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The 2006 Interim Report of the UN Special Representative on Human Rights and Transnational Corporations: Breakthrough or Further Polarization?

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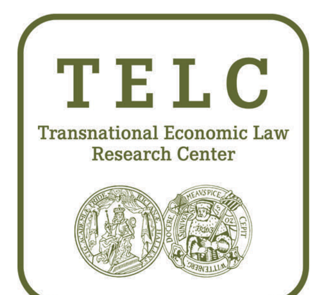

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Introduction

On 22 February 2006, the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *John G. Ruggie*, submitted his interim report to the Commission on Human Rights at its sixty-second session. Despite being only of a preliminary character, the much awaited study, made available to the public on 2 March 2006, must be regarded as being of particular importance since, as *Ruggie* himself points out, it is "intended to frame the overall context encompassing the mandate as the Special Representative of the Secretary-General sees it [and] to outline the general strategic approach taken" (Interim Report, p. 1).

This paper is intended to provide a first assessment of the possible impact of the strategic directions as laid down in *Ruggie*'s interim report on the ongoing debate taking place in the United Nations and among its stakeholders concerning the approach to be pursued with regard to the need and possibilities for making transnational corporations responsible for the promotion of international community interests. In this connection, it will be argued that, based on an overall assessment, the interim report can be qualified as a quite promising and thus laudable step in the right direction with a considerable potential to contribute to the advancement of corporate social responsibility in a realistic way. However, it has to be criticized that *Ruggie* included a very negative assessment of the possible role played by the *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. His evaluation and in particular the harsh language employed in this connection was unnecessary and is regrettable. It is likely to lead to a further polarization of the respective debate in the United Nations and thus to quite the opposite outcome of what has been envisioned by the Commission on Human Rights when requesting the appointment of a special representative on the issue of human rights and transnational corporations.

The Background: "The Debate to Date has been Highly Polarized"

The 2005 resolution by the Commission on Human Rights requesting "the Secretary General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises" (Resolution 2005/69, para. 1) was the first attempt to deal with and ultimately reach a breakthrough in an increasingly deadlocked discussion on

whether and how the United Nations should position itself concerning the nature and possible scope of international responsibilities of transnational corporations.

The Secretary-General's Global Compact – the UN "flagship" in the realm of promoting global corporate citizenship – had been more and more subject to occasionally severe criticism voiced especially by many NGOs and parts of the literature with regard to, *inter alia*, the initiative's transparency, its impact on the participating companies as well as an alleged lack of appropriate compliance mechanisms to ensure the effective implementation of the Global Compact's core principles. In addition, an even more influential cause for the increasingly polarized discussion on the issue of how to frame corporate social responsibility has rightly been identified in a development which can be traced back to approximately the same time when the Global Compact was initiated: On 3 August 1999, the former Sub-Commission on Prevention of Discrimination and Protection of Human Rights established through its Decision 1999/101, adopted on the basis of its Resolution 1998/8, a Sessional Working Group on the Working Methods and Activities of Transnational Corporations comprised of five members. Already in the course of its first session, the members of the Working Group agreed to draft, in cooperation with other UN agencies, business associations, corporations and NGOs, a "code of conduct for TNCs based on the human rights standards" (Report of the Sessional Working Group, paras. 32, 37). This decision ultimately led to the adoption of the *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* by the re-named Sub-Commission on the Promotion and Protection of Human Rights on 13 August 2003.

The Norms were welcomed by a considerable number of NGOs as a major achievement worth being adopted and implemented in practice as soon as possible. However, it is well-known that the Norms met quite stiff resistance from most corporations and business associations and received a rather reserved response by the Commission on Human Rights in its Decision 2004/116 of 20 April 2004. The Commission – after pointing out that, *inter alia*, the Norms had not been requested by the Commission and have no legal standing – requested the Office of the United Nations High Commissioner for Human Rights to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights (Decision 2004/116, lit. b and c). The respective 2005 UN High Commissioner for Human Rights's report included a listing of the arguments brought forward in favour as well as against

the Norms and concluded in this regard with the rather cautious recommendation "to maintain the draft norms among existing initiatives and standards on business and human rights, with a view to their further consideration" (UN High Commissioner Report, para. 52 lit. d).

Despite this quite discouraging response that the Norms received by the Commission on Human Rights and the business community, the future fate of this document continues to exercise a strong influence on – or in the eyes of its opponents, is continuously "haunting" – virtually every debate on the issue of corporate social responsibility. The Sub-Commission on the Promotion and Protection of Human Rights has decided in the years 2004 and 2005 to continue to be actively involved in this matter, *inter alia*, on the basis of a renewed mandate of the respective Sessional Working Group on the Working Methods and Activities of Transnational Corporations (see, e.g., Sub-Commission Resolution 2004/16 and 2005/6; as well as Sub-Commission Decision 2005/102 and 2005/112). Furthermore, civil society organizations regularly stress the continued importance of the Norms as a nearly ideal approach to further developing corporate social responsibility, thereby equally frequently being opposed by representatives of the private economic sector. To mention but one example, the deadlock in the respective discourse became obvious in the recent consultations convened by the High Commissioner for Human Rights in November 2005 in which "discussions revealed quite divergent views on the draft Norms, with many business participants objecting to them while NGO participants were supportive" (UN High Commissioner Report, para. 29).

Against this background, being a long-term and influential adviser to the Secretary-General on how to strengthen the relationship between the UN and the private business sector in general as well as being generally regarded as one of the main architects of the UN Global Compact in particular, *Ruggie* himself cherished no illusions about the underlying purpose of his appointment "as a means to move beyond the stalemate" (Interim Report, para. 55) and had been fully aware of the knotty task ahead. In his opening remarks at the Wilton Park Conference on Business and Human Rights in October 2005 he soberly summarized his assignment and respective expectations in the following way: "I don't underestimate for a moment how difficult this mandate will be. The issues are complex, we are in novel terrain, and the debate to date has been highly polarized".

Evaluating the UN Norms: From "Doctrinal Excesses" to "A Principled Form of Pragmatism"

Taking into account this current "stalemate" in the discussion and its underlying reasons, it hardly comes as a surprise that the Special Representative's discussion of the future strategic directions to be taken starts with an in-depth assessment of the Norm's potential to contribute to identifying "an approach that can move the agenda forward effectively" (Interim Report, paras. 54 et seq.). While acknowledging the existence of "useful elements" such as the listing of individual rights that are likely to be affected by or in the course of business activities, *Ruggie* reaches the quite uncompromising conclusion that "the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions". He continues to state that a number of fundamental "flaws of the Norms make that effort a distraction from rather than a basis for moving the Special Representative's mandate forward" (Interim Report, para. 69). In this connection, he points – in addition to, *inter alia*, the so far quite elusive concept of "spheres of influence" taken recourse to by the Norms – in particular at the indeed highly contentious approach adopted by the Norms of imposing virtually the whole established international legal regimes on the protection of human and labour rights as well as of the environment on transnational corporations and other business enterprises.

The Special Representative's assertions concerning the Norm's controversial legal assumptions neither come as a surprise nor are they totally devoid of merit. It has already for quite some time been argued in the legal literature that international human rights treaties may be interpreted as also being directly applicable to private actors such as transnational corporations. However, the majority of international legal scholars, by taking recourse to the drafting history of the respective conventions and the teleological method of treaty interpretation, has quite convincingly demonstrated that human rights treaties as well as, for example, the increasing number of international conventions aimed at combating bribery, do not impose direct obligations on any other entity than the states being parties to the particular convention. Despite some notable recent developments, such as attempts to enforce alleged human rights obligations towards corporations before domestic courts in the United States, one cannot but agree – at least on the basis of the still prevailing concept of international legal personality – with the predominant view among international legal scholars that transnational corporations have neither under treaty law nor in the realm of customary international law – except for a small number of very specific regulations – received a suffi-

cient degree of normative recognition by states and international organizations with regard to the imposition of obligations unter international law.

Thus, dismissing the Norms as being "engulfed by its own doctrinal excesses" (Interim Report, para. 59), *Ruggie* with regard to the non-evidence-based part of his mandate, announced and summarized his intended approach as being one of "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 life of people" (Interim Report, para. 81).

A Promising "Means to Move Beyond the Stalemate" or the Cause of Further Polarization?

Overall it is scarcely possible to disagree with the findings – albeit hardly all of them new – included in *Ruggie*'s interim report. His assessments with regard to, *inter alia*, the changing structural features of the international system, the effects of the processes of globalization on the position of the state as the previously predominant actor on the international scene, the ever more important role played by transnational corporations as economic and political actors and the resulting chances for, but especially also risks to, the promotion and protection of global community interests, as well as the resulting need for "[e]mbedding global markets in shared values and institutional practices" (Interim Report, para. 18) can in general readily be subscribed to.

In particular, the Special Representative rightly draws the attention to a number of increasingly pressing problems in the realm of corporate social responsibility. Prominent among them is the continued proliferation of codes of conduct – often addressing the same issue – developed by an ever-growing number of multi-stakeholder and civil society initiatives. Attempting to comply with all of these codes simultaneously becomes more and more burdensome – in some cases even impossible – for individual business enterprises and thus often results in an understandable but nevertheless undesirable "pick and choose" approach by corporations. Against this background it is to be hoped that future efforts of the Special Representative will also be directed at countering a development of what might be qualified as – inspired by similar developments discussed with regard to the international legal order in general – an increasing "fragmentation of corporate social responsibility" caused by a growing and thus ever more many-voiced chorus of standard setters. A certain "unification" would indeed constitute a worthy goal to be pursued especially – taking into account its self-perception as a "place for [the]

setting of global standards" (Report by the Secretary General, para. 1) – by the United Nations. In addition, *Ruggie* appropriately criticises the procedural grievance that there are currently still no common and effective human rights impact assessment tools available by which corporations as well as other stakeholders could evaluate and measure – on the basis of generally recognized indicators – the human rights implications of their activities and projects.

Finally, to mention one further example, the interim report rightly takes into account and emphasizes not only the obvious advantages but also the well-known deficits of the existing initiatives and instruments in the international system aimed at making transnational corporations responsible for the protection and promotion of global public goods: "One weakness is that most choose their own definitions and standards of human rights, influenced by but rarely based directly on internationally agreed standards. Those choices have as much to do with what is politically acceptable within and among the participating entities than with objective human rights needs. Much the same is true with regard to their accountability provisions. Moreover, these initiatives tend not to include determined laggards, who constitute the biggest problem […]" (Interim Report, para. 53; see also, recently, *Ruggie*'s Plenary Remarks at the World Mines Ministries Forum on 3 March 2006). Bearing in mind these limitations inherently connected with a purely voluntary and market-based approach to the nature and scope of transnational corporation's international responsibilities, the Special Representative is – despite his rather harsh judgment on the Norms – not at all generally opposed to the creation of legally binding obligations for business actors with regard to the protection of international human rights. Quite to the contrary, he explicitly – albeit cautiously and in the form of, *de lege ferenda*, "policy preferences about what the law should become" – acknowledges that "[t]here are legitimate arguments in support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host Governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended" (Interim Report, para. 65). *Ruggie*'s assertion, that the coming into existence of respective international legal obligations for transnational corporations requires positive action by states, finds itself in full conformity with the currently still predominant view on the prerequisites for the achievement of international legal personality. However, one is tempted to point at a certain discrepancy with his prior assessment, made in the first part of his interim report, concerning the states

under the influence of the processes of globalization being no longer "the sole international decision-makers of any significance" as well as the global public interest being no longer only constituted by "whatever accommodation States managed to reach among their respective national interests" (Interim Report, para. 9).

Despite the interim report appearing to be thus what can, based on an overall assessment, for valid reasons be qualified as a quite promising and therefore laudable step in the right direction with a considerable potential to constructively contribute to the advancement of corporate social responsibility, it nevertheless is far from certain whether *Ruggie*'s study will achieve its intended goal to move the UN debate on the nature and scope of international responsibilities of transnational corporations beyond the current stalemate. The primary reason for this rather cautious prognosis lies in the – regrettably and unnecessarily – quite insensitive finding with regard to the possible future role (or more precisely, non-role) assigned to the Norms in the general strategic approach chosen by the Special Representative.

First, the presumably intentionally employed harsh language used in qualifying the Norms as "a distraction" being guided by "doctrinal excesses" the discussion on which "obscures rather than illuminates promising areas of consensus and cooperation" is regrettable, because it – as shown above wrongly – could convey the impression that *Ruggie* has exclusively and definitely taken sides with most members of the business community in the ongoing controversial debate on the creation of international legal responsibilities for transnational corporations; a discussion in which the future fate of the Norms has evolved as a – to a large extent merely symbolic – but in the eyes of many NGOs and trade unions nevertheless very important issue. It is not too far-fetched to predict that this impression has the potential to seriously damage the reputation of *Ruggie* as an impartial Special Representative on the issue of human rights and transnational corporations among many influential non-state actors belonging to the realms of civil society and labour, thus making it increasingly difficult for him to exercise his mandate on the necessary basis of a trustworthy, balanced and constructive cooperation with all relevant stakeholders. This rather gloomy prognosis is even more likely to materialize, if one takes into account the well-known though usually unmentioned fact that already the Secretary-General's appointment of *Ruggie* as his Special Advisor itself has resulted in the raising of considerably more than one eyebrow among civil society. As already pointed out, *Ruggie* is one of the main architects of the UN Global Compact, served as the Special Advisor to the Secretary-General on this initiative and had in

this function played, *inter alia*, an important role in the development of the Global Compact's new governance structure until July 2005. From the Global Compact's point of view it stands to reason and can be regarded as quite telling that the Global Compact Office and the then Special Advisor have from the very beginning displayed a rather cautious attitude towards the adoption of the Norms. This approach is even more understandable if one takes into account that the Norms, if pursued in an earnest way by the Commission on Human Rights, could have – due to its limited compatibility with the informal and non-regulatory approach adopted by the Global Compact – the potential to undermine the very foundations of the dialogue forum and learning network initiated by the Secretary-General. This would seriously threaten the continued existence of the entire Global Compact. Against this background, not all members of the NGO community were willingly granting the newly appointed Special Representative the usual leap of faith with regard to the exercise of his mandate and some of them might now see their foreboding confirmed.

Although it is not inevitable, the probably not at all favourable reactions to the interim report – in particular to the Special Representative's assessment of the Norms – on the side of many representatives of the civil society community have unfortunately a considerable potential to further polarizing the debate in the United Nations on the possible nature and scope of international responsibilities of transnational corporations. The undiplomatic language taken recourse to by *Ruggie* in his attempt to provide a kind of "third-class funeral" for the Norms is likely to stiffen the position of several NGOs on this issue. They might now oppose the whole – and in the beginning quite promising – process started with the appointment of *Ruggie*. In sum, it is to be regretted that the Special Representative has apparently underestimated the question of prestige connected with the project of the Norms in the eyes of many civil society and labour organizations; a prestige that undoubtedly had further grown as a result of the controversial discussions on this topic and is now to be expected to prevent NGOs and trade unions from acquiescing to letting the Norms ending as – what many might regard – the "MAI of the NGOs".

Second, to make matters even worse, the Special Representative's uncompromisingly harsh judgment on the Norms might not only result in a continued deadlocking of the respective discussion, but it was also completely unnecessary for *Ruggie* to make this polarizing move. As shown above, the Special Representative is not at all generally opposed to incorporating in his mandate the evaluation of possibilities for creating also legally binding obligations for transnational corporations.

Thus, his insensitively negative assessment of the Norms is to be regarded as being in itself a distraction from the numerous laudable and constructive observations included in his interim report. Furthermore, as *Ruggie* himself emphasizes, currently "operational issues […] have been taken up by a group of 10 companies known as the Business Leaders for International Human Rights (BLIHR), which are engaged in a constructive effort to explore whether and how some of the concrete provisions of the Norms can be turned into company policies, processes and procedures" (Interim Report, para. 58). It might not have been unwise to first await the outcomes of this quite promising cooperative effort between business and civil society actors before delivering a final judgment on the project of the Norms. Finally, the approach adopted by the Special Representative was unnecessary since *Ruggie* had with the 2005 "Report of the United Nations High Commissioner on Human Rights on the Responsibility of Transnational Corporations and Related Business Enterprises with Regard to Human Rights" an instructive example at hand of how one could have dealt with the Norms in a balanced and thus "face-saving" manner. It is suggested that at this early stage of his activities, the careful and cautious wording chosen in the 2005 Report of the United Nations High Commissioner on Human Rights would have constituted a far more appropriate guidance in light of the Special Representative's self-perception of his mandate "as a means to move beyond the stalemate".

Conclusion

As being emphasized by *Kofi Annan* in his recent report to the General Assembly of 7 March 2006, the United Nations "[t]hroughout its history, […] has played a vital role as a meeting place for the discussion of global issues and setting of global standards" (Report by the Secretary General, para. 1). It is sincerely to be hoped for that this also continues to apply to the issue of the nature and scope of international responsibilities of transnational corporations and other business enterprises. However, this goal worth to be pursued will – in the future more than ever – require an open-minded, constructive and diplomatic attitude by all relevant stakeholders.

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