigm has dramatically increased inequality throughout the capitalist world in the vast majority of both developed and “developing countries”.²¹ This includes prominently the core of the system, where inequality began increasing decades before the September 2008 U.S. financial markets’ implosion. A report from the Economic Policy Institute shows that economic growth in the U.S. has bypassed everyone but the wealthiest: wages have stagnated despite rapid growth in productivity; wages of younger workers are below those of their predecessors; there is less upward mobility than in similar economies; and the country has the greatest degree of inequality of all OECD countries included in its analysis. The study concludes that “if the findings in the hundreds of tables and figures that follow can be reduced to one observation, it would be that, when it comes to an economy that is working for working families, growth in and of itself is a necessary but not a sufficient condition. The growth has to reach the people. The benchmarks by which we judge the economy must reflect these distributional concerns, and we must construct policies and institutions to address them”.²² It is starkly evident that Mr. Ruggie will not recommend a universal legally-binding framework for he is an apologist of the market context.

²¹ For a detailed elaboration on the true socio-economic, democratic and sustainability conditions of today see: I. The Global Stage in Context: , in Álvaro de Regil. Business and Human Rights. Towards a New Paradigm of True Democracy and the Sustainability of People and Planet or Rhetoric Rights in a Sea of Deception and Posturing. The good old formula of changing so that everything remains the same...The Jus Semper Global Alliance, TLWNSI Issue Study, January 2008 (page 9).

²² Lawrence Mishel, Jared Bernstein and Sylvia Alegretto “The State of Working America 2006-2007”, Economic Policy Institute, Cornell University Press 2006.

VI. Conclusion

❖ Mr. Ruggie's conclusion

The SRSG-BHR concludes that many countries, including in the developing world, have been able to take advantage of this new economic landscape to increase prosperity and reduce poverty. However, rapid market expansion has also created “governance gaps” in numerous policy domains including in the area of business and human rights. Nonetheless, Mr. Ruggie considers that there has been progress in reducing such governance gaps as multi-stakeholder initiatives as well as government actions have increased the stakes for corporate liability in the area of human rights, whilst they promote a culture of respect for these rights. Such progress notwithstanding, he deems that the resources available are too little for the problem at hand and they do not cohere as parts of a more systemic response with cumulative effects. Thus he asserts that this is what needs fixing and that his proposed framework of “protect, respect and remedy” is intended to help achieve. Consequently, albeit the UN cannot impose its will on the world, Ruggie feels that it must lead intellectually. Accordingly, he considers that the Human Rights Council can make a singular contribution to closing the governance gaps in business and human rights by supporting this framework, inviting its further elaboration, and fostering its uptake by all relevant social actors. (paragraphs 104 and 105).

☑ Assessment's conclusion

It is absolutely futile to address the customary violation of human rights in the business ethos if Mr. Ruggie does not address the true root of the problem: true democracy has been supplanted by marketocracy and, thus, has disabled the States ability to impose a regulatory framework that effectively protects human rights from corporate malfeasance. Consequently, as long as we do not demand from our governments a universal and legally-binding framework to protect human rights from business' predatory practices –that becomes integrated as a core element of international law, with power to impose penalties commensurate with the harm inflicted– we will remain, as I asserted in my previous assessment, “in a sea of rhetoric rights, deception and posturing”. Unless we force our governments to fulfil our demands they will continue relying on the good old formula of pretending that they are making changes so that, at the end, everything remains the same.

Mr. Ruggie is clearly not qualified to come up with solutions that address the real problem for he is a staunch defendant of the status quo. Neither in this report nor in his previous

reports has he addressed the lack of true democratic practice that engulfs the world nor the domination of public policy by market-centred criteria. From the very start, the appropriate thing should have been that former Secretary General Annan would have created a balanced team of experts in all areas of concern regarding human rights in the sphere of business, and representing all stakeholders both North and South, with the democratic context overriding all other considerations. Unfortunately, it has always been clear that there is an enormous gap between the appropriate thing to do –to pursue a balanced perspective– and the “realpolitik”. Consequently, Mr. Ruggie's future work is rather predictable as he will continue to propose token solutions in a sea of deception and posturing, so that everything remains the same.

