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The Future of Corporate Accountability for Violations of Human Rights

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THE FUTURE OF CORPORATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS

This panel was convened at 10:45 a.m., Friday, March 27, by its moderator, Penelope Simons of the University of Ottawa, who introduced the panelists: John G. Ruggie of Harvard's Kennedy School of Government and Special Representative of the United Nations' Secretary-General for Business and Human Rights; Robert McCorquodale, Director of the British Institute of International and Comparative Law; Christiana Ochoa of the Indiana University Maurer School of Law; Adam Greene of the United States Council for International Business; and Lisa Misol of Human Rights Watch.

INTRODUCTION

*By Penelope Simons**

It is my pleasure to welcome you to this panel on the Future of Corporate Accountability for Violations of Human Rights. The global concern for the human rights implications of corporate activity and corporate impunity for violations of human rights is not new. The issue was most recently propelled to the forefront of global debate in 2003. The catalyst was the drafting of the *UN Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights*¹ (the *UN Norms*) by a UN working group of independent experts, their subsequent unanimous adoption by (what was then) the Sub-Commission on the Promotion and Protection of Human Rights, and finally their submission to the Human Rights Commission (now the Human Rights Council). One of the results of the controversy provoked by the *UN Norms* was the creation of a new UN special procedure, the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Entities, and the appointment to that position of Professor John Ruggie.

In April last year, Professor Ruggie submitted his much anticipated final report to the Human Rights Council. His Report sets out a comprehensive policy framework aimed at reducing the "governance gaps" in relation to the negative human rights impacts of corporate activity.² It is based on three principles: the further development of the state's international human rights law duty to protect individuals from violations of their human rights by corporate actors; the concept of the responsibility of business to respect human rights—"to do no harm"; and the development of remedies for victims of corporate human rights abuses. Professor Ruggie's proposals are thoughtful, comprehensive, and strategic. The Report was well received by the Human Rights Council, business,³ and a number of NGOs. It has also

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¹ UNECOSOC, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) and *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003).

² UNHRC, *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 Entities*, A/HRC/8/5 (Apr. 7, 2008).

³ See, e.g., IOE, ICC & BIAC, *Joint Initial Views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third Report of the Special Representative of the UN Secretary-General on Business and Human Rights*, available at <<http://www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf>>.

been criticized by others who would have liked to have seen his recommendations go further and include some reference to the role of binding legal human rights obligations for corporate actors.⁴

In June 2008, the Human Rights Council extended Professor Ruggie's mandate for another three years, requesting him to, among other things, develop the three principles of his policy framework; integrate a gender perspective throughout his work and give attention to those belonging to vulnerable groups, in particular children; identify, exchange, and promote best practices for business in this area; and advance the policy framework, continuing to consult with a wide variety of stakeholders. Professor Ruggie released his preliminary work plan for his new mandate in October 2008.⁵

In this panel we will be discussing the work of the Special Representative and the operationalization of his policy framework. In particular, panelists will consider where we should go from here in the effort to develop norms to regulate corporate activity effectively and address corporate impunity for human rights abuses.

**PROTECT, RESPECT AND REMEDY:
A UNITED NATIONS POLICY FRAMEWORK FOR BUSINESS
AND HUMAN RIGHTS**

*By John Gerard Ruggie**

At its June 2008 session, the United Nations Human Rights Council unanimously "welcomed" the "protect, respect and remedy" policy framework I had proposed in my capacity as Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises.¹ This marked the first time the Council or its predecessor, the Commission on Human Rights, had taken an actual policy position on business and human rights. The Council also extended my mandate by three years, tasking me with "operationalizing" the framework—providing "practical recommendations" and "concrete guidance" to states, businesses, and other social actors on its implementation.²

The policy framework 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

⁴ Amnesty International, *Submission to the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises*, July 2008, available at <<http://www.business-humanrights.org/Documents/RuggieHRC2008>>; see also *Joint NGO Statement to the Eighth Session of the Human Rights Council: Third Report of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises*, May 19, 2008, available at <<http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council>>; and Canadian Network on Corporate Accountability, *Submission to the UN Secretary General's Special Representative on Business and Human Rights (SRSG)*, available at, <http://www.halifaxinitiative.org/updir/CNCA_statement_re_Ruggie_report-July_08.pdf>.

⁵ The Special Representative's 2009 Report develops this work plan in significantly more detail: see UNHRC, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Entities*, A/HRC/11/13 (Apr. 22, 2009).

* Kirkpatrick Professor of International Affairs at Harvard's Kennedy School of Government; Affiliated Professor in International Legal Studies at Harvard Law School; and United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.

¹ UN Document A/HRC/8/5 ("2008 Report"). Unless otherwise indicated, all subsequent references to resolutions and reports are to UN documents.

² A/HRC/RES/8/7.

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. The three pillars are complementary in that each supports the others.

The precipitating factor behind my original mandate in 2005 was the Commission's negative reaction to the "Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," a self-initiated effort by an expert subsidiary body.³ A broad spectrum of states, North and South, nevertheless felt that business and human rights required serious attention. The Commission therefore requested the UN Secretary-General to appoint a Special Representative to "identify and clarify" existing standards and ways of moving the agenda forward.⁴ Then Secretary-General Kofi Annan appointed me in July 2005, and Ban Ki-moon continued the assignment.

This note outlines the framework and flags some of the strategic directions in which the "operationalization" phase is moving.

I. THE STATE DUTY TO PROTECT

The state duty to protect against third party abuse, including by business, is grounded in international human rights law.⁵ It is a standard of conduct, not result: states are not held responsible for corporate-related human rights abuse *per se* but may be considered in breach of their obligations where they fail to take appropriate steps to prevent and investigate, as well as to punish and redress it when it occurs.⁶ States have certain discretion as to how to fulfill the duty, but the main human rights treaties generally contemplate legislative, administrative, and judicial measures.

The extraterritorial dimension of the duty to protect remains unsettled in international law. Current guidance from international human rights bodies suggests that states are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, but nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis and that an overall reasonableness test is met. Within those parameters, some UN Treaty Bodies are encouraging home states to take steps to prevent abuse abroad by corporations within their jurisdiction.⁷

There are strong policy reasons for home states to encourage "their" companies to respect rights abroad, especially if the state is involved in the business venture—whether as owner, investor, insurer, procurer, or simply promoter. Such encouragement limits home states' possible association with possible overseas corporate abuse. And it can provide much-needed support to host states lacking the capacity to implement an effective regulatory environment on their own.

States have long understood their obligations regarding abuse by state agents. Moreover, most have adopted measures and established institutions in certain core areas of business and human rights, such as labor standards and workplace non-discrimination. But beyond

³ E/CN.4/Sub.2/2003/12/Rev.2.

⁴ Commission Resolution 2005/69.

⁵ See A/HRC/8/5/Add.1 for a summary of my research on the UN human rights treaties and UN Treaty Body commentaries as they relate to business.

⁶ Under other areas of international law, corporate acts may be directly attributed to states in some circumstances; for example, where a state exercises such close control that the company is its mere agent.

⁷ E.g. CERD/C/USA/CO/6 (2008), ¶ 30; CESCR General Comment 19 (2008), ¶ 54.

that, the business and human rights domain exhibits considerable legal and policy incoherence, as elaborated in my 2008 Report.

There is “vertical” incoherence, where governments sign on to human rights obligations but then fail to adopt policies, laws, and processes to implement them. Even more widespread is “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. Domestic policy incoherence inevitably is reproduced at the international level. This results in ambiguous and mixed messages to business from governments and international organizations.

Therefore, a major objective of the new mandate is to assist governments in recognizing these connections, driving the business and human rights agenda into the major policy and legal domains that most directly shape business practices, and fostering corporate cultures respectful of human rights.

Policy and legal innovation are especially important for conflict-affected areas: the current international human rights regime cannot possibly be expected to function as intended where societies are torn apart by civil war or other major strife, yet this is where the most egregious corporate-related human rights abuses typically occur. Accordingly, this is another mandate priority under the state duty to protect.

II. THE CORPORATE RESPONSIBILITY TO RESPECT

Companies know they must comply with all applicable laws to obtain and sustain their legal license to operate. However, companies are finding that legal compliance alone may not ensure their social license to operate, particularly where the law is weak. The social license to operate is based on prevailing social norms that can be as important to a business’ success as legal norms. Of course, social norms may vary by region and industry. But one has acquired near-universal recognition by all stakeholders, including business: the corporate responsibility to respect human rights—or, put simply, to not infringe on the rights of others.

As a well-established and institutionalized social norm, the corporate responsibility to respect exists independently of state duties and variations in national law. There may be situations in which companies have additional responsibilities. But the responsibility to respect is the baseline norm for all companies in all situations.

Company claims that they respect human rights are all well and good, but do they have systems in place enabling them to demonstrate the claim with any degree of confidence? Relatively few do.⁸ What is required is an ongoing **human rights due diligence** process, whereby companies become aware of, prevent, and mitigate adverse human rights impacts. I outlined four core elements of human rights due diligence in my 2008 Report: having a human rights policy; assessing human rights impacts of company activities; integrating those values and findings into corporate cultures and management systems; and tracking, as well as reporting, performance.

What is the appropriate **scope** of a company’s human rights due diligence process—the range of factors it needs to consider? Three are essential. The first is the country and local *context* in which the business activity occurs. This might include the country’s human

⁸ A/HRC/4/35/Add.4.

rights commitments and practices, the public sector's institutional capacity, ethnic tensions, migration patterns, the scarcity of critical resources like water, and so on. The second factor is what impacts the company's own activities may have within that context—in its capacity as producer, service provider, employer, and neighbor—understanding that its presence inevitably will change many pre-existing conditions. The third factor is whether and how the company might contribute to abuse through the relationships connected to its activities, such as with business partners, entities in its value chain, other non-state actors, and state agents.

Companies also need to know the **substantive content** of due diligence, or which rights it should encompass. The answer is simple: in principle, all internationally-recognized human rights. The quest to determine a finite list of rights for companies to respect is a fool's errand because companies can affect the entire spectrum of rights, as I have documented.⁹ Therefore, the responsibility to respect must apply to all such rights, although in practice some may be more relevant in particular contexts.

For the substantive content of due diligence, then, companies at a minimum should look to the International Bill of Human Rights—the Universal Declaration and the two Covenants—as well as the core ILO conventions. They should do so for two reasons. First, the principles these instruments embody are the most universally agreed upon by the international community. Second, they are the main benchmarks against which other social actors judge the human rights impacts of companies.

Companies might need to consider additional standards depending on the situation. For example, in conflict affected areas they should take into account international humanitarian law and policies; and in projects affecting indigenous peoples, standards specific to those communities.

In sum, discharging the responsibility to respect human rights requires due diligence whereby companies become aware of, prevent, and mitigate adverse human rights impacts of their activities and relationships. The mandate is beginning a series of consultations to flesh out the elements, challenges, and opportunities of this process.

III. ACCESS TO REMEDY

Access to effective remedy, the framework's third pillar, is an important component of both the state duty to protect and of the corporate responsibility to respect. For states, it is a means of enforcing and incentivizing corporate compliance with relevant law and standards, and of deterring abuse. For companies, operational-level mechanisms provide early warning of problems and help mitigate or resolve them before abuses occur or disputes compound. And without access to remedy, the rights of victims would be rendered weak or even meaningless.

State Obligations

As noted earlier, as part of their duty to protect, states are required to take appropriate steps to investigate, punish, and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction—in short, to provide access to remedy.¹⁰

⁹ A/HRC/8/5/Add.2; E/CN.4/2006/97, ¶¶ 24-30.

¹⁰ Several core international and regional human rights treaties provide for these elements; where they do not there has been some useful commentary from human rights bodies.

This state *obligation* to provide access to remedy is distinct from the individual *right* to remedy recognized in a number of international and regional human rights conventions. While the state obligation applies to corporate abuse of all applicable human rights, it is unclear how far the individual right to remedy extends to non-state abuses. However, an individual right to remedy has been affirmed for the category of acts covered by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, “irrespective of who may ultimately be the bearer of responsibility for the violation.”¹¹

States often point to their criminal and civil law systems to demonstrate that they are meeting their international obligations to investigate, punish, and redress abuse. In some jurisdictions, there has been an increase in the number of civil cases brought against parent companies for their acts and omissions in relation to human rights harm involving their foreign subsidiaries. However, significant barriers to accessing effective judicial remedies persist.¹² Most are well known, are not unique to business and human rights, and are the subject of ongoing capacity-building work by states together with international institutions. Therefore, my mandate work focuses specifically on barriers that are particularly salient for victims of corporate-related human rights abuses, and on strategies for reducing those barriers.

Non-Judicial Mechanisms

Non-judicial mechanisms play an important role alongside judicial processes. They may be particularly significant in a country where courts are unable, for whatever reason, to provide adequate and effective access to remedy. Yet they are also important in societies with well-functioning rule-of-law institutions, where they may provide a more immediate, accessible, affordable, and adaptable point of initial recourse.

In my 2008 Report, I presented a set of Grievance Mechanism Principles. Six should underpin all non-judicial grievance mechanisms: legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency. As a seventh principle specifically for company-level mechanisms, I stressed that they should operate through dialogue and mediation rather than the company itself acting as adjudicator. I am currently focusing on how incorporating these principles can help strengthen existing public and private non-judicial mechanisms—or the establishment of new ones where none exist.

A major barrier to victims accessing non-judicial mechanisms, from the company or industry to the national and international levels, is the lack of information available about such mechanisms. This deficit also makes it difficult to improve such mechanisms and to learn from past disputes and avoid their replication. To reduce these barriers, I have launched Business and Society Exploring Solutions—A Dispute Resolution Community.¹³ BASESwiki (www.baseswiki.org) is an interactive, on-line forum for sharing, accessing, and discussing information about non-judicial mechanisms that address disputes between companies and their external stakeholders. It includes information about how and where mechanisms work, solutions they have achieved, experts who can help, and research and case studies. BASESwiki will be built over time by and for its users. It is currently available with English, French,

¹¹ A/RES/60/147, Principle 3(c).

¹² See “Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuses,” available at <<http://www.reports-and-materials.org/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf>>.

¹³ In collaboration with the International Bar Association and with support from the Compliance Advisor/Ombudsman of the World Bank Group and JAMS Foundation.

Spanish, Chinese, and Russian portals; an Arabic portal is under development. I urge all stakeholders—business, NGOs, states, mediators, lawyers, academics, and others—to help develop this important resource and to assist those without internet access.

Various stakeholders have pressed for a new international institution to improve access to non-judicial remedies. Proposals include a clearinghouse to direct those with disputes towards mechanisms that might offer a remedy; a capacity-building entity to help disputing parties use those mechanisms effectively; an expert body to aggregate and analyze outcomes, enabling more systemic learning and dispute prevention; and a grievance mechanism for when local or national mechanisms fail or are inadequate. These and other options will be explored through research and consultations in the current phase of the mandate.

IV. UPTAKE

Even prior to its operationalization, the framework has enjoyed considerable uptake. In announcing its new “Statement on Human Rights,” Canada’s export credit agency said it would monitor the Special Representative’s work to “guide its approach to assessing human rights.”¹⁴ The UK Government has found against a British company operating in the Democratic Republic of Congo for failing to exercise adequate human rights “due diligence” as set out in the framework.¹⁵ An Australian parliamentary motion invoked the framework in calling on the Government to “encourage Australian companies to respect the rights of members of the communities in which they operate and to develop rights-compliant grievance mechanisms, whether acting in Australia or overseas.”¹⁶ The Norwegian Government’s 2009 Corporate Social Responsibility White Paper discusses the framework extensively.¹⁷

Leading business entities have endorsed the framework. The world’s largest business associations jointly said it provides “a clear, practical and objective way of approaching a very complex set of issues.”¹⁸ It was welcomed by the International Council on Mining and Metals, and the Business Leaders Initiative on Human Rights.¹⁹ Forty socially responsible investment funds stated that the framework helped their efforts by promoting greater disclosure of corporate human rights impacts and appropriate steps to mitigate them.²⁰ A joint civil society statement to the Council noted the framework’s value.²¹ Amnesty International separately said the framework “has the potential to make an important contribution to the protection of human rights.”²²

Endorsement by the Human Rights Council and strong positive reactions from key stakeholders should provide a solid basis for undertaking the important task of moving from general principle to concrete guidance.

¹⁴ “New Statement Sets Out EDC’s Principles for the Consideration of Human Rights,” Apr. 30, 2008, available at <http://www.edc.ca/english/docs/news/2008/mediaroom_14502.htm>.

¹⁵ Final Statement by UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd., Aug. 28, 2008, ¶¶ 41, 64, 77, available at <<http://www.berr.gov.uk/files/file47555.doc>>.

¹⁶ Senate Official Hansard (no. 6 2008), June 23, 2008, pp. 3037 – 3038, available at <<http://www.aph.gov.au/HANSARD/senate/dailys/ds230608.pdf>>.

¹⁷ “Corporate Social Responsibility in a Global Economy,” Ministry of Foreign Affairs, Norway, Jan. 23, 2009, <<http://www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf>>.

¹⁹ See <<http://www.icmm.com/page/8331/icmm-welcomes-ruggie-report>>; and <<http://www.reports-and-materials.org/BLIHR-statement-Ruggie-report-2008.pdf>>.

²⁰ <<http://www.reports-and-materials.org/SRI-letter-re-Ruggie-report-3-Jun-2008.pdf>>.

²¹ A/HRC/8/NGO/5.

²² <<http://www.reports-and-materials.org/Amnesty-submission-to-Ruggie-Jul-2008.doc>>.

TOWARDS MORE EFFECTIVE LEGAL IMPLEMENTATION OF CORPORATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS

By Robert McCorquodale*

CONTEXT

The first President of the British Institute of International and Comparative Law (BIICL) was Lord Denning, who was one of the most famous common law judges of his day. He stated that: "A corporation ... has no body to be kicked or soul to be damned."¹ One of the considerable achievements of the framework for considering the issues of corporations and human rights created by John Ruggie² is to confirm the growing conviction that Lord Denning is no longer correct. There is now acceptance that corporations do feel and act in ways that show that they have bodies and souls, and that they need to respect human rights.

Another strong aspect of this framework is that it asserts the importance of all human rights to corporations. This is essential, as too many corporate social responsibility (CSR) policies choose only some civil and political human rights as of relevance to them. This highlights the fact that having a CSR policy is not the same as providing protection for all human rights, as CSR policies are largely management-driven and voluntary, whilst human rights protections are person-centred and have legitimate compliance mechanisms.³

INTERNATIONAL LAW

Professor Ruggie's Report notes that:

Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.⁴

Therefore, regulation is needed in order to ensure that this framework is "operationalized."⁵ There are many methods of regulation such as social action, political activity, and economic engagement.

Regulation without law and legal compliance mechanisms is rarely effective as a means of long-term social, economic, or public behavioral change, as seen most clearly in the current economic crisis, where the financial markets have had little legal regulation.⁶ Business activity is assisted substantially by the operation of a rule of law. As Lord Bingham, the

* Director, British Institute of International and Comparative Law; Professor of International Law and Human Rights, University of Nottingham. My sincere thanks to Ndanga Kamau for her research assistance.

¹ *British Steel v. Granada TV* (1981) AC 1096, 1127 per Lord Denning. BIICL was formed from the merger of much older institutions dating back to 1894.

² The Report to the United Nations Human Rights Council (HRC) of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises is found in UN Doc A/HRC/8/5 (*hereinafter* "Report"), as well as a companion report at UN Doc A/HRC/8/16.

³ See, e.g., A. McBeth and S. Joseph, *Same Words, Different Language: Corporate Perceptions of Human Rights Responsibilities* 11 AUSTRALIAN JOURNAL OF HUMAN RIGHTS 95-127 (2005).

⁴ Report, *supra* note 2, ¶ 22.

⁵ The HRC, in extending the mandate of the Special Representative, stated that it "recognizes the need to operationalize this framework": HRC Resolution 8/7 (2008), Preamble.

⁶ As John Ruggie has bravely entered the court of international lawyers, I will focus on legal regulation. Though there needs to be an awareness that the law cannot be blamed for failing to do what it cannot be expected to do, such as to limit corporate aims to make money.

current President of BIICL has made clear, a rule of law is different from a rule by law or a rule by power.⁷ Where there is an effective rule of law, corporations can conduct their business aware that there is likely to be a large degree of stability, certainty, and recourse, which serves to reduce their risks.⁸

In the “operationalization” of the Mandate’s framework, it is essential that all the international legal obligations of states with regard to the activities of corporations are clarified, especially in the area of human rights. This will include a state’s obligation to enact national laws and regulate practices of corporate nationals operating both within the territory of a state and, importantly, extraterritorially,⁹ and any obligations in relation to subsidiaries, and could include changes to national company law, such as with director’s duties. This approach could require capacity building in some states. Indeed, most corporations respond better to preventative regulation by a state than to reactive litigation. This clarification should include the extent of a state’s responsibility when a corporation is acting under the authority of a state or under its direction and control.¹⁰ It would also include where a state has been a decisive influence in a corporation’s activities, such as through offering trade incentives and export credits.¹¹

RESPONSIBILITY

The Report’s framework distinguishes between a legal “duty,” being on states, and a non-legal “responsibility” being on corporations. This “responsibility” is called a “social norm” by John Ruggie. This distinction is a difficult one to maintain;¹² one major concern in leaving a corporation’s “responsibility” as a “social norm” is the uncertainty of which society is relevant: is it all of the international community, just the industrialized, consumer active North, or the rural poor in non-industrialized states? It might lead to economic power to be used to change “social norms” to reflect corporations’ interests, in the same way it has affected governments’ decision-making and laws.¹³ A corporation’s “responsibility” must be given real substance and close detail in the next report.

In many civil law areas, corporations can be legally responsible for actions that violate aspects of human rights, such as in consumer protection laws and environmental damage. The responsibility requires a positive obligation on corporations and not merely “doing no

⁷ Lord Bingham has indicated that a rule of law requires good governance consistent with justice and human rights, that everyone is accountable to the law (including governments and those with power), that everyone can have disputes settled in an independent and accessible way, and that there are compliance checking mechanisms: Lord (Tom) Bingham, *The Rule of Law*, 66 CAMBRIDGE LAW JOURNAL 67 (2007).

⁸ See D. Kaufmann, A. Kraay, & M. Mastruzzi, Report from the World Bank on the Link between the Rule of Law and GDP, *Governance Matters* (2005), available at <<http://www.worldbank.org/wbi/governance>> (last visited Mar. 3, 2009).

⁹ See R. McCorquodale & P. Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 Mod. Law Review 599-626 (2007).

¹⁰ For example, with military contractors and others in Iraq: see M. Bina, *Private Military Contractor Liability and Accountability After Abu Ghraib*, 39 J. MARSHALL L. REV. 1237 (2005).

¹¹ See McCorquodale & Simons, *supra* note 9.

¹² Indeed, the Human Rights Council uses the term “responsibility” for both states and corporations: HRC resolution 8/7, Preamble.

¹³ See, e.g., S. SCHLESINGER & S. KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA (1982), 90-97.

harm.”¹⁴ These civil law aspects should be examined during the mandate’s next phase.¹⁵ Further, “operationalizing” the due diligence responsibility of a corporation could create an internal corporate compliance process, including monitoring of activities, suppliers, and subsidiaries, and ensure a deeper CSR. This can apply to all corporations, not just the large OECD-based transnational corporations. It can also lead to the development of local grievance mechanisms that allow voices of all stakeholders to be heard, including women,¹⁶ and so to deepen corporate responsibility beyond a mere social norm.

REMEDIES

There are a number of existing international instruments that could be developed to establish more effective remedies, such as the OECD Guidelines on Multinational Enterprises (Guidelines).¹⁷ In a recent case, a UK corporation was held to be in violation of the Guidelines, as there had been insufficient “due diligence” in its supply chain.¹⁸ Unfortunately, there are few compliance mechanisms to enforce this decision. So the next stage of the mandate should look at ways of making these compliance mechanisms stronger and with effective sanctions. These could, for example, link the determination of violations more directly into the OECD state’s existing national human rights and/or ombudsman institutions, or create a distinct OECD Guidelines legal committee with enforcement powers. There is a particular need for these types of powers where corporations are operating in conflict zones and regions where there is weak governance.¹⁹

There could also be more effective and pro-active application of human rights law by the international financial institutions.²⁰ This could mean greater transparency and accountability of governments in terms of how they have used international loans, as well as an increase in transparency of corporate activity, including where there is bribery.²¹ In addition, there could be a recommendation in the next report that all stabilization clauses be removed from bilateral investment treaties (and similar treaties), so that states that wish to change their laws to protect their inhabitants from violations of all human rights can do so.

¹⁴ See *Torture as Tort* (C. Scott ed., 2001). There is also the possibility of joint liability at the international level of a state and a corporation in the same way as it can occur within many states’ national laws, and with a change of burden of proof in some instances.

¹⁵ Although there has been considerable discussion on the Report in terms of the extent to which corporations can have individual responsibility for international crimes, I am not going to deal with this issue here, though I note that a number of states enable criminal laws to apply to corporations without needing an individual within the corporation to be directly linked to the criminal activity: see, e.g., Italian statute Decreto Legislativo 231#, 2001, and Australian Commonwealth Criminal Code 1995.

¹⁶ This is particularly important as gender perspective needs to be integrated under the mandate: HRC resolution 8/7, *supra* note 5, ¶ 4(d).

¹⁷ OECD, *The OECD Guidelines for Multinational Enterprises*, OECD DECLARATION AND DECISIONS ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: BASIC TEXTS (DAFFE/IME, 2000). Note that most transnational corporations have their home state in an OECD state: see UNCTAD WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D (2006).

¹⁸ *Global Witness v. Afrimex Ltd*, UK National Contact Point, Aug. 28, 2008, available at <<http://www.bert.gov.uk/files/file47555.doc>> (last visited Jan. 26, 2009). Afrimex Ltd. was a UK corporation and so the case was brought before the UK National Contact Point (NCP), being the relevant supervisory body under the Guidelines. The claim was that Afrimex paid bribes to a rebel group and purchased from mines in the Democratic Republic of Congo where child labor and forced labor were being used. Some of this activity occurred through corporations not registered in the UK. The NCP required the corporation to formulate an appropriate CSR policy and put it into effective practice.

¹⁹ See, e.g., the OECD Risk Awareness Tools for Multinational Enterprises in Weak Governance Zones.

²⁰ See, e.g., M. DARROW, *BETWEEN LIGHT AND SHADOW, THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW* (2003).

²¹ See, e.g., the approach of the Extractive Industries Transparency Initiative, available at <<http://citransparency.org/>> (last visited Mar. 3, 2009).

CONCLUSION

The Report has made a significant contribution to this area through the creation of its framework, and through the active consultation process and the consensus it has achieved.²² The real test will be in the “operationalization” of this framework, as then the hard issues as to how to put in place effective and constructive regulation, especially legal regulation, will have to be faced, and whether the consensus can then be maintained. If it is achieved, then any corporation that acts contrary to its responsibilities will rightly be kicked and damned.

THE FUTURE OF CORPORATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS

*By Christiana Ochoa**

The work of the Special Representative of the Secretary-General (SRSG) on the issue of business and human rights continues to elicit an impressive number and range of reactions, suggestions, and responses from all geographic corners and from all interested parties. I am honored to have the opportunity to offer a part of mine here. I have two main objectives. First, I would like to position the SRSG’s work on a chronological continuum specific to the regulation of business and human rights. And second, I would like to take this opportunity to argue for the increased participation of states in these governance efforts, given the place along the chronological continuum at which this issue now sits.

TRANSITIONING TO LAW AND LEGAL INSTITUTIONS

It can sometimes seem to be a long road from nascent norms to evolving governance and soft, let alone hard, law. The ease by which we lose sight of this road often leaves students of the issue of business and human rights with a certain pessimism. But this pessimism should dissipate when the issue is seen in historical scope. One can think of the issue of business and human rights as occupying essentially three eras: the era of impunity, the era of civil society and self regulation, and the era of law and legal institutions. During the era of impunity, the atomistic, multi-jurisdictional, private nature of human rights abuses committed at the hands of, or at the behest of, businesses left numerous isolated communities and individuals aggrieved. Corporate legal orders that permitted and encouraged legal insulation in the form of complex parent/subsidiary structures and strategic undercapitalization of legally exposed corporate entities added yet another level of complexity that made traction on this issue difficult to obtain. Still, during this era, victims of business-based violations left memories and records all over the world, almost as scribbles on scraps of paper, stating their claims. Most often, no one, and, more to the point, no institution, was available to recognize or hear them. But victims are not necessarily placid and, as a result, this lawless era became significantly politicized, with real pressure mounting from civil society for accountability, for liability, and for law. Traditionally, however, law can only be formed by states, and states were barely and rarely paying attention to these demands.

²² The use of a wiki resource by John Ruggie’s team is a very good one, though limited to those in the world with access to reliable electricity and unfettered Internet access.

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The era of organized civil society arose in this vacuum and resulted in some notable examples of responsive corporate self-regulation and also in mounting pressure from interested parties on international financial organizations and the United Nations to facilitate global dialectical engagement on the intricate nexus of business and human rights. Excepting some sporadic and relatively discrete efforts of the ILO, the OECD, and the United Nations during the 1970s and 1980s, the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (“Norms”), despite their failure to gain support, were the first clear sign that the era of civil society and self-regulation might lead, eventually, to legal ordering. The Norms also awakened the attention of the business community to an unprecedented degree, lending legitimacy to the subsequent United Nations efforts on this issue.

It may well be that the Norms provided a prototype, an early and almost necessarily flawed version, of what the era of law and legal institutions might look like. But that they signified the beginning of a transition into that era is hardly in dispute.

It is in this transition that the work of the SRSG is properly situated. The most valuable contribution of the SRSG’s mandate has been in the form of mapping the multitude of interested parties, organizing the prolific and dispersed dialogues on business and human rights, and channeling that discourse into the three now-familiar pieces of the framework he has provided. These three tracks—the state duty to protect human rights, business’s responsibility to respect human rights, and the need for improved and increased access to remedies—are well designed to carry this issue out of this transition and into the era of law and legal institutions. And this brings me to my second purpose in this Comment.

THE PRESSING NEED FOR STATE ACTION AND LEADERSHIP

The speed and ease with which the three tracks of the framework arrive at law and legal institutions will depend, in great part, on the participation, indeed the leadership, of states. Until quite recently, states have been reticent to play a leadership role in negotiating the needs of interested parties. But this work, which states are uniquely well positioned to perform, is a mandatory element of the law-making and institution-building project that lies ahead. The SRSG’s work has inspired at least some of the current state-based inquiries and efforts on business and human rights and it will continue to facilitate these early forays by, for example, coordinating empirical research on how “national corporate law principles and practices currently foster corporate cultures respectful of human rights.”¹ There is a growing catalog of state action on this issue that is worth noting perhaps because, all together, these actions may someday be assembled into a statement of state-based “better practices,” even if “best practices” seems a distant possibility.

A partial list of notable current state action on the issue of business and human rights includes the U.K. Parliament’s recent mini-conference on business and human rights, which was held mainly for its own edification, but also surely as a signal of the rising prominence and importance of the issue; the adoption of state procurement and investment rules by, for example, the Netherlands and Norway; the commissioning by some states, such as Norway, of white-papers on CSR; the strengthening by a few states, such as Norway, the U.K., and the Netherlands, of their obligatory OECD National Contact Points; Denmark’s steps to

¹ Leading Corporate Law Firms Advise UN Special Representative on Business and Human Rights, *available at* <<http://198.170.85.29/Corporate-law-firms-advise-Ruggie-23-Mar-2009.pdf>>.

require CSR reporting that is congruent with human rights impact assessment requirements; and the U.S. federal courts' continued openness to Alien Tort Statute cases.

There are others, and this list should and will continue to grow. Moreover, there is a wealth of policy proposals that lie dormant including, most prominently, the continued plea by many members of the human rights community that states take the steps necessary to transform existing international codes, guidelines, and norms into binding standards and definitive legal guidance for businesses and affected communities on the responsibilities of businesses for human rights harms.

The SRSG's current mandate will expire in 2011. His completed work has brought order to a chaotic global problem. Governance of the problem will now rely significantly on states' embracing the unique role of governments in governing.

COMMENTS FROM THE INTERNATIONAL BUSINESS COMMUNITY ON THE WORK OF THE SPECIAL REPRESENTATIVE ON BUSINESS AND HUMAN RIGHTS

*By Adam B. Greene**

The international business community welcomes the "Protect, Respect and Remedy" framework developed by Professor John Ruggie, the Special Representative of the UN Secretary-General on business and human rights, which presents a well-constructed and clearly articulated framework for addressing business and human rights.

CONSULTATION PROCESS

The business community commends the Special Representative for the exemplary consultation process that was used under his entire mandate and for the objective manner in which he researched the numerous issues covered in his mandate. The Special Representative was open and responsive with all stakeholders in the process and adopted a level of transparency that should serve as a model for all special procedures. Additionally, the extensive research and numerous investigations that were carried out under his direction is an indication of the thoughtfulness and seriousness with which he fulfilled his mandate. Both the transparent consultation process and objective approach to the issues greatly helped to strengthen the Special Representative's final views and recommendations.

PROPOSED FRAMEWORK

The business community believes that the proposed framework is an appropriate and accurate reflection of the state of business and human rights, and that it will be very useful in advancing the discussion. The three elements of the framework—the state responsibility to protect human rights, the corporate responsibility to respect human rights, and access to remedies—cover the key aspects of the issue in a logical and practical manner.

The proposed framework recognizes four key elements that were missing from previous attempts to address this issue. The first is that the root causes of most human rights are based in governance gaps, specifically the failure or inability of governments to protect human rights in their own jurisdictions. The second is that most human rights abuses occur

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in countries with weak governance, limited political or civil freedoms, high levels of corruption, or in actual conflict; any serious effort to address human rights abuses must address these root causes. The third is that governments and business have distinct and very different responsibilities in relation to human rights, and that confusing these responsibilities would not serve to protect human rights. And the last is that these issues apply to all companies, including state-owned, private, small and medium-sized, national and multinational companies.

The business community welcomes the inclusion of the “state duty to protect” and particularly its placement as the first and foundational element. However, we believe that more needs to be said about what states need to do in order to establish the proper framework conditions for all actors in society, including the government itself. Much more could be said on the need for the rule of law, good governance, and independent judicial systems. A key issue in nearly all countries remains the need for adequate implementation and effective enforcement of existing laws—addressing this issue alone would improve human rights in innumerable ways. These elements should be given the highest priority under the state duty to protect.

We are also concerned about the excessive focus on multinational companies and foreign investment in this section, which has the effect of reducing the focus on the vast majority of enterprises in the world which operate at the local and national level. If the goal is to reach down into the global supply chain, then the focus should be on the suppliers themselves and the framework conditions in which they operate, since this will also be relevant for the much, much larger number of local and national companies who do not supply multinationals.

CORPORATE RESPONSIBILITY TO RESPECT

The business community welcomes the inclusion of the “corporate responsibility to respect human rights” as distinct from the state responsibility to protect, which recognizes that companies cannot assume the responsibilities of states. The business community has been unequivocal in saying that all companies must comply with the law, even if it is not enforced, and that they should respect the principles of relevant international instruments where national law is absent. We also welcome the call to carry out due diligence in relation to human rights as a useful and practical part of the framework.

ACCESS TO REMEDIES

Business recognizes the importance of remedies and therefore fully supports the Special Representative’s focus on this issue as part of the framework. All representatives of society, business included, need the ability to seek redress for grievances as part of an orderly social system.

Of the many types of remedies that are presented, business continues to believe that judicial mechanisms are the most important and deserve the greatest attention and resources. While the Special Representative’s Report places judicial mechanisms first among remedies, much of the discussion relates to the extraterritorial application of the law, which we believe misses the point. Many actors have sought to use the courts of other countries precisely because the courts in their own country were inaccessible, inefficient, corrupt, politically controlled, or all of the above. Rather than promoting extraterritorial laws, which raise a host of concerns in their own right, the focus should be on improving national judicial mechanisms in line with the fourth Universal Principle of the Rule of Law. The other forms of redress that are

presented can all play useful roles in advancing communication and engagement, but none can fill the role of judicial mechanisms and none should be used to do so.

Finally, we have serious reservations about the idea of establishing a global ombudsman function as part of the business and human rights mandate. Aside from being an impractical and an inefficient solution, it runs completely counter to the need to address the root causes of the issues at hand. Establishing an international ombudsman would do nothing to address the lack of access to effective and impartial judicial mechanisms at the national and local levels, nor would it be able to provide the redress that a well-functioning judicial system would. The solution must address the problem, and this proposed solution does not.

FUTURE ENGAGEMENT

Moving forward, the business community proposes three specific contributions that we believe will advance the mandate and the work of the SRSG: First, on the state duty to protect human rights, which is the cornerstone of the framework, we will develop an informed business statement on issues related to state duty, including bilateral investment treaties. Second, on the corporate responsibility to respect human rights, we offer our assistance in identifying companies that could form a small informal contact group to serve as a resource to the SRSG on issues related to due diligence. Third, on improving access to remedies, we propose collaborating with the SRSG on a project that is designed to pilot his proposed Grievance Mechanism Principles. We would seek to help identify a small number of companies from relevant sectors that would test pilot these Principles at the plant or project level and disseminate the results as part of the learning experience. We believe that these additional business contributions would provide valuable and relevant input to the mandate and we look forward to discussing them in more detail with the SRSG.

Finally, there can be little doubt that the SRSG has advanced the debate on business and human rights. He has shown how a transparent multi-stakeholder consultation process can deliver real results and we have seen an increasing number of companies and business associations respond positively to the climate that the SRSG has helped to create. The challenge for the rest of this mandate is to remain focused on providing a clear, practical, balanced, and objective way forward. We will do all we can to help achieve that goal.

THE UNITED NATIONS' WORK ON BUSINESS AND HUMAN RIGHTS: TAKING THE LONG VIEW

*By Lisa Misol**

INTRODUCTION

The mandate of the United Nations Special Representative of the Secretary-General (SRSG), Professor John Ruggie, is one important strand of the UN's longstanding efforts to respond to corporate involvement in human rights abuses. This Article assesses the work carried out under the SRSG's first mandate (2005-2008), particularly his 2008 Report to the UN Human Rights Council (HRC), and offers suggestions for next steps.

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THE FIRST MANDATE

In 2005, when Professor Ruggie began his work as SRSR, the debate at the UN on corporate accountability was highly polarized. The SRSR also got off to a contentious start, but made progress over the course of his first mandate.¹ For example, he did not initially plan to travel to sites of alleged corporate abuse and engage directly with victims of human rights abuses, but ultimately he did carry out both visits and engagement.² Similarly, many nongovernmental organizations (NGOs) were concerned by aspects of the SRSR's first report to the HRC, written in 2006, but by 2008 he had enriched his views on several issues.³

In contrast to his 2006 Report, Ruggie's 2008 Report was well-received by NGOs.⁴ The SRSR's three-part conceptual framework of "protect, respect, and remedy" is broadly aligned with the themes that have long been stressed in human rights discussions, namely the duty of states to protect people from abuse (including by third parties), the responsibility of business to respect all rights, and the right of victims to remedy and reparation. By putting these basic principles together, albeit in a looser formulation, the SRSR provided a means to make progress on essential issues even where views still differ.⁵

The HRC's June 2008 resolution, which welcomed the SRSR's framework, also, in some ways, went beyond the framework. Most notably, it recognizes the need to consolidate

¹ This evolution can in part be traced through a reading of the SRSR's correspondence with stakeholders since 2005, catalogued by the Business and Human Rights Resource Center and available at <<http://www.business-humanrights.org/Documents/Submissions-to-John-Ruggie>> (last visited May 4, 2009).

² NGOs repeatedly made this suggestion, including at an informal meeting with the SRSR in New York on Sept. 12, 2005, and in written form. See, e.g., HUMAN RIGHTS WATCH, CORPORATE ACCOUNTABILITY: A HUMAN RIGHTS WATCH POSITION PAPER, RECOMMENDATIONS TO THE SPECIAL REPRESENTATIVE TO THE U.N. SECRETARY-GENERAL ON BUSINESS AND HUMAN RIGHTS, Sept. 8, 2005, available at <<http://www.hrw.org/en/news/2005/09/08/corporate-accountability-human-rights-watch-position-paper>>. The HRC mandate had not explicitly contemplated that the SRSR conduct site visits or regional consultations, nor provided funding, so he sought special financing for such travels as well as assistance with organizing and outreach.

³ For example, after undertaking his own study on the matter, Prof. Ruggie affirmed that businesses can potentially affect all human rights, a view long propounded by NGOs. See CORPORATIONS AND HUMAN RIGHTS: A SURVEY OF THE SCOPE AND PATTERNS OF ALLEGED CORPORATE-RELATED HUMAN RIGHTS ABUSE, addendum to PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS, REPORT OF THE SECRETARY-GENERAL'S SPECIAL REPRESENTATIVE ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, May 23, 2008, A/HRC/8/5/Add.2, available at <<http://www.business-humanrights.org/Documents/RuggieHRC2008>>. See also, e.g., HUMAN RIGHTS WATCH & CENTER FOR HUMAN RIGHTS & GLOBAL JUSTICE, ON THE MARGINS OF PROFIT: RIGHTS AT RISK IN THE GLOBAL ECONOMY, Volume 20, No. 3(G), Feb. 2008, available at <<http://www.hrw.org/en/reports/2008/02/18/margins-profit-0>>.

⁴ Human Rights Watch, in a joint statement with ten other NGOs, acknowledged the 2008 Report as a valuable contribution. This statement, however, did not constitute an endorsement of the Report, as has sometimes been suggested. JOINT NGO STATEMENT TO THE EIGHTH SESSION OF THE HUMAN RIGHTS COUNCIL: THIRD REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, May 19, 2008, available at <<http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council>>.

⁵ Differences remain regarding the way in which the SRSR framed two of the three pillars of his framework, which did not fully reflect existing human rights principles. In his 2008 Report, the SRSR acknowledged the "state duty to protect" as drawing on a clear principle of human rights, but attributed the principle of "the corporate responsibility to respect" to social expectations (rather than to human rights responsibilities deriving from the International Bill of Human Rights and also the provisions of international humanitarian law) and articulated the third pillar of his framework as "the need for more effective access to remedies" (rather than affirming victims' rights to an effective remedy). The SRSR's 2009 Report, issued after the 2009 ASIL conference, follows the lead of the 2008 HRC resolution in referring more precisely to the need for "greater access by victims to effective remedy" (emphasis added). See MANDATE ON THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, Resolution 8/7, available at <<http://www2.ohchr.org/english/bodies/hrcouncil/8session/resolutions.htm>>. See also, BUSINESS AND HUMAN RIGHTS: TOWARDS OPERATIONALIZING THE "PROTECT, RESPECT AND REMEDY" FRAMEWORK, REPORT OF THE SECRETARY-GENERAL'S SPECIAL REPRESENTATIVE ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, Apr. 22, 2009, A/HRC/11/13, available at <<http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>>.

standards, with a view to possibly developing a comprehensive international framework in the future.⁶ Many NGOs would welcome a standard-setting initiative directed toward the preparation of an international instrument adopted by governments.⁷ They recognize, however, that such a process would not begin immediately.

THE SECOND MANDATE

Governments in the HRC extended the SRSG's term until 2011 and tasked him with making concrete recommendations to "operationalize" the general principles of his framework. As he embarks on that process, we offer some views on how this should be prioritized. We would suggest that work in each area should tackle pressing issues. As much as possible, initiatives of the SRSG should be mutually reinforcing. They should build toward long-term progress, so that immediate steps contribute to the ultimate goal of closing governance gaps. The law has an important role to play in this arena to improve clarity on standards, consistency in their application, and compliance with human rights principles.⁸

For example, in considering the first pillar of the SRSG's framework, the state duty to protect, it will be essential to address the transnational dimension, including by exploring what can be achieved through greater international cooperation between states.⁹ Domestic regulation also needs attention. Such regulation is crucially important in its own right and can contribute over time to the development of international law.

The SRSG envisions that the corporate responsibility to respect should rest on the application of "due diligence." Yet, the global economic meltdown shows that private risk management failed spectacularly in the absence of sufficient transparency and oversight. Incentives and deterrents are needed, including laws that impose monitoring and reporting requirements and that clearly prohibit and punish gross misconduct. Also, respecting human rights and avoiding abuses is a *minimum* benchmark for companies; there are times when a higher standard may be appropriate.¹⁰

The SRSG's work on access to justice has developed further since the 2008 Report, to better balance the previous emphasis on non-judicial mechanisms with more attention to judicial remedies. To give effect to victims' rights to an effective remedy, it will be important to clarify questions of jurisdiction and address other obstacles to justice.¹¹

⁶ The language appears in the resolution's preamble and provides an indication that some governments feel strongly that international law must evolve to better tackle corporate abuse of human rights. In fact, one government spoke out at the HRC to say that it would not join the consensus of members approving the resolution (which was adopted without a vote) because it felt the final text did not go far enough in this direction.

⁷ A broad array of NGOs have long called for global standards on business and human rights to be articulated in an international instrument adopted by governments, such as a UN declaration. See, e.g., JOINT NGO STATEMENT TO THE EIGHTH SESSION OF THE HUMAN RIGHTS COUNCIL; and Joint NGO Letter in response to the interim report of the UN Special Representative on Human Rights and Business, May 18, 2006, available at <<http://www.business-humanrights.org/Updates/Archive/SpecialRepresentativeinterimreportcommentaries>>.

⁸ See *supra* note 5, regarding interpretations of the three pillars of the SRSG's framework.

⁹ The SRSG's 2009 Report takes up this issue in part, but his provisional interpretation of "international cooperation" does not include the exercise of extraterritorial jurisdiction, a subject he addresses elsewhere in the Report. BUSINESS AND HUMAN RIGHTS: TOWARDS OPERATIONALIZING THE "PROTECT, RESPECT AND REMEDY" FRAMEWORK, ¶¶ 38-43.

¹⁰ The SRSG's 2009 Report acknowledges some of the situations in which companies may face a higher standard, (such as when a company fulfills a public function), elaborating on a point that received only cursory treatment in his 2008 Report. *Id.*, ¶ 64.

¹¹ The SRSG identified projects addressing victims' obstacles to judicial remedies in a work plan he issued on Oct. 10, 2008, and these were developed further in his 2009 Report to the HRC. *Id.*, ¶¶ 93-98.

We recognize the ways in which the SRSG has enriched his work to date. Three further suggestions would help ensure that his work has a lasting impact. Specifically, we encourage him to:

- Make further efforts to involve individuals and communities whose rights have been negatively affected by business activity. They can help inform the work of elaborating the framework and identifying priorities as well as testing the proposed policy responses. This could prove invaluable and also would help give voice to victims of business abuses.
- Focus on the nexus between the three pillars of the framework since all three elements must work in concert and doing so maximizes the impact of policy interventions.¹² For example, one could envision a national-level law modeled after the United States Foreign Corrupt Practices Act that would give due diligence real teeth by *requiring* companies to conduct human rights risk assessments, put effective policies and procedures in place, and hold them accountable if they fail to do so.
- Work toward the long-term, not only the immediate. The SRSG represents a global body so he has the opportunity to make recommendations that can have wide applicability, and influence the future direction of international efforts. He could point the way by acknowledging the need for intergovernmental standards addressing business and human rights.

CONCLUSION

The economic crisis has radically shifted the terrain for corporate responsibility. The injection of taxpayer money into many companies has created demand for transparency, oversight, and accountability. More broadly, the current crisis makes it painfully clear that we need stronger rules to ensure responsible business practices. The widespread realization that current ways of doing business need to be transformed provides a real opportunity to build a more ethical global economy for the future, one where businesses everywhere respect human rights or face consequences.

¹² In his 2009 Report, the SRSG referred to such a nexus in relation to the access to justice. *Id.*, ¶ 115.