

**Consultation on operationalizing the framework for business and human rights presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises  
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**Opening Remarks by  
Professor John G. Ruggie, SRSG**

Excellencies, High Commissioner, Ladies and Gentlemen,

In June 2008, the United Nations Human Rights Council unanimously welcomed the “protect, respect and remedy” policy framework for better managing the human rights challenges posed by transnational corporations and other business enterprises. The Council also extended my mandate by another three years, tasking me with “operationalizing” the framework—that is, to provide “practical recommendations” and “concrete guidance” to States, businesses and others on its implementation.

In that same resolution, the Council also requested the Office of the High Commissioner to convene this consultation, bringing together “business representatives and all relevant stakeholders, including non-governmental organizations and representatives of victims of corporate abuse, in order to discuss ways and means to operationalize the framework.” The Council must be as impressed as I am by this extraordinary turnout.

I am immensely grateful to the Ambassadors of Nigeria and Norway, two main sponsors of my mandate, for chairing this very important event; to the Office of the High Commissioner for convening it—especially to Lene Wendland, who has supported my mandate creatively and wisely from the start; and of course to all the participants, some from far away: you honor us with your presence.

By now, most if not all of you are familiar with the policy framework itself. It rests on three pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.

Subsequent sessions will discuss some of the framework's main elements and how they relate to one another. But let me take this opportunity to step back a bit and provide a more strategic overview of what the mandate is trying to do, and why. I'll begin by describing some of the key business and human rights challenges we are grappling with. Then I'll explain why I have serious questions about the traditional ways of approaching these challenges. I conclude by noting the productive uses some actors have already made of the framework, in the hope that this will inspire us all to work together and conclude the next phase successfully.

### **Five Key Challenges**

1. Companies can affect the entire spectrum of internationally recognized rights, not only a limited subset. In addition to the range of workplace issues, companies also impact health-related rights; rights related to an adequate living standard, including access to housing, food and water; the physical security of the person; the rights of indigenous peoples; and even such classic civil rights as free expression, privacy, peaceful assembly, and a fair trial. Therefore, the quest to construct *ex ante* a delimited list of business-specific rights for which companies would have some responsibility is a fool's errand. Virtually all rights are relevant, though some may be more so than others in particular circumstances. This fact needs to inform the policies of states and companies alike.

2. Governments currently lack adequate policies and regulatory arrangements for fully managing the complex business and human rights agenda. Although some states are moving in the right direction, overall their practices exhibit substantial legal and policy incoherence. The most widespread is what I have called "horizontal" incoherence, where economic or business-focused departments and agencies that directly shape business practices—including trade, investment, export credit and insurance, corporate law, and securities regulation—conduct their work in isolation from and largely uninformed by their government's human rights agencies and obligations, and vice versa.

Not long ago, the government of South Africa was confronted with a startling instance of how serious this lack of policy coherence can be when investors from Italy and Luxembourg took it to binding international arbitration under a bilateral investment treaty. The investors claim that certain mining provisions of the Black Economic Empowerment Act amount to expropriation, entitling them to compensation. Why did the government sign up in the first place to an investment agreement that could threaten the country's post-*apartheid* foundational principle of social justice? An official policy review explains that,

among other reasons, “the Executive had not been fully apprised of all the possible consequences of BITs,” including for human rights.

The case demonstrates why governments cannot adequately discharge their human rights duties if they segregate business and human rights into a narrow conceptual and institutional box and ignore the issue in other business-related policy domains. Their duty to protect requires a more comprehensive understanding and coherent application.

3. With rare exceptions, even large multinational companies lack fully-fledged internal governance and management systems for conducting adequate human rights due diligence. Their approach in a sense has been highly “legalistic”: focused on the requirements of their legal license to operate, and only slowly discovering that in many situations meeting legal requirements alone may fall short of the universal expectation that they operate with respect for human rights—especially, but not only, where laws are inadequate or not enforced. Respecting rights is the very foundation of a company’s social license to operate.

4. Similarly, most companies lack grievance mechanisms to which affected individuals and communities can bring concerns, including companies with large physical footprints on their areas of operation, such as extractive and infrastructure projects. In effect, this replicates the “legalistic” approach I’ve just described: if it isn’t required by law, we don’t need to do it. Companies thereby deny those who are adversely affected by their activities an opportunity to resolve issues that may be readily remediable. At the same time, they deny themselves an early-warning system signaling when all is not well before disputes escalate into major campaigns or lawsuits.

5. The incidence of corporate-related human rights abuse is higher in countries with weak governance institutions: local laws either do not exist or are not enforced, even where the country in question may have ratified all the relevant international human rights conventions. The worst cases occur amid armed conflict over the control of territory or of the government itself. Such contexts attract marginal and illicit enterprises, which treat them as law-free zones. But legitimate and well recognized firms also may become implicated in human rights abuses, typically committed by others, for example, security forces protecting company installations and personnel. These situations impede or block entirely access to justice by victims. They may pose even greater challenges for victims when multinational corporations are involved.

The use of extraterritorial jurisdiction might be one way to close such impunity gaps, but it also raises legitimate concerns on the part of states and business. In the absence of other widely applicable tools, the U.S. Alien Tort

Statute has become a *de facto* ultimate recourse because federal courts have applied it to conduct abroad by companies that need have only a limited connection to the United States. But while it clearly has some deterrent effect, this 18<sup>th</sup> century civil statute cannot shoulder the world's burden: its applicability to companies has never been directly tested in the U.S. Supreme Court; it remains vulnerable in Congress; it is hugely expensive, subject to a host of procedural obstacles, and sometimes resented by other countries; and in relation to major corporations it has produced a grand total of two concluded jury trials to date, both in favor of the company, and two settlements. This is far from a systemic solution— which needs to include greater enforcement of existing laws, clearer standards and more innovative policy responses by both home and host states.

This list is not comprehensive. But it does highlight some of the major institutional challenges facing the business and human rights domain. I turn now to alternative approaches for dealing with them.

### **Alternative Approaches**

Two options traditionally have dominated the debate. Human rights advocates favor binding standards imposed on companies directly under international law. Business traditionally has favored voluntary initiatives coupled with the identification of best practices and the development of management tools, arguing that the market itself will drive the process of change. The cardinal shortcoming of both approaches is that neither can tell a compelling story about how to get from here to there, or what the “there” would look like.

A pure model of self-regulation beyond compliance with national laws lacks *prima facie* credibility. We live in a world of 192 nation states, 80,000 multinational corporations, millions of affiliates and suppliers, and countless other firms, large and small. There is not enough magic in any marketplace, real or imaginary, to overcome the staggering collective action problems.

Moreover, it is difficult to see how the identification of best practices could get markets to a tipping point unless it involved some authoritative mechanism for determining what constitutes “best” and was coupled with some means of dealing with those who act otherwise.

As for imposing binding substantive human rights standards on companies directly under international law, that would require a treaty. And if we take seriously the fact that corporations can affect all human rights, as I do, then the treaty would have to include such standards for companies in relation to all internationally recognized rights. Allow me to raise a few practical issues about this option— precisely the type of questions urged upon us in an important

publication co-authored by the International Commission of Jurists, entitled *Human Rights Standards: Learning from Experience*.

First, why would states, North and South, which do not accept all international human rights standards for themselves, agree to subject their companies, multinational *and* national, to such standards under international law?

Second, leaving that issue aside, would the standards in such a treaty likely be higher or lower than the highest standards companies have in place today? I believe the question answers itself. How, then, would we prevent a downward drift in leading corporate practices toward the new lower legal standards? And how would we ensure that all others would ever rise above them?

Third, how would such a treaty be enforced? Would it include a new international court for companies as legal persons? No one seriously expects that to materialize any time soon. So even if we had a treaty tomorrow, would we not end up with variable national enforcement? And if major Northern and Southern states didn't ratify the treaty, would we then not end up with variable enforcement of variable standards—essentially the situation we have currently? The only possible difference might be a new UN treaty body. But they are hard pressed to keep up with 192 state actors, let alone the vast global constellation of businesses.

Fourth, major treaties on complex and controversial subjects require decades for the subject to ripen and negotiations to conclude. Some have said that it would be the bold thing for me to push for such a treaty. On the contrary, it would be the easy option: grabbing a big headline and leaving others to do the years of hard work long after my mandate, or to carry the blame if the endeavor should fail. By all means think big. But as you do so, don't lose sight of the fact that victims of corporate-related abuse need change now—not just in a generation or more.

So where does this leave us? A wise colleague of mine once wrote: "Necessities do not create possibilities. The possibility of effective action depends on the ability to provide the necessary means." The "protect, respect and remedy" framework lays the foundations for generating the necessary means to advance the business and human rights agenda. It spells out differentiated yet complementary roles and responsibilities for states and companies, and it includes the element of remedy for when things go wrong. It is systemic in character, meaning that the component parts are intended to support and reinforce one another, creating a dynamic process of cumulative progress—one that does not foreclose additional longer-term meaningful measures.

Expressing the framework's aim in normative terms, I find helpful guidance in the recent book on justice by the Nobel laureate Amartya Sen. "What moves us," Sen writes, "is not the realization that the world falls short of being completely just—which few of us expect—but that there are clearly remediable injustices around us which we want to eliminate."

## **Uptake**

Given the long and ill-fated history of UN efforts to devise rules of the road for multinational corporations and other business enterprises—going back to the 1970s code of conduct days up to the more recent Norms exercise—I am both pleased and humbled by the framework's reception: unanimous backing in the Council; strong endorsements by international business associations and individual companies; and positive statements from civil society.

Numerous national bodies have invoked the framework in their own policy assessments—including a Norwegian white paper on corporate responsibility; a UK joint parliamentary committee holding hearings on business and human rights; and the South Africa Human Rights Commission's submission to that country's review of bilateral investment treaties.

Sweden is dedicating an EU Presidency Conference to elaborating the framework; the European Commission is drawing on the framework in a study of legal liability regarding human rights and the environment applicable to European enterprises operating abroad; and the OECD has agreed to update its Guidelines for Multinational Corporations and has invited my involvement.

The UK government, acting under the OECD Guidelines in a case brought by an NGO, cited the framework's human rights due diligence component in a finding against Afrimex, an oil trading company operating in the Democratic Republic of the Congo. The UN Special Rapporteur on toxic wastes referenced the framework as an authoritative source in reaching his conclusions on Trafigura, an international commodities trading company accused of dumping toxic chemicals near Abidjan, Ivory Coast, causing illness and alleged deaths. The Permanent Forum on Indigenous Issues gave its support to the framework and to my efforts at operationalizing it, and is exploring its applicability to the challenges facing indigenous peoples in the business and human rights sphere.

Now, I am not foolish enough, or so arrogant, as to believe that the "protect, respect and remedy" framework answers all our prayers. In fact, our journey has just begun. But I think it's fair to say that we have come remarkably far in a relatively short period of time. And judging from these and other examples of uptake, I believe we can draw the conclusion that we are heading in

the right direction. But we need your help—and the help of all those you represent—to take it to next level of operationalization.

I will listen attentively during the next two days to your insights, and your advice. And please continue to share your thoughts with us as we launch an ongoing global online consultation later this fall.

Thank you for being here, and for your engagement.

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*John G. Ruggie, SRSG for Business & Human Rights, is Berthold Beitz Professor in Human Rights and International Affairs at the John F. Kennedy School of Government and Affiliated Professor in International Legal Studies at Harvard Law School.*