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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

### **Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie\***

**Business and human rights: further steps toward the operationalization  
of the “protect, respect and remedy” framework**

#### *Summary*

This is a progress report submitted in follow-up to A/HRC/8/5. Section I illustrates the Special Representative’s working methods in operationalizing and promoting the “protect, respect and remedy” framework. The following three sections summarize his current thinking on the three pillars and the synergies among them, pointing towards the guiding principles that will constitute the mandate’s final product.

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\* Late submission.

## Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction.....	1–3	3
II. Principled pragmatism .....	4–15	3
III. The State duty to protect .....	16–53	5
A. Safeguarding the ability to protect human rights .....	20–25	6
B. Doing business with business .....	26–32	7
C. Fostering rights-respecting corporate cultures .....	33–43	8
D. Conflict-affected areas .....	44–45	10
E. Extraterritorial jurisdiction .....	46–50	11
F. Summing up.....	51–53	12
IV. The corporate responsibility to respect .....	54–87	12
A. Foundations .....	57–65	12
B. Legal compliance.....	66–78	14
C. Due diligence .....	79–86	16
D. Summing up.....	87	17
V. Access to remedy .....	88–119	17
A. Company-level.....	91–95	18
B. State-based non-judicial.....	96–102	19
C. Judicial mechanisms .....	103–113	20
D. Complementarities .....	114–116	22
E. Summing up.....	117–119	22
VI. Conclusion .....	120–126	23

## I. Introduction

1. In its resolution 8/7, adopted on 18 June 2008, the Human Rights Council was unanimous in welcoming the “protect, respect and remedy” policy framework (now widely referred to as “the United Nations framework”) that the Special Representative proposed for better managing business and human rights challenges. 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 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.

2. From the outset, the Special Representative has maintained that the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences, were unsustainable. These governance gaps, he has observed, “provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation”.<sup>1</sup> The framework is intended to help close those gaps. Its three pillars are distinct yet complementary. The State duty to protect and the corporate responsibility to respect exist independently of one another, and preventative measures differ from remedial ones. Yet, all are intended to be mutually reinforcing parts of a dynamic, interactive system to advance the enjoyment of human rights.

3. The Council extended the Special Representative’s mandate until 2011, with two main tasks: “operationalizing” the framework, i.e., providing concrete guidance and recommendations to States, businesses and other actors on the practical meaning and implications of the three pillars and their interrelationships; and “promoting” the framework, coordinating with relevant international and regional organizations and other stakeholders.

## II. Principled pragmatism

4. In his first report to the then Commission on Human Rights, the Special Representative described the approach he would take to the mandate as principled pragmatism: “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people”.<sup>2</sup>

5. In 2008, having systematically mapped patterns of corporate-related human rights abuse and existing standards and initiatives and consulted widely across regions and sectors of society, he advised the Human Rights Council: “there is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors — States, businesses, and civil society — must learn to do many things differently”.<sup>3</sup> But, he added, those things must cohere and generate an interactive dynamic of cumulative progress – which the framework is designed to help achieve.

6. The same approach informs the current phase of operationalizing and promoting the framework: maximizing tangible results for affected individuals and communities by identifying and fostering standards and processes within and among relevant entities —

<sup>1</sup> A/HRC/8/5, para. 3.

<sup>2</sup> E/CN.4/2006/97, para. 81.

<sup>3</sup> A/HRC/8/5, para. 7.

private and public, national and international — that will make them more effective in dealing with business and human rights.

7. As has been true throughout the mandate, the operationalization phase combines research, consultations and practical experimentation.<sup>4</sup> For example, to benefit from diverse regional perspectives, since 2008 the Special Representative has held multi-stakeholder consultations in New Delhi, Buenos Aires and Moscow, including participants from nearby countries.<sup>5</sup> Sweden, during its European Union Presidency, convened a European Union-wide consultation. The Office of the High Commissioner for Human Rights (OHCHR) organized a global consultation in Geneva, involving more than 300 participants.

8. To facilitate additional stakeholder input and engagement on the corporate responsibility to respect human rights, the Special Representative launched an online consultation in December 2009,<sup>6</sup> which attracted visitors from 101 countries in its first three months.

9. To better understand the role that corporate law and securities regulation do and could play in ensuring corporate respect for human rights, the Special Representative worked with 19 leading law firms from around the world in mapping more than 40 jurisdictions, followed by an international expert workshop to extract patterns and lessons from the information gained.

10. To provide the mandate with information on obstacles to accessing judicial remedy, Amnesty International and two Norwegian research institutes, the Peacekeeping Centre and Fafo, organized a meeting of legal practitioners from diverse regions and legal traditions.

11. Five companies are testing the framework's principles for company-based grievance mechanisms: Carbones del Cerrejon with neighbouring indigenous communities in Colombia; Esquel Group, a garment manufacturer based in Hong Kong, China, in its Vietnamese facility; Sakhalin Energy Investment Corporation in Russia; the retailer Tesco in its South African fruit supply chain; and Hewlett-Packard with two of its suppliers in China.

12. Because the most egregious business-related human rights abuses occur in conflict-affected areas, the Special Representative has convened a small, informal but representative group of States to brainstorm innovative ideas about how host, home and neighbouring States might help prevent or mitigate such abuses. Participating countries include Belgium, Brazil, Canada, China, Colombia, Ghana, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, the United Kingdom and the United States of America.

13. The Special Representative's efforts to promote the framework are equally wide-ranging and results-oriented. He is liaising with the Organization for Economic Cooperation and Development (OECD) as it updates its Guidelines for Multinational Enterprises; the International Finance Corporation as it revises its Performance Standards; the Human Rights Working Group of the Global Compact in identifying best practices; and the European Commission, which is exploring ways of ensuring responsible behaviour overseas by European firms. He provided input for the human rights section of the social responsibility standard of the International Organization for Standardization (ISO 26000); successfully urged the United Nations Commission on International Trade Law to consider greater transparency in its investor-State arbitration proceedings when public interest considerations, including human rights, are involved; and he or a representative presented

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<sup>4</sup> All research and consultations reports are available from <http://www.business-humanrights.org/SpecialRepPortal/Home>.

<sup>5</sup> Earlier regional consultations were held in Bangkok, Bogota and Johannesburg.

<sup>6</sup> See <http://www.srsgconsultation.org>.

the framework to, among other forums, the National Human Rights Institutions' Working Group on Business and Human Rights, the treaty bodies, the Permanent Forum on Indigenous Issues and the Inter-American Commission on Human Rights.

14. Several countries have referenced the framework in conducting their own policy assessments, including France, Norway, South Africa and the United Kingdom. Several global corporations are already aligning their due diligence processes with the framework. Civil society actors have employed the framework in their analytical and advocacy work. Other special procedures have drawn on the framework, notably the Special Rapporteur investigating a multinational company's large-scale toxic-waste dumping in Côte d'Ivoire. The German Ministry for Economic Cooperation and Development convened a Berlin workshop for stakeholders from around the world to share their experiences of using the framework.

15. The *Financial Times* reports that the Special Representative "has won unprecedented backing across the battle lines from both business and pressure groups for his proposals for tougher international standards for business and governments".<sup>7</sup> He is immensely grateful to everyone who has supported and participated in the mandate's comprehensive and inclusive process, and the progress achieved to date. Principled pragmatism has helped turn a previously divisive debate into constructive dialogues and practical action paths.

### III. The State duty to protect

16. Resolution 8/7 asks the Special Representative to provide views and recommendations "on ways to strengthen the fulfilment of the duty of the State to protect all human rights" from corporate-related abuses. This duty highlights that States have the primary role in preventing and addressing corporate-related human rights abuses. The Special Representative documented the duty's legal foundations, policy rationales and scope in his 2008 and 2009 reports.<sup>8</sup>

17. This section describes a portfolio of possible measures by States to promote corporate respect for human rights and prevent corporate-related human rights abuse. The duty's main remedial components are addressed in section IV.

18. Although States interact with business in numerous ways, many currently lack adequate policies and regulatory arrangements for effectively managing the complex business and human rights agenda. While some are moving in the right direction, overall State practices exhibit substantial legal and policy incoherence and gaps, which often entail significant consequences for victims, companies and States themselves. The most common gap is the failure to enforce existing laws, although for "at-risk" and vulnerable groups, there may be inadequate legal protection in the first place. The most prevalent cause of legal and policy incoherence is that departments and agencies which directly shape business practices — including corporate law and securities regulation, investment, export credit and insurance, and trade — typically work in isolation from, and uninformed by, their Government's own human rights obligations and agencies.

19. The Special Representative has identified five priority areas through which States should strive to achieve greater policy coherence and effectiveness as part of their duty to protect: (a) safeguarding their own ability to meet their human rights obligations; (b) considering human rights when they do business with business; (c) fostering corporate

<sup>7</sup> Hugh Williamson, "Time to redraw the battle lines", *Financial Times*, 30 December 2009.

<sup>8</sup> A/HRC/11/13, paras. 13–16; and A/HRC/8/5, paras. 18–19.

cultures respectful of rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict-affected areas; and (e) examining the cross-cutting issue of extraterritorial jurisdiction.

## A. Safeguarding the ability to protect human rights

20. There is a saying that the first thing to do when you are stuck in a deep hole is to stop digging. Yet, countries unwittingly get stuck in metaphorical holes that may constrain their ability to adopt legitimate policy reforms, including for human rights. The prime examples the Special Representative has studied in depth, because their effects can be so far-reaching, are bilateral investment treaties (BITs) and host government agreements (HGAs), the contracts between governments and foreign investors for specific projects.

21. A current BIT case illustrates the problem. European investors have sued South Africa under binding international arbitration, contending that certain provisions of the Black Economic Empowerment Act amount to expropriation, for which the investors claim compensation.<sup>9</sup> A policy review examined why the Government had agreed to such BIT provisions in the first place. It explains that, among other reasons, “the Executive had not been fully apprised of all the possible consequences of BITs”.<sup>10</sup> The same is often true for HGAs, which can remain in force a half-century.

22. There is a compelling need to protect foreign investors from unfair and arbitrary treatment by host governments. The more than 1,000 instances of nationalization in the 1970s led to a proliferation of BITs, which now number nearly 3,000. However, in successive BIT negotiations, capital importers that lacked significant market power felt increasingly pressured to compete with one another for investments by accepting ever-more expansive provisions, constraining their policy discretion to pursue legitimate public interest objectives.

23. Several States are currently conducting BIT policy reviews. The Special Representative encourages States to ensure that new model BITs combine robust investor protections with adequate allowances for bona fide public interest measures, including human rights, applied in a non-discriminatory manner.

24. The same holds for HGAs, which include provisions (“stabilization clauses”) that can either insulate investors from new environmental and social laws or entitle them to seek compensation for compliance. Two themes emerged from several mandate consultations with HGA negotiators representing States and companies, and non-governmental organizations (NGOs). First, stabilization clauses, where they are used, should meet the twin objectives of ensuring investor protection and providing the required policy space for States to pursue bona fide human rights obligations. Second, there is an urgent need for all parties, including State and company negotiators and their legal and financial advisers, to consider the human rights implications of long-term investment projects at the contracting stage, thereby reducing subsequent problems. The Special Representative is exploring possible guidance for all parties on responsible contracting.

25. In conclusion, one important step for States in fulfilling their duty to protect against corporate-related human rights abuses is to avoid unduly and unwittingly constraining their human rights policy freedom when they pursue other policy objectives.

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<sup>9</sup> See *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, (International Centre for Settlement of Investment Disputes Case No. ARB (AF)/07/1).

<sup>10</sup> South Africa, Department of Trade and Industry, “Bilateral Investment Treaty Policy Framework Review”, June 2009, p. 5.

## B. Doing business with business

26. States conduct many kinds of transactions with businesses: as owners, investors, insurers, procurers or simply promoters. This provides States — individually and collectively — with unique opportunities to help prevent adverse corporate-related human rights impacts. Indeed, the closer an entity is to the State, or the more it relies on statutory authority or taxpayer support, the stronger is the State’s policy rationale for ensuring that the entity promotes respect for human rights.

27. States should find it easiest to promote respect for rights by State-owned enterprises. Senior management typically is appointed by and reports to State agencies. Associated government departments have greater scope for scrutiny. Indeed, where companies are owned by and/or act as mere State agents, the State itself may be held legally responsible for such entities’ wrongful acts. Of course, State-owned enterprises, like other companies, are also subject to the corporate responsibility to respect human rights, discussed in section III.

28. Some States are moving towards promoting respect for human rights in such enterprises. In 2008, China issued guidance to its State-owned enterprises, recommending systems for corporate social responsibility (CSR) reporting and protecting labour rights.<sup>11</sup> Sweden requires such enterprises to have a human rights policy and engage on human rights issues with business partners, customers and suppliers. They must also report on these issues, tracking Global Reporting Initiative indicators, which include human rights.<sup>12</sup> Dutch State-owned enterprises are encouraged to do the same.<sup>13</sup>

29. Despite the State nexus, relatively few export credit agencies and official investment insurance or guarantee agencies explicitly consider the human rights impacts of the ventures they support, even where the risks are known to be high. This deficit of concern may be changing slowly. For example, recent United States legislation directs the Overseas Private Investment Corporation to issue “a comprehensive set of environmental, transparency and internationally recognized worker rights and human rights guidelines with requirements binding on the Corporation and its investors”.<sup>14</sup>

30. Some export and investment promotion agencies claim that considering human rights would put them and their clients at a competitive disadvantage. International cooperation can help level the playing field, but it must do so by raising the performance of laggards. At the regional level, a recent statement of the European Union Presidency, setting forth the framework’s relevance for European Union member States, encourages them to consider the human rights impacts of projects supported by export credit guarantees.<sup>15</sup> The OECD “Common Approaches” could provide helpful guidance to its member States on human rights due diligence requirements.

31. Public procurement provides yet another vehicle. For example, the commitment of the Government of the Netherlands to achieving full sustainable procurement by 2010 will

<sup>11</sup> “Instructing opinions about central State-owned enterprises fulfilling social responsibility”, issued by the Chinese State-owned Asset Supervision and Administration Commission of the State Council, 4 January 2008.

<sup>12</sup> See, for example, <http://www.regeringen.se/content/1/c6/13/43/68/906181f3.pdf> and <http://www.sweden.gov.se/sb/d/2025/a/94125>.

<sup>13</sup> See [http://www.minfin.nl/Actueel/Kamerstukken/2009/04/Brief\\_publicke\\_belangen\\_en\\_staatsdeelnemingen](http://www.minfin.nl/Actueel/Kamerstukken/2009/04/Brief_publicke_belangen_en_staatsdeelnemingen).

<sup>14</sup> 22 U.S.C. , para. 2191b.

<sup>15</sup> Available from [http://www.se2009.eu/polopoly\\_fs/1.23024!menu/standard/file/Deklaration%20engelska.pdf](http://www.se2009.eu/polopoly_fs/1.23024!menu/standard/file/Deklaration%20engelska.pdf).

be supplemented by criteria that include respect for international human rights standards.<sup>16</sup> In the United States, all contractors doing significant business with the Federal Government must certify that they have compliance programmes rooted in ethical and legally compliant cultures, based on those required in the Federal Sentencing Guidelines.<sup>17</sup>

32. In short, the State's role as an economic actor is a key — but underutilized — leverage point in promoting corporate human rights awareness and preventing abuses.

### **C. Fostering rights-respecting corporate cultures**

33. The State duty to protect extends well beyond its role as economic actor. Most States have adopted measures and established institutions relevant to business and human rights, including labour standards, workplace non-discrimination, health and safety and consumer protection. However, States have been slow to address the more systemic challenge of fostering rights-respecting corporate cultures and practices. Four policy tools and their current usage are discussed here: CSR policies, reporting requirements, directors' duties and legal provisions specifically recognizing the concept of "corporate culture".

34. Numerous governments have adopted CSR guidelines or policies. To cite two recent examples, India has issued guidelines for companies to protect workers' rights, implement respect for human rights and avoid complicity in human rights abuses,<sup>18</sup> while a CSR white paper by Norway guides companies on relevant international human rights standards, suggests resources for addressing human rights-related dilemmas and recommends that companies adopt the framework's due diligence process.<sup>19</sup>

35. Nevertheless, on the whole, relatively few national CSR policies or guidelines explicitly refer to international human rights standards. They may highlight general principles or initiatives that include human rights elements, notably the OECD Guidelines and the Global Compact, but without further indicating what companies should do operationally. Other policies are vaguer still, merely asking companies to consider social and environmental "concerns", without explaining what that may entail in practice. To merit the term "policy", even voluntary approaches by States should indicate expected outcomes, advise on appropriate methods and help disseminate best practices. The United Nations framework's "corporate responsibility to respect" pillar can provide guidance in this regard.

36. Encouraging or requiring companies to report on human rights policies and impacts is a second key policy tool. It enables shareholders and other stakeholders to better engage with businesses, assess risk and compare performance within and across industries. Moreover, it helps companies to integrate human rights as core business concerns, supporting their responsibility to respect human rights.

37. Governmental guidance or policies on CSR reporting, including on human rights, varies widely. Examples in State-owned enterprises from China, Netherlands and Sweden were already mentioned. In Denmark, all companies above a certain size must report whether they have CSR policies.<sup>20</sup> In Malaysia, annual reports of listed companies must

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<sup>16</sup> See, for reference, [http://www.agentschapnl.nl/sustainableprocurement/criteria\\_development/index.asp](http://www.agentschapnl.nl/sustainableprocurement/criteria_development/index.asp).

<sup>17</sup> United States Federal Register, vol. 73, No. 219, 12 November 2008.

<sup>18</sup> Available from [http://www.mca.gov.in/Ministry/latestnews/CSR\\_Voluntary\\_Guidelines\\_24dec2009.pdf](http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf).

<sup>19</sup> Available from <http://www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Reports-to-the-Storting/2008-2009/report-no-10-2008-2009-to-the-storting.html?id=565907>.

<sup>20</sup> Act amending the Danish Financial Statements Act, 2008.

include a description of their CSR activities (including those of their subsidiaries) or state that they have none.<sup>21</sup> In South Africa, companies listed on the Johannesburg Stock Exchange must disclose compliance with a national corporate governance code that recommends integrated financial and non-financial reporting.<sup>22</sup> In France, a new bill will extend standardized sustainability reporting requirements beyond listed to non-listed companies (small- and medium-sized enterprises excepted). However, such steps are unusual and even among them, explicit human rights references remain rare; there is considerable variation in what and how companies should report and whether and how the provisions are enforced.

38. Worldwide, companies' financial reporting is their most tightly regulated and legally consequential reporting requirement. Companies generally must disclose all information that is "material" or "significant" to their operations and financial condition, with penalties for non-disclosure or misrepresentation. Regulators tend to regard information as "material" if there is a substantial likelihood that a "reasonable investor" would consider it important in making an investment decision. Such information uniformly includes financial risks, but regulators increasingly also recognize the "materiality" of certain short- and long-term non-financial risks to a company's performance. However, the Special Representative's corporate law project documents that none of the 40-plus jurisdictions studied specifically identify human rights-related risks as a factor in determining "materiality", therefore few companies report them.<sup>23</sup> This is despite the growing number of lawsuits against companies on human rights grounds, coupled with emerging evidence of significant costs triggered by human rights-based grievances (see section III). Regulators should clarify that human rights impacts may be "material" and indicate when they should be disclosed under current financial reporting requirements.

39. A third policy tool is the specification of directors' duties. Directors can set the right tone at the top and play vital oversight roles. The Special Representative's corporate law project examined to what extent directors' duties currently facilitate corporate respect for human rights. Two themes emerged. One is lack of clarity regarding not only what directors are required to do regarding human rights, but even what they are permitted to do. The other is the limited (to non-existent) coordination between corporate regulators and government agencies tasked with implementing human rights obligations. As a result, directors get little, if any, guidance on how best to oversee their company's respect for human rights. Yet, in some instances, directors may already be at risk of legal non-compliance by not considering human rights impacts, as discussed in paragraphs 69–73.

40. Innovative practices with human rights implications are rare. The UK Companies Act requires directors, in promoting the company's success, to "have regard" for the company's "impact on the community and the environment".<sup>24</sup> The new company law of Indonesia requires natural resources companies to "put into practice environmental and social responsibility",<sup>25</sup> which may require directors' oversight. The new South African Companies Act will permit non-shareholders to demand that a company itself institute legal

<sup>21</sup> Bursa Malaysia listing requirements (appendix 9c, part A (291)). Available from [http://www.klse.com.my/website/bm/regulation/rules/listing\\_requirements/downloads/bm\\_mainchapter9.pdf](http://www.klse.com.my/website/bm/regulation/rules/listing_requirements/downloads/bm_mainchapter9.pdf).

<sup>22</sup> Section 8.63 (a) of the Johannesburg Stock Exchange limited listings requirements.

<sup>23</sup> See <http://www.business-humanrights.org>.

<sup>24</sup> Section 172, para. 1 (d), Companies Act 2006.

<sup>25</sup> Article 74, para. 1, of Law No. 40 of 2007 concerning Limited Liability Companies.

proceedings to protect its interests, including for breach of directors' duties, provided a court decides that the action is necessary to protect the claimant's legal rights.<sup>26</sup>

41. Corporate law provisions requiring directors, as part of their duty to the company, to consider the company's broader social impacts, including on human rights, would mark a significant step toward fostering rights-respecting corporate cultures, even if the benchmark remains the company's own success.

42. Under criminal law, a fourth tool is recognizing the "corporate culture" of companies as a factor at the prosecution or sentencing stage – where "culture" refers to the adequacy of a company's internal systems of oversight and control, coupled with prevailing company ethics. In Australia, a firm itself may be held liable when its systems and culture expressly or tacitly permit the commission of an offence by an employee or officer, including participation in an international crime.<sup>27</sup> An Italian criminal statute similarly provides that a corporation can be found liable if it lacks effective systems of control and supervision.<sup>28</sup> In the United States, the Federal Sentencing Guidelines require judicial consideration of whether a corporation has an "organizational culture that encourages ethical conduct and a commitment to compliance with the law" in assessing criminal penalties.<sup>29</sup> Such provisions incentivize companies to ensure they have a culture of legal compliance and ethical standards.

43. In conclusion, most Governments are still at an early stage of policy development in fostering rights-respecting corporate practices – ironically, the most underutilized tools are those that most directly shape business behaviour. States should reconsider the misconception that companies invariably prefer, or benefit from, State inaction. Indeed, where companies are facing difficult, politically charged situations, they are particularly in need of and look for guidance from Governments on how to manage the risks such environments inevitably pose.

#### **D. Conflict-affected areas**

44. The worst corporate-related human rights abuses occur amid armed conflict over the control of territory, resources or a government itself – where the human rights regime cannot be expected to function as intended and illicit enterprises flourish. However, even reputable firms may become implicated in abuses, typically committed by others; for example, security forces protecting company installations and personnel. Businesses increasingly seek guidance from States. Yet, Governments — host, home and neighbouring alike — are reluctant and poorly equipped to provide such assistance.<sup>30</sup> Even the directly relevant Voluntary Principles on Security and Human Rights still lack a critical mass of participating States.

45. As noted, the Special Representative has convened a group of States in informal, scenario-based, off-the-record brainstorming sessions to generate innovative and practical approaches for preventing and mitigating corporate abuses in these difficult contexts. On the agenda are the potential roles of home-country embassies; closer cooperation among home-

<sup>26</sup> Section 165, Companies Act 2008, expected to come into force in 2010.

<sup>27</sup> Sections 12.3, para. 2 (c) and (d), Criminal Code Act 1995 (Cth).

<sup>28</sup> Legislative decree No. 231 of 8 June 2001.

<sup>29</sup> U.S.S.G, sect. 8B2.1 (a).

<sup>30</sup> There are exceptions: the British Government has issued a "Business and Human Rights Toolkit" for its overseas missions. Available from <http://www.fco.gov.uk/resources/en/pdf/3849543/bus-human-rights-tool.pdf>; see also OECD, "Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones". Available from <http://www.oecd.org/dataoecd/26/21/36885821.pdf>.

State development assistance agencies, foreign and trade ministries and export finance institutions, as well as between them and host government agencies; and the possibility of developing early warning indicators for government agencies and companies. The lessons that the Special Representative took away from the first meeting are the need to address issues early before situations on the ground deteriorate and to improve in-country coordination between trade promotion and human rights functions within the same embassy.

## **E. Extraterritorial jurisdiction**

46. All States have the duty to protect against corporate-related human rights abuses within their territory and/or jurisdiction. In several policy domains, including anti-corruption, anti-trust, securities regulation, environmental protection and general civil and criminal jurisdiction, States have agreed to certain uses of extraterritorial jurisdiction. However, this is typically not the case in business and human rights.

47. Legitimate issues are at stake and they are unlikely to be resolved fully anytime soon. However, the scale of the current impasse must and can be reduced. To take the most pressing case, what message do States wish to send victims of corporate-related abuse in conflict affected areas? Sorry? Work it out yourselves? Or that States will make greater efforts to ensure that companies based in, or conducting transactions through, their jurisdictions do not commit or contribute to such abuses, and to help remedy them when they do occur? Surely the latter is preferable.

48. In the heated debates about extraterritoriality regarding business and human rights, a critical distinction between two very different phenomena is usually obscured. One is jurisdiction exercised directly in relation to actors or activities overseas, such as criminal regimes governing child sex tourism, which rely on the nationality of the perpetrator no matter where the offence occurs. The other is domestic measures that have extraterritorial implications; for example, requiring corporate parents to report on the company's overall human rights policy and impacts, including those of its overseas subsidiaries. The latter phenomenon relies on territory as the jurisdictional basis, even though it may have extraterritorial implications.

49. Thus, extraterritoriality is not a binary matter: it comprises a range of measures. Indeed, one can imagine a matrix, with two rows and three columns. Its rows would be domestic measures with extraterritorial implications; and direct extraterritorial jurisdiction over actors or activities abroad. Its columns would be public policies for companies (such as CSR and public procurement policies, export credit agency criteria, or consular support); regulation (through corporate law, for instance); and enforcement actions (adjudicating alleged breaches and enforcing judicial and executive decisions). Their combination yields six types of "extraterritorial" form, each in turn offering a range of options. Not all are equally likely to trigger objections under all circumstances.

50. The Special Representative will continue to consult on how to unpack the broad and highly politicized category of extraterritorial jurisdiction. Distinguishing what is truly problematic from measures that are entirely permissible under international law would be in the best interests of all concerned: the victims of corporate-related human rights abuse; host Governments that may lack the capacity for dealing with the problem; companies that may face operational disruptions or protracted and unpredictable law suits; and the home country itself, whose own reputation may be on the line.

## **F. Summing up**

51. The Special Representative is tasked with providing views and concrete recommendations on ways to strengthen States' fulfilment of their duty to protect against corporate-related human rights abuse. Part of the solution lies in preventative measures. If Governments safeguard their capacity to protect human rights, promote respect for rights when they do business with business, foster corporate cultures respectful of rights at home and abroad and work together to prevent and address the specific challenges posed by conflict-affected areas, they will take important steps in the right direction.

52. Greater policy coherence is also needed at the international level. States do not leave their human rights obligations behind when they enter multilateral institutions that deal with business-related issues. States should encourage those bodies to institute policies and practices that promote corporate respect for human rights. Additionally, capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect.

53. The elements of the State duty to protect as discussed above can also assist other actors, including international and regional human rights bodies, civil society and indeed business itself, draw attention to gaps in the current system and identify ways of closing them.

## **IV. The corporate responsibility to respect**

54. Resolution 8/7 tasks the Special Representative with elaborating further "the corporate responsibility to respect all human rights" and to provide concrete guidance on its operationalization to business and other stakeholders.

55. The term "responsibility" to respect, rather than "duty", is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws. At the international level, the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility,<sup>31</sup> and now affirmed by the Council itself.

56. Beyond meeting legal requirements, companies increasingly include human rights elements in CSR initiatives. This practice has grown rapidly over the past decade, stimulating learning and helping to raise the visibility of human rights as a corporate concern. However, as the Special Representative has shown, CSR initiatives often deal with human rights in ad hoc ways that vary considerably across companies; typically they are decoupled from companies' internal control and oversight systems; and many are weak on external accountability practices.<sup>32</sup> Part of the problem has been that companies have lacked a strategic concept for addressing human rights systematically. The "corporate responsibility to respect" provides such a concept.

### **A. Foundations**

57. The corporate responsibility to respect human rights means avoiding the infringement of the rights of others and addressing adverse impacts that may occur. This

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<sup>31</sup> The ubiquity of this norm is documented in A/HRC/11/13, paras. 46–48.

<sup>32</sup> See A/HRC/4/35, paras. 66–81.

responsibility exists independently of States' human rights duties. It applies to all companies in all situations.

58. What is the scope of this responsibility? What acts or attributes does it encompass? Scope is defined by the actual and potential human rights impacts generated through a company's own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-State actors and State agents. In addition, companies need to consider how particular country and local contexts might shape the human rights impact of their activities and relationships. Such attributes as companies' size, influence or profit margins may be relevant factors in determining the scope of their promotional CSR activities, but they do not define the scope of the corporate responsibility to respect human rights. Direct and indirect impacts do.

59. Because companies can affect virtually the entire spectrum of internationally recognized rights,<sup>33</sup> the corporate responsibility to respect applies to all such rights. In practice, some rights will be more relevant than others in particular industries and circumstances and will be the focus of heightened company attention. However, situations may change, so broader periodic assessments are necessary to ensure that no significant issue is overlooked.

60. When conducting such assessments, companies can find an authoritative list of rights at a minimum in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the ILO core conventions.<sup>34</sup> The principles that these instruments embody are the foundational elements of the international human rights regime. Yet, because they are State-based instruments, there has been some confusion over their relevance to companies. Why should companies be concerned with them if they don't impose legal obligations on companies directly? The confusion is easily resolved: companies can and do infringe on the enjoyment of the rights that these instruments recognize. Moreover, those rights are the baseline benchmarks by which other social actors judge companies' human rights practices. In short, companies should look to these instruments as authoritative lists of internationally recognized rights. Further guidance on how companies might impact such rights is provided in the OHCHR publication, *Human Rights Translated: A Business Reference Guide*.<sup>35</sup>

61. Depending on circumstances, companies may need to consider additional standards: for instance, they should also take into account international humanitarian law<sup>36</sup> in conflict-affected areas (which pose particular challenges) and standards specific to "at-risk" or vulnerable groups (for example, indigenous peoples or children) in projects affecting them.<sup>37</sup>

<sup>33</sup> The range of company impacts on rights is documented in A/HRC/8/5/Add.2.

<sup>34</sup> The ILO considers eight conventions to be "core" or "fundamental", and they form the basis of the Declaration on Fundamental Principles and Rights at Work. Available from: <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

<sup>35</sup> This report was produced jointly with the Global Compact, the International Business Leaders Forum and the Castan Centre for Human Rights Law at Monash University. Available from: [http://www.ohchr.org/Documents/Publications/Human%20Rights%20Translated\\_web.pdf](http://www.ohchr.org/Documents/Publications/Human%20Rights%20Translated_web.pdf).

<sup>36</sup> International Committee of the Red Cross, "Business and International Humanitarian Law". Available from: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/business-ihl-150806>.

<sup>37</sup> The Special Representative thanks the Ethical Globalization Initiative for convening a workshop on integrating gender issues into the framework; see, for information, <http://www.reports-and-materials.org/Gender-meeting-for-Ruggie-29-Jun-2009.pdf>.

62. A number of stakeholders have asked whether companies have core human rights responsibilities beyond respecting rights. Some have even advocated that businesses' ability to fulfil rights should translate into a responsibility to do so, particularly where Government capacity is limited.<sup>38</sup>

63. Companies may undertake additional human rights commitments for philanthropic reasons, or to protect and promote their brand, or to develop new business opportunities. Operational conditions may dictate additional responsibilities in specific circumstances, while contracts with public authorities for particular projects may require them. In other instances, such as natural disasters or public health emergencies, there may be compelling reasons for any social actor with capacity to contribute temporarily. Such contingent and time-bound actions by some companies in certain situations may be both reasonable and desirable.

64. However, the proposition that corporate human rights responsibilities as a general rule should be determined by companies' capacity, whether absolute or relative to States, is troubling. On that premise, a large and profitable company operating in a small and poor country could soon find itself called upon to perform ever-expanding social and even governance functions – lacking democratic legitimacy, diminishing the State's incentive to build sustainable capacity and undermining the company's own economic role and possibly its commercial viability. Indeed, the proposition invites undesirable strategic gaming in any kind of country context.

65. In contrast, the corporate responsibility to respect human rights exists independently of States' duties or capacity. It constitutes a universally applicable human rights responsibility for all companies, in all situations.

## **B. Legal compliance**

66. As noted, the corporate responsibility to respect human rights is not a law-free zone because elements of it may be required under domestic law. Companies universally state that their social responsibilities begin with legal compliance. However, in the area of human rights they do not always treat legal compliance as an obligation about which they must be proactive. Moreover, there are situations where prudence suggests that companies should adopt a legal compliance approach even though precise legal standards may not yet be fully defined. Three such compliance-related scenarios are addressed here: weak governance zones, the possible "materiality" of human rights-related risks, and reduction of the risk of corporate complicity in international crimes.

67. First, many corporate-related human rights abuses violate existing domestic laws that are enforced poorly or not at all. Early in his mandate, the Special Representative asked the world's largest international business associations to address this problem. Their response was resolute: "All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent."<sup>39</sup>

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<sup>38</sup> The Special Representative thanks the Institute for Human Rights and Business for convening a workshop on this subject.

<sup>39</sup> International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, "Business proposals for effective ways of addressing dilemma situations in weak governance zones", 2006. Available from: <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>.

68. The challenge is more complex where national law conflicts with international standards and where legal compliance may undermine the corporate responsibility to respect. The classic case thereof was apartheid in South Africa. The Special Representative addressed this dilemma in his 2009 report.<sup>40</sup> He is seeking further views and experiences on possible ways of dealing with it through his online consultation.

69. The second scenario is more complex. There are situations in which companies harm human rights and, in doing so, they may also be non-compliant with existing securities and corporate governance regulations. What is the connection? If companies are not adequately assessing and aggregating stakeholder-related risks, they are unlikely to be disclosing and addressing them, as may be required. Stakeholder-related risks stem from community challenges and resistance to company operations, typically on environmental and human rights grounds. Current evidence comes largely from the extractive and infrastructure sectors, especially where companies operate in conflict-affected or otherwise difficult contexts. However, similar internal control and oversight gaps are likely to exist in other sectors as well.

70. Such risks to companies include delays in design, siting, granting of permits, construction, operation and expected revenues; problematic relations with local labour markets; higher costs for financing, insurance and security; reduced output; collateral impacts such as diverted staff time and reputational hits; and possible project cancellation, forcing a company to write off its entire investment and forgo the value of its lost reserves, revenues and profits, which can run into several billion dollars in the latter case.<sup>41</sup>

71. A study of 190 projects operated by the international oil majors indicates that the time for new projects to come on stream has nearly doubled in the past decade, causing significant cost inflation. Delays are attributed to projects' "technical and political complexity".<sup>42</sup> An independent and confidential follow-up analysis of a subset of those projects indicates that non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the largest single category. It further estimated that one company may have experienced a US\$ 6.5 billion "value erosion" over a two-year period from these sources, amounting to a double-digit fraction of its annual profits. These are big numbers.

72. What appears to be happening is that such costs are atomized within companies, spread across different internal functions and budgets and not aggregated into a single category that would trigger the attention of senior management and boards. However, when added up, some of these risks could well count as being "material" even according to the narrowest definitions and, if unaddressed, could require disclosure under existing law.

73. This is a lose-lose-lose situation: human rights are adversely impacted, serious corporate value erosion occurs and disclosure requirements and directors' duties may be breached. Clearly, better internal control systems and oversight are necessary.

74. The same is true for a third issue: managing the risk that companies may be implicated in human rights-related international crimes. This is particularly problematic in similar sectors and circumstances as the issues just discussed. Few reputable companies may ever directly commit acts that amount to international crimes. Yet, there is growing

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<sup>40</sup> A/HRC/11/13, paras. 66–68.

<sup>41</sup> See World Resources Institute, "Development without Conflict: The Business Case for Community Consent", 2007. Available from: [http://pdf.wri.org/development\\_without\\_conflict\\_fpic.pdf](http://pdf.wri.org/development_without_conflict_fpic.pdf).

<sup>42</sup> Goldman Sachs Global Investment Research, "Top 190 projects to change the world", April 2008.

risk that they will face allegations of complicity in such crimes committed by others connected to their business.<sup>43</sup>

75. For example, the more than 50 cases brought since 1997 against United States-based and other companies under the Alien Tort Statute have included allegations of complicity in genocide, slavery, extrajudicial killings, torture, crimes against humanity, war crimes and other egregious human rights violations. Other jurisdictions, too, have allowed civil claims and there have been significant settlements in the United States and elsewhere. In the criminal sphere, the Special Representative has explained how the incorporation of the International Criminal Court Statute provisions into domestic law in jurisdictions that provide for corporate criminal responsibility broadens the potential scope of such provisions beyond individual corporate officers to the company itself.<sup>44</sup> Human rights groups have pressed for the use of such provisions and at least one investigation by State officials has occurred.

76. Prudence suggests that companies should treat this risk robustly. Yet despite the expanding web of potential corporate legal liability, even leading companies in the most directly affected sectors tend not to treat it as a legal compliance issue, perhaps finding it difficult to grasp that they could be held responsible for contributing to human rights abuses committed by third parties, such as State or other security forces, connected to their operations.

77. Finally, companies should reflect on the fact that the three scenarios just described have intersected in several well-known cases brought against companies: weak national legal systems, community-based operational disruptions and company requests for or acceptance of coercive measures by security forces leading to the commission of alleged crimes, which the company is then charged in courts of law with aiding and abetting.

78. As self-evident as the requirement of legal compliance may seem, in the human rights context improvements in companies' internal control and oversight systems are necessary.

### **C. Due diligence**

79. The appropriate corporate response to managing the risks of infringing the rights of others is to exercise human rights due diligence. That very process helps companies address their responsibilities to individuals and communities that they impact and their responsibilities to shareholders, thereby protecting both values and value.

80. Human rights due diligence can be a game-changer for companies: from "naming and shaming" to "knowing and showing". Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights. Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence.

81. Companies routinely conduct due diligence to ensure that a contemplated transaction has no hidden risks. Starting in the 1990s, companies added internal controls for the ongoing management of risks to both the company and stakeholders who could be harmed by its conduct, for example, to prevent employment discrimination, environmental damage or criminal misconduct. Drawing on well-established practices and combining them with

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<sup>43</sup> The weight of international legal opinion suggests that the relevant standard is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime. See A/HRC/8/16.

<sup>44</sup> See A/HRC/4/35, paras. 22–25.

what is unique to human rights, the “protect, respect and remedy” framework lays out the basic parameters of human rights due diligence. Because the process is a means for companies to address their responsibility to respect human rights, it must go beyond simply identifying and managing material risks to the company itself to include the risks a company’s activities and associated relationships may pose to the rights of affected individuals and communities.

82. But one size does not fit all in a world of 80,000 transnational corporations, 10 times as many subsidiaries and countless national firms, many of which are small- and medium-sized enterprises. The Special Representative’s aim is to provide companies with universally applicable guiding principles for meeting their responsibility to respect human rights, recognizing that the complexity of tools and processes companies employ, will necessarily vary with circumstances.

83. Considered in that spirit, human rights due diligence comprises four components: a statement of policy articulating the company’s commitment to respect human rights; periodic assessment of actual and potential human rights impacts of company activities and relationships; integrating these commitments and assessments into internal control and oversight systems; and tracking and reporting performance. Company-level grievance mechanisms perform two functions: under the tracking and reporting component of due diligence, they provide the company with feedback that helps identify risks and avoid escalation of disputes; they can also provide remedy, as discussed in section IV. Each of these components is essential. Without them, a company cannot know and show that it is meeting its responsibility to respect rights.

84. Merely having a set of components in place, however, is no guarantee that the system will work. Accordingly, the Special Representative is also developing guidance points for their implementation. One example is that companies must understand that the responsibility to respect human rights is not a one-time transactional activity, but is ongoing and dynamic. Another is for companies to accept that, because human rights concern affected individuals and communities, managing human rights risks needs to involve meaningful engagement and dialogue with them. A third is that, because a main purpose of human rights due diligence is enabling companies to demonstrate that they respect rights, a measure of transparency and accessibility to stakeholders will be required. The Special Representative’s online consultation is exploring how to elaborate these components and processes.

85. This discussion of due diligence concludes with two provisos. One might be described as “the dilemma of normalization”. Making human rights a standard part of enterprise risk management should reduce the incidence of corporate-related human rights harm. However, it could also give companies a false sense of security that they are respecting rights if they lose sight of what makes rights unique. Human rights risk management differs from commercial, technical and even political risk management in that it involves rights-holders. Therefore, it is an inherently dialogical process that involves engagement and communication, not simply calculating probabilities.

86. The second proviso concerns the limits on what companies should expect to gain from human rights due diligence in legal terms. Conducting due diligence enables companies to identify and prevent adverse human rights impacts. Doing so also should provide corporate boards with strong protection against mismanagement claims by shareholders. In Alien Tort Statute and similar suits, proof that the company took every reasonable step to avoid involvement in the alleged violation can only count in its favour. However, the Special Representative would not support proposals that conducting human

rights due diligence, by itself, should automatically and fully absolve a company from Alien Tort Statute or similar liability.<sup>45</sup>

## **D. Summing up**

87. Just as “the duty to protect” provides guidance to States on how to achieve greater policy coherence and effectiveness with regard to business and human rights, so “the corporate responsibility to respect” provides companies with a pathway for managing human rights risks effectively. It identifies critical lacunae in legal compliance issues and leads to a due diligence process whereby companies become aware of and address the human rights harm they cause. At the same time, it can inform efforts by other actors, including States and civil society, to facilitate and ensure that companies respect rights.

## **V. Access to remedy**

88. In resolution 8/7, the Council underscored the need for “enhancing access to effective remedies available to those whose human rights are impacted by corporate activities” and asked the Special Representative to “explore options and make recommendations”.

89. He has focused on three types of grievance mechanisms that can provide avenues for remedy: company-level mechanisms and both non-judicial and judicial State-based mechanisms. He has also examined how these can be complemented by initiatives undertaken by industry bodies, multi-stakeholder groups, international organizations and regional human rights systems.

90. A grievance is understood here as a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, explicit or implicit promises, customary practice, or general notions of fairness that may differ from standard economic and bureaucratic rationales.

### **A. Company-level**

91. Successful companies do not wait for employee or consumer complaints to be lodged with external complaints bodies or the courts. They have established means for dealing with a variety of grievances in order to retain customer loyalty, maintain employee morale and sustain their reputation as responsive and responsible enterprises. These do not preclude individuals from recourse to State-based mechanisms, nor should they undermine trade union representation and collective bargaining arrangements. They can be important complements; however, such mechanisms remain underdeveloped in the human rights domain.<sup>46</sup>

92. As noted, grievance mechanisms perform two key functions regarding the corporate responsibility to respect. First, they serve as early warning systems, providing companies with ongoing information about their current or potential human rights impacts from those impacted. By analysing trends and patterns in complaints, companies can identify systemic problems and adapt their practices accordingly. Second, these mechanisms make it possible

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<sup>45</sup> This has been proposed by Lucien J. Dhooge, “Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute”, vol. 22, 2008, *Emory International Law Review*, p. 455.

<sup>46</sup> All grievance mechanisms need to separate legitimate from vexatious claims; human rights are no different in this respect.

for grievances to be addressed and remediated directly, thereby preventing harm from being compounded and grievances from escalating.

93. Such mechanisms may be provided directly by a company, through collaborative arrangements with other companies or organizations or by facilitating recourse to a mutually accepted external expert or body.

94. The Special Representative has identified a set of principles that all non-judicial human rights-related grievance mechanisms should meet to ensure their credibility and effectiveness: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. A seventh principle specifically for company-level mechanisms is that they should operate through dialogue and engagement rather than the company itself acting as adjudicator.<sup>47</sup>

95. There are numerous ways for company-level mechanisms to put these principles into practice. Appropriate approaches will depend in part on the sectoral, political and cultural context, as well as the scale of a company's operations and its potential impacts. Nevertheless, the integrity of the principles should be maintained. The pilot projects referred to in paragraph 11 are testing these principles and specific guidance points for their operationalization.

## **B. State-based non-judicial**

96. Under their duty to protect, States must take appropriate steps within their territory and/or jurisdiction to ensure access to effective remedy through judicial, administrative, legislative or other appropriate means.<sup>48</sup> The importance of non-judicial, State-based mechanisms, alongside judicial mechanisms, is often overlooked, as regards both their complaints-handling role and other key functions they can perform, including promoting human rights, offering guidance, building capacity and providing support to companies and stakeholders.

97. National human rights institutions (NHRIs) are one promising vehicle for achieving these objectives. The Special Representative interacted with several this past year, including those of Denmark, India, Kenya and South Africa. He also met with the International Coordinating Committee, and welcomes the formation of the Working Group on Business and Human Rights. Many NHRIs are not mandated to address business-related grievances, however, or are permitted to do so only when business performs public functions or impacts certain rights. Governments should reconsider this limitation as one important step towards enhancing access to effective remedy.

98. The national contact points (NCPs), which address complaints under the OECD Guidelines, also have the potential of providing effective remedy. Thirty-one OECD member States and 11 other States adhere to the Guidelines. Several areas of improvement should be considered in updating the Guidelines to realize that potential.

99. NCPs consider roughly 40 per cent of the complaints submitted to be without substantive merit or falling beyond the Guidelines' purview.<sup>49</sup> A major reason for the latter is the absence of an "investment nexus" – either because the multinational involved is a buyer from, not an equity holder in, the supplier; or it is a lending institution that enabled an operating company's foreign investment, but is not itself the investor. This approach

<sup>47</sup> See A/HRC/8/5, para. 99.

<sup>48</sup> See A/HRC/11/13/Add.1.

<sup>49</sup> OECD, Review of NCP Performance: Key Findings, document DAF/INV/WP(2008)1/REV1.

reflects the link between the Guidelines and the OECD Declaration on International Investment; however, it significantly limits NCPs' utility as a grievance mechanism for rapidly expanding segments of global value chains.

100. Another weakness is that no minimum performance standards exist for NCPs. Some have made major improvements, while others remain virtually invisible. Their varied caseloads only in part reflect the number of multinationals domiciled in those countries; they also result from marked differences in the receptivity and effectiveness of NCPs. In addition, there are no official consequences to an NCP finding against a company: it could reapply immediately for export or investment assistance from the same government. The Guidelines' update should address all of these defects.

101. NHRIs and NCPs are two important examples of how non-judicial remedy can contribute to the State duty to protect. Yet neither exists in all States, and they rarely if ever provide full coverage of business-related human rights complaints. Thus, the universe of State-based non-judicial grievance mechanisms remains both under-populated and under-resourced. These gaps contribute to the heavy reliance by aggrieved parties and their representatives on campaigns and lawsuits against companies.

102. States may address this deficit by extending the mandates of existing mechanisms or adding complementary ones, drawing on examples of complaints procedures in fair trading, advertising standards or consumer affairs. Whatever roads they choose, States should view the provision of remedy comprehensively so that judicial and non-judicial approaches begin to cohere as a system of remedial options for victims of corporate-related abuse.

### **C. Judicial mechanisms**

103. The responsibility for establishing judicial mechanisms, ensuring their functionality and facilitating access to them rests with States. If access to judicial remedy for corporate-related human rights impacts is to be improved, it is essential that both States and companies act in a manner supportive of the independence and integrity of judicial systems. States that deliberately erect barriers to prevent cases from being brought against business or that obstruct or intimidate the peaceful and legitimate activities of human rights defenders may breach their duty to protect.<sup>50</sup> Companies that obstruct or corrupt judicial mechanisms act at variance with their responsibility to respect.

104. Even where such impediments are not at issue, victims of corporate-related human rights abuse may confront legal and practical challenges stemming from the complexity of modern corporate structures coupled with existing imbalances in the operation of judicial systems.

105. First, one legal challenge is the attribution of responsibility among members of a corporate group. Many corporate-related human rights violations also violate existing national civil or criminal law, but applying those provisions to corporate groups can prove extremely complex, even in purely domestic cases.

106. A range of legal arguments has been advanced in cases involving the responsibility of parent companies for harm caused by subsidiaries. Some rely on the parent company's alleged "negligence" with respect to its subsidiary (primary liability), focusing, for example, on whether the parent has established key systems or processes, like those dealing with hazardous activities. Other arguments invoke "complicity" (secondary liability) or the concept of "agency" (vicarious or third party liability), which are found in both common

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<sup>50</sup> See, for reference, General Assembly resolution 53/144.

and civil law jurisdictions. The responsibility of partners in joint ventures and other contract-based relationships raises even more complex questions, though the theory of multi-agency liability has gained traction in some jurisdictions. In short, far greater clarity is needed regarding the responsibility of corporate parents and groups for the purposes of remedy.

107. Second, these challenges are compounded in cases involving the foreign operations of multinational corporations. A central issue here concerns the permissible grounds for courts to exercise extraterritorial jurisdiction. There is some consensus: for example, in criminal cases, nationality is an acceptable basis for exercising such jurisdiction over defendants, including companies; in civil cases, the defendant being “domiciled” (or “present”) in the forum serves that purpose. All national systems need to adopt a principled approach to the question of adjudicative extraterritorial jurisdiction, balancing the interests of claimant, defendant and States, especially in situations where there is a heightened risk of denial of remedy in the host country.

108. A third legal challenge is that investigating large companies for human rights abuses is typically well beyond State prosecutors’ usual work. It requires expertise, resources and political will. Where events in other countries are involved, such investigations also rely on international cooperation to be effective. Criminal provisions remain mere words on paper unless States act upon their obligations to investigate individual and corporate involvement in business and human rights-related crimes.

109. Turning to practical obstacles, three are particularly problematic: costs; bringing representative and aggregated claims; and disincentives to providing legal and related assistance to victims. Their coexistence can make it almost impossible for victims to access effective judicial remedy.

110. The question of costs is fundamental – costs of obtaining legal advice and of the case itself should the claimant prove unsuccessful. There is an appropriate role for costs as a deterrent to unmeritorious cases, but they should not prevent legitimate claimants from accessing the judicial system. The costs of simply accessing a qualified lawyer can be a barrier for at least some plaintiffs in most jurisdictions. Beyond the provision of legal aid, there are examples of innovation in litigation funding and fee rules — legal expenses insurance, for one — but they are not widely available.

111. A second practical barrier can result from limitations on “standing” (who can bring a suit) and on the ability to bring group claims for compensation. Many instances of corporate-related harm involve a large number of individual claims that are grounded on the same underlying set of facts, each of which would be too costly for a single claimant to pursue. Jurisdictions are increasingly considering how such claims can be most effectively aggregated, and the conditions under which representative proceedings will be allowed. Alternatives being explored include the European debate over models of “collective redress” in the consumer protection field; the evolving system of “opt-in” representative suits in civil cases in China; and the expansion of forms of “class actions” in such jurisdictions as Chile (for consumer claims), Indonesia (in cases of environmental harm) and South Africa (to protect constitutional rights). However, the scope of many of these developments in relation to business and human rights claims remains unclear.

112. A third practical barrier is the financial, social and political disincentives for lawyers to represent claimants in this area. As a result, there is a far larger (and better compensated) pool advising corporate defendants. In some jurisdictions, the terms of settlements exacerbate this situation by requiring that the claimants’ lawyers not act against the same company in future matters. Compounding this, where human rights defenders are obstructed or intimidated, victims may be without any legal or related support at all.

113. Governments often point to the mere existence of judicial systems as proof that they are fulfilling their duty to protect, but, as the above discussion demonstrates, much more is required. The Special Representative will continue to examine options for addressing these legal and practical barriers, including through a multi-stakeholder consultation.

#### **D. Complementarities**

114. State-based judicial and non-judicial mechanisms should form the foundation of a wider system of remedy for corporate-related human rights abuse. Within such a system, company-level grievance mechanisms can provide early-stage recourse and possible resolution. State and company-level mechanisms can be supplemented or enhanced by a range of collaborative initiatives.

115. Industry-based and multi-stakeholder initiatives can enable companies to increase the reach and reduce the costs of grievance mechanisms. Global framework agreements may achieve the same for union federations and transnational companies. Regional or international mechanisms may strengthen common standards for States and companies across jurisdictions. Whatever the rationale, the fundamental purpose of such mechanisms is to provide remedy to victims. Companies and States collaborating to develop or oversee such mechanisms should do so in a manner consistent with the corporate responsibility to respect and the State duty to protect.

116. The challenges to accessing any of these mechanisms can be greatest for the “at-risk” and vulnerable groups arguably most in need. Whether through active discrimination or as the unintended consequences of the way remedial mechanisms are designed and operate, these groups often face additional cultural, social, physical, and financial impediments to accessing them. The custodians of any mechanism should give due attention to possible differential impacts on such groups at each stage of the grievance process: access, procedures and outcome.

#### **E. Summing up**

117. Reality falls far short of constituting a comprehensive and inclusive system of remedy for victims of corporate-related human rights abuse. Although progress has been made, all types of mechanisms — State-based non-judicial and judicial, company-based, as well as collaborative and international — remain underdeveloped.

118. Moreover, individuals and communities are often unaware of existing avenues for remedy or how to make meaningful choices between them. As mechanisms further proliferate, the challenge of access will increase unless there is adequate assistance to all parties in navigating their options. The Special Representative recently upgraded his online resource, BASESwiki,<sup>51</sup> through which he will continue to support improved access to information, learning and expertise in pursuit of more effective non-judicial grievance mechanisms. It currently features over 200 mechanisms and 70 case stories.

119. He is also conducting a feasibility study of whether and how new international networked arrangements for mediation might enhance access to sustainable dispute resolution in business and human rights. The results will be included in his final report.

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<sup>51</sup> Available at [www.baseswiki.org](http://www.baseswiki.org).

## VI. Conclusion

120. Resolution 8/7 extended the Special Representative's mandate to 2011. The Council asked him to operationalize the "protect, respect and remedy" framework "with a view to providing more effective protection to individuals and communities against human rights abuses by, or involving, transnational corporations and other business enterprises".

121. In deciding how best to pursue this task, the Special Representative found wisdom in the words of 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".<sup>52</sup> This perspective, which resonates well with the Special Representative's own approach of "principled pragmatism", leads one to inquire how to improve actual lives, Sen continues, rather than to theoretical characterizations of "perfectly just societies" or institutions, which in any case remain illusory. Accordingly, this report has addressed how States and companies can become more responsive and effective in dealing with business and human rights challenges. Identifying such practical measures also provides a basis for assessing the performance of States and companies, by each other, and by other stakeholders.

122. The United Nations "protect, respect and remedy" framework lays the foundations of a system for better managing business and human rights. It comprises State duties and corporate responsibilities. It includes preventative and remedial measures. It involves all relevant actors: States, businesses, affected individuals and communities, civil society and international institutions.

123. Progress within any one pillar will trigger and reinforce progress in the others. States and business have independent obligations, thus neither needs to, nor should, wait for the other to move first. As States do a better job of fulfilling their duty to protect, that will facilitate and begin to ensure that all companies meet their responsibility to respect. As companies internalize the responsibility to respect, they will increasingly support State efforts to bring laggards along. As access to remedy improves, companies and States alike will learn how better to prevent corporate-related abuses in the first place. And so on.

124. In his 2011 report, the Special Representative will provide a set of guiding principles for the operationalization of the framework's distinct yet complementary and interactive elements and processes.

125. The final report also will present options and recommendations to the Council regarding possible successor initiatives to the mandate. The Special Representative will engage extensively with Member States and others in developing these ideas. Nevertheless, to sustain the momentum the mandate has achieved, he is flagging one recommendation now.

126. Beyond the area of labour standards, the Special Representative has become the de facto United Nations focal point for business and human rights. States, companies, United Nations organizations and other national and international entities regularly seek his advice regarding their own corporate-related human rights policies and practices. Resource constraints limit how much he and his small team have been able to do. However, even those limited efforts will come to a halt once his mandate ends unless an advisory and capacity-building function is anchored firmly within the

<sup>52</sup> *The Idea of Justice* (Harvard University Press, 2009), p. vii.

**United Nations. Logically, this should rest with OHCHR. But the Office would need to become equipped to provide the leadership and guidance that stakeholders require and expect. The Special Representative urges early consideration of this matter by the Council.**

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