

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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>1</sup> 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.<sup>2</sup>

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

<sup>4</sup> 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](http://www.halifaxinitiative.org/updir/CNCA_statement_re_Ruggie_report-July_08.pdf)>.

<sup>5</sup> 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.

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

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

<sup>3</sup> E/CN.4/Sub.2/2003/12/Rev.2.

<sup>4</sup> Commission Resolution 2005/69.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> 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

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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

<sup>10</sup> 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.”<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> BASESwiki ([www.baseswiki.org](http://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,

<sup>11</sup> A/RES/60/147, Principle 3(c).

<sup>12</sup> 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>>.

<sup>13</sup> 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.”<sup>14</sup> 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.<sup>15</sup> 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.”<sup>16</sup> The Norwegian Government’s 2009 Corporate Social Responsibility White Paper discusses the framework extensively.<sup>17</sup>

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.”<sup>18</sup> It was welcomed by the International Council on Mining and Metals, and the Business Leaders Initiative on Human Rights.<sup>19</sup> 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.<sup>20</sup> A joint civil society statement to the Council noted the framework’s value.<sup>21</sup> Amnesty International separately said the framework “has the potential to make an important contribution to the protection of human rights.”<sup>22</sup>

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.

<sup>14</sup> “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](http://www.edc.ca/english/docs/news/2008/mediaroom_14502.htm)>.

<sup>15</sup> 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>>.

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

<sup>17</sup> “Corporate Social Responsibility in a Global Economy,” Ministry of Foreign Affairs, Norway, Jan. 23, 2009.

<sup>18</sup> <<http://www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf>>.

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

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

<sup>21</sup> A/HRC/8/NGO/5.

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