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Business and human rights: Towards operationalizing the "protect, respect and remedy" framework

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PROMOTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

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 enterprises*

Summary

This report recapitulates the key features of the "protect, respect and remedy" framework and outlines the strategic directions of the Special Representative's work streams to date in operationalizing the framework.

* This report has been submitted late in order to include the most up-to-date information.

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I. INTRODUCTION

1. At its June 2008 session, the Human Rights Council was unanimous in welcoming the "protect, respect and remedy" policy framework proposed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.[1] This marked the first time the Council or its predecessor had taken a substantive policy position on business and human rights. By its resolution 8/7, the Council also extended the Special Representative's mandate for another three years, tasking him with "operationalizing" the framework - providing "practical recommendations" and "concrete guidance" to States, businesses and other social actors on its implementation.

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

3. The new mandate is intended to translate the framework into practical guiding principles. Even prior to further operationalization, it has enjoyed considerable uptake. For example, the announcement of Canada's export credit agency's new "Statement on Human Rights" referenced the framework and said the agency would monitor the Special Representative's work to "guide its approach to assessing human rights".[3] The United Kingdom's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises found against a company for failing to exercise adequate human rights "due diligence" - using the term as defined in the Special Representative's report to the Council in 2008 (A/HRC/8/5) - and drew the company's attention to that report in recommending how to implement an effective corporate responsibility policy.[4] An Australian parliamentary motion took note of the framework and called on the Government to "encourage Australian companies to respect the rights of members of the communities in

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[1] A/HRC/8/5.

[2] The State duty to protect is well-established, with a firm basis in international human rights law, and is unrelated to the "responsibility to protect" principle in the humanitarian intervention debate.

[3] "New statement sets out EDC's principles for the consideration of Human Rights", 30 April 2008: http://www.edc.ca/english/docs/news/2008/mediaroom_14502.htm.

[4] Final Statement by UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd., 28 August 2008, paras. 41, 64, 77: http://www.berr.gov.uk/files/file47555.doc.

which they operate and to develop rights-compliant grievance mechanisms, whether acting in Australia or overseas".[5] The Norwegian Government's 2009 Corporate Social Responsibility White Paper discusses the framework extensively.[6]

4. Leading business entities have endorsed the framework. In a joint statement, the International Organization of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) to the OECD said that the framework provides "a clear, practical and objective way of approaching a very complex set of issues".[7] It was welcomed by the International Council of Mining and Metals and the Business Leaders Initiative on Human Rights.[8] Forty socially responsible investment funds wrote to the Council, saying that the framework helped them by promoting greater disclosure of corporate human rights impacts, and appropriate steps to mitigate them.[9] The oil company, ExxonMobil, in a public commemoration of the sixtieth anniversary of the Universal Declaration of Human Rights, cited the framework's corporate responsibility to respect principle as a benchmark for its own employees.[10]

5. A joint civil society statement to the Council in May 2008 noted the framework's value, and several signatories have invoked it in subsequent advocacy work.[11] Amnesty International said the framework "has the potential to make an important contribution to the protection of human rights".[12] The Special Representative was pleased by the positive feedback from non-governmental organizations (NGOs) at a multi-stakeholder consultation in New Delhi in February 2009, and a NGO briefing in New York in March 2009. Finally, his work is featured prominently in academic writings and the media.

6. This report provides an update on steps the Special Representative has taken towards operationalizing the framework, and it addresses a number of issues related to it that have

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[5] Senate Official Hansard (No. 6 2008) 23 June 2008, pp. 3037-3038: http://www.aph.gov.au/HANSARD/senate/dailys/ds230608.pdf.

[6] "Corporate Social Responsibility in a Global Economy", Ministry for Foreign Affairs, Norway, 23 January 2009.

[7] http://www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf.

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

[9] http://www.reports-and-materials.org/SRI-letter-re-Ruggie-report-3-Jun-2008.pdf.

[10] This appeared on the *New York Times* op-ed page: http://www.exxonmobil.com/corporate/news_opeds_20081218_humanrights.aspx.

[11] A/HRC/8/NGO/5.

[12] http://www.reports-and-materials.org/Amnesty-submission-to-Ruggie-Jul-2008.doc.

emerged from ongoing consultations. But before proceeding, brief reflections are in order concerning today's very difficult economic climate, and how it might affect business and human rights.

II. THE ECONOMIC CRISIS

7. From his first report to the Commission on Human Rights in 2006 onwards, 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.[13] "There is no magic in the marketplace", he began his 2007 report.[14] Markets can be highly efficient means for allocating scarce resources, and powerful forces for promoting social objectives ranging from poverty alleviation to the rule of law. But for markets to work optimally they must have adequate institutional underpinnings and be embedded in the broader values of social community. All along he has stressed that these governance gaps "create the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation".[15] He employed this framing to explain the state of business and human rights. We now know it holds for the world political economy as a whole.

8. Today, policymakers everywhere are focused on putting out the fires in the global financial system and containing their consequences for the real economy. According to an Asian Development Bank report, the worldwide loss of wealth this year may total US$ 50 trillion, or one year's worth of GDP.[16] A World Bank report projects global GDP in 2009 to decline for the first time since World War II, and the drop in world trade to be the steepest in 80 years.[17] Even countries that were relatively insulated from the original financial sector meltdown, including the majority of developing countries, are hard hit by its effects: weak demand for their exports, collapsing commodity prices, lack of trade finance, severe credit squeezes, deep declines in foreign direct investment, and a sharp deceleration in workers' remittances. The ILO estimates that the number of persons officially unemployed could rise above 230 million in 2009, from 193 million last year.[18]

9. In major downturns, those who are already vulnerable - individuals and countries - are often the most severely affected. Global and national efforts are needed to limit the damage and

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[13] E/CN.4/2006/97, para. 18.

[14] A/HRC/4/35, para. 1.

[15] A/HRC/8/5, para. 3.

[16] http://www.adb.org/Media/Articles/2009/12818-global-financial-crisis/Major-Contagion-and-a-shocking-loss-of-wealth.pdf.

[17] http://siteresources.worldbank.org/NEWS/Resources/swimmingagainstthetide-march2009.pdf.

[18] http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_103456.pdf.

restore economic momentum. Governments must avoid erecting protectionist barriers or lowering human rights standards for businesses; their short-run gains are illusory and they undermine longer term recovery. For companies, even downsizing and plant closings must be conducted responsibly, and restoring public trust and confidence in business is as much of an immediate challenge as reinventing viable business models.

10. However painful the near-term may be, going forward elements of the business and human rights agenda should become more closely aligned with the world's overall economic policy agenda than in recent decades. Governments once championing neo-liberal economic doctrines have been reminded starkly that they have duties no other social actor can fulfil, resulting in a recalibration of the balance between market and State. For other countries, the need to deepen their domestic markets will require greater attention to social investments and safety nets, thereby fostering their citizens' fuller realization of certain economic and social rights. Companies have had to acknowledge that business as usual is not good enough for anybody, including business itself, and that they must better integrate societal concerns into their long-term strategic goals. Society as a whole cries out for remedy where wrong has been done. The terms transparency and accountability resonate more widely than before. And calls for fairness are more insistent. Because the business and human rights agenda is tightly connected to these shifts, it both contributes to and gains from a successful transition toward a more inclusive and sustainable model of economic growth.

11. It is often mused that in every crisis there are opportunities. In operationalizing the "protect, respect and remedy" framework, the Special Representative aims to identify such opportunities in the business and human rights domain and demonstrate how they can be grasped and acted upon.

III. THE STATE DUTY TO PROTECT

12. The Council asked the Special Representative to provide views and recommendations on strengthening the fulfilment of the State duty to protect against corporate-related human rights abuse, including through international cooperation. This section summarizes this duty's content and elaborates upon several business-related policy areas highly relevant to States fulfilling their duty.[19]

13. The State duty to protect against third party abuse is grounded in international human rights law. The specific language employed in the main United Nations human rights treaties varies, but all include two sets of obligations. First, the treaties commit States parties to refrain from violating the enumerated rights of persons within their territory and/or jurisdiction. Second, the treaties require States to "ensure" (or some functionally equivalent verb) the enjoyment or realization of those rights by rights holders.[20] In turn, ensuring that rights holders enjoy their

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[19] Access to remedy is discussed in section IV.

[20] For example, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child use "respect and ensure", with "respect" in the State context, meaning that the State must refrain from violating the rights. The Convention on the Rights of Persons with Disabilities requires States parties to "ensure and promote", and to take appropriate

rights requires protection by States against other social actors, including business, who impede or negate those rights. Guidance from international human rights bodies suggests that the State duty to protect applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises.[21]

14. The State duty to protect is a standard of conduct, and not a standard of result. That is, 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 it and to investigate, punish and redress it when it occurs.[22] Within these parameters, States have discretion as to how to fulfil their duty. The main human rights treaties generally contemplate legislative, administrative and judicial measures. The treaty bodies have recommended to States such measures as adopting anti-discrimination legislation governing employment practices; consulting with communities before approving mining and logging projects; monitoring and addressing the human rights impacts of such projects; and encouraging businesses to develop codes of conduct that include human rights.

15. 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, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met. Within those parameters, some treaty bodies encourage home States to take steps to prevent abuse abroad by corporations within their jurisdiction.[23]

16. There are also strong policy reasons for home States to encourage their companies to respect rights abroad, especially if a State itself is involved in the business venture - whether as owner, investor, insurer, procurer, or simply promoter. Such encouragement gets home States out

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measures to "eliminate" abuse by private "enterprises". The International Convention on the Elimination of All Forms of Racial Discrimination requires that States parties "shall prohibit and bring to an end … racial discrimination by any persons, group or organization". The Convention on the Elimination of All Forms of Discrimination against Women requires States parties "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise". In the International Covenant on Economic, Social and Cultural Rights, States parties undertake "to take steps … achieving progressively the full realization of rights", while its rights-specific provisions, such as those dealing with labour, refer to States "ensuring" those rights.

[21] See A/HRC/8/5/Add.1 for a summary of the Special Representative's research on the United Nations human rights treaties and treaty body commentaries.

[22] 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.

[23] E.g. CERD/C/USA/CO/6 (2008), para. 30; CESCR general comment 19 (2008), para. 54.

of the untenable position of being associated with possible overseas corporate abuse. And it can provide much-needed support to host States that lack the capacity to implement fully an effective regulatory environment on their own.

17. States have long been aware of the range of measures required of them in relation to abuse by State agents. Moreover, most States have adopted measures and established institutions in certain core areas of business and human rights, such as labour standards and workplace non-discrimination. But beyond that, the business and human rights domain exhibits considerable legal and policy incoherence, as discussed in the Special Representative's 2008 report.

18. 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.

19. Domestic policy incoherence is reproduced at the international level. This results in ambiguous and mixed messages to business from Governments and international organizations.

20. Recent legal and policy developments begin to address some of the challenges. In previous reports, the Special Representative noted four significant legal developments: the growing international harmonization of standards for international crimes that apply to corporations under domestic law, largely as a by-product of converging standards applicable to individuals; an emerging standard of corporate complicity in human rights abuses; the consideration by some States of "corporate culture" in deciding criminal responsibility or punishment; and an increase in civil cases brought against parent companies for their acts and omissions in relation to harm involving their foreign subsidiaries.[24]

21. In the policy realm, a growing number of States are adopting corporate social responsibility (CSR) policies.[25] They vary in content and form, but generally encourage responsible business practices, including fostering business understanding of and respect for human rights. In some cases, access to official assistance, such as export credit or investment insurance, may be linked to companies having a CSR policy, participating in the United Nations Global Compact, or confirming their awareness of the OECD Guidelines.

22. The Special Representative considers it important for all stakeholders, including Governments, to learn more about these policy developments and how they may contribute to

[24] A/HRC/4/35, paras. 19-32; A/HRC/8/5, paras. 31 and 90; A/HRC/8/16.

[25] Many OECD countries have such policies. Elements can also be found in Brazil, China, Indonesia and elsewhere.

greater policy coherence in business and human rights. Therefore, he is surveying Member States. He is grateful to OHCHR for facilitating the survey, and urges all Governments to respond.

23. The Special Representative is also exploring several other policy domains closely related to the State duty to protect - corporate law, investment and trade agreements, and international cooperation, particularly with respect to conflict affected areas.

A. Corporate law

24. Corporate law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. Traditionally, the two have been viewed as distinct legal and policy spheres, populated by different communities of practice. That trend is beginning to change as Governments and courts introduce more public interest considerations into the equation. A few examples illustrate the trend.

25. Recently adopted Danish legislation requires larger companies to report on their CSR programme, or report that they lack one.[26] The recently revised Companies Act in the United Kingdom requires directors to "have regard" to such matters as "the impact of the company's operations on the community and the environment" as part of their duties towards the company.[27] The United Kingdom Government recently confirmed that pension fund trustees are not prohibited from considering social, environmental and ethical issues in their investment decisions, provided they act in the fund's best interests.[28] The recent South African Companies Act allows the Government to prescribe social and ethics committees for certain companies.[29] A draft companies bill in India includes a provision requiring publicly listed companies above a certain size to have a board-level "stakeholder relations committee" to "consider and resolve the grievances of stakeholders".[30]

26. In the United States, Federal statutes require publicly listed companies to have robust programmes to assess, manage and report on material risks. None refers to human rights explicitly, but material risks clearly do encompass human rights issues: since the path-breaking *Doe v. Unocal* litigation in 1997, more than 50 cases have been brought against companies under the Alien Tort Statute alleging corporate involvement in human rights abuse abroad. Reputational damage and operational disruptions pose additional risks.

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[26] Act amending the Danish Financial Statements Act, entered into force 1 January 2009.

[27] Section 172 (1) (d) of the UK Companies Act (2006), entered into force 1 October 2007.

[28] Statement by Lord McKenzie of Luton, Parliamentary Under-Secretary of State, Department of Work and Pensions, Parliamentary Hansard (26 November 2008).

[29] Section 72 (4), 2008 South African Companies Act.

[30] Section 158 (12-13), 2008 Indian Companies Bill.

27. To provide greater clarity about what is currently expected of companies under corporate law as it relates to human rights, the Special Representative is pleased that 19 leading law firms from around the world have volunteered to survey corporate law provisions in over 40 jurisdictions.[31] The firms will document how the consideration of human rights by companies and their officers are addressed, explicitly or by implication, in laws and guidelines relating to incorporation, directors' duties, reporting, stakeholder engagement, and corporate governance generally. They will also report on how corporate regulators and courts apply these laws and guidelines, and whether legal or policy reform is being considered. The results will be published, and the Special Representative then will consult widely on what recommendations he might make to States.

B. Investment and trade agreements

28. Despite the current downturn, investment and trade will resume as engines of economic growth, and sustainable growth remains the necessary condition for economic and social development. The challenge in the short run is to avoid tit-for-tat escalation of protectionism - which deepened and lengthened the Great Depression, ultimately giving rise to some of the worst horrors of the twentieth century.

29. History has also witnessed successive waves of States arbitrarily expropriating foreign investments, and in prior eras, the "gunboat diplomacy" that was sometimes triggered in response. The modern investment regime is based on international investment treaties and contracts, often coupled with binding investor-State arbitration, all of which increased exponentially in the 1990s.

30. Nevertheless, recent experience suggests that some treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations. That is because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance.[32]

31. A Norwegian draft model agreement and commentary address such concerns about bilateral investment treaties. The commentary notes that these treaties pose potential risks to Norway's own highly developed system of regulations and protection, including environmental and social policies. It also stresses the vulnerability of developing countries to agreements "that tie up political freedom of action and the exercise of authority ... ".[33] The draft model agreement

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[31] http://www.reports-and-materials.org/Corporate-law-firms-advise-Ruggie-23-Mar-2009.pdf.

[32] *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB (AF)/07/1) has attracted international attention because it involves that country's black economic empowerment laws.

[33] "Comments on the Model for Future Investment Agreements (English Translation)", 19 December 2007 (copy on file with the Special Representative), p. 11.

strives to "ensure that the State's right to make legitimate regulations of the actions of investors is not restricted by an investment agreement. However, the right to regulate must be balanced against the investors' wish for predictability, legal safeguards, minimum requirements regarding the actions of the State and compensation in the event of expropriation".[34]

32. Investors often enhance the protection available under bilateral investment treaties with "stabilization" provisions in confidential contracts with host Governments called "host Government agreements". The Special Representative, in collaboration with the International Finance Corporation, analysed stabilization provisions in nearly 90 recent host Government agreements.[35] Among the key findings are: none of the host Government agreements with OECD countries offered investors exemptions from new laws and, with minor exceptions, they tailored stabilization clauses to preserve public interest considerations; a majority of the host Government agreements with non-OECD countries did have provisions to insulate investors from compliance with new environmental and social laws or facilitated compensation for compliance; the most sweeping stabilization provisions were found in Sub-Saharan Africa, where 7 of the 11 host Government agreements specified exemptions from or compensation for the effect of all new laws for the duration of the project, irrespective of their relevance to protecting human rights or any other public interest.

33. This research was discussed with experts in London, Johannesburg, and Marrakesh. Seasoned project lawyers from major international law firms expressed surprise that some of their peers were still employing the more extreme stabilization provisions and that Governments were willing to sign them, while several developing country negotiators were unaware of alternatives.

34. When an investor brings a claim regarding a bilateral investment treaty or host Government agreement to binding international arbitration, depending on the rules incorporated into the agreements, little or nothing about the case may be made public. This is at variance with precepts of transparency and good governance. While confidential business information must be protected, under some rules not even the existence of a case against a country is known to its public, let alone its substance. This impedes more responsible contracting by companies and Governments, and contributes to inconsistent rulings by arbitrators, undermining the system's predictability and legitimacy.

35. Accordingly, the Special Representative was pleased that the United Nations Commission on International Trade Law (UNCITRAL), one of the sources of arbitration rules, invited his views at its forty-first session in 2008. He is encouraged by the Commission's conclusion that transparency is a desirable objective in investor-State arbitration and its decision to address this as a matter of priority.[36]

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[34] Ibid., p. 27.

[35] See "Stabilization Clauses and Human Rights", http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_LessonsLearned.

[36] A/63/17.

36. As a next step, the Special Representative is exploring the feasibility of developing guidance on "responsible contracting" for host Government agreements in relation to human rights. As in the aforementioned Norwegian commentary concerning bilateral investment treaties, such guidance would have to satisfy two equally important objectives, safeguarding the host State's ability to discharge its obligations, including those under international human rights law, and giving investors confidence that the host State will not act in a discriminatory or arbitrary manner or for non-bona fide purposes.

37. The Special Representative has not yet undertaken corresponding projects on trade. But he continues to consult experts extensively on whether and how the trade regime may constrain or facilitate the State duty to protect.[37]

C. International cooperation

38. The Human Rights Council asked the Special Representative to provide recommendations regarding "international cooperation" in relation to the State duty to protect. As he understands the term in the business and human rights context, this involves States working together through awareness-raising, capacity-building and joint problem-solving. Several factors currently limit the achievement of these aims.

39. First, States are not using existing forums as effectively as they could to enhance peer learning with respect to the State duty to protect in the business context. These forums include the treaty bodies, the Human Rights Council's Universal Periodic Review, National Contact Points under the OECD Guidelines, and regional human rights mechanisms. No serious intergovernmental dialogue on these issues is evident in international trade and financial institutions, with the exception of the IFC and OECD, in part reflecting the involvement of private sector actors.

40. The Special Representative continues his outreach efforts within and beyond the United Nations human rights mechanisms - to date, the treaty bodies and special procedures, regional human rights entities, national human rights commissions, the World Bank, UNCITRAL, OECD, the European Commission and Parliament, and national Governments. He welcomes additional opportunities.

41. Beyond dialogue and learning lies State capacity-building. But business and human rights is not high on the capacity-building agenda of most international and bilateral agencies. The ILO is a notable exception regarding labour rights, and some bilateral development agencies support CSR programmes in developing countries. OHCHR only within the past year has begun to consider including business and human rights in its capacity-building work at the country level, but this is not yet a priority.

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[37] The Committee on Economic, Social and Cultural Rights, for example, has expressed concern about the potential adverse impact of trade agreements on Covenant obligations (C.12/CRI/CO/4/CRP.1, para. 42).

42. The adverse consequences of this scarcity of support are demonstrated in the earlier example of developing country investment negotiators signing contracts that adversely affect their States' duty to protect, at least in part because of capacity shortfalls that also extend to other policy domains.

43. Finally, international cooperation involves joint problem-solving by States. Nowhere is this more desperately needed than in conflict situations. 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. It is therefore unsurprising that the most egregious corporate-related human rights abuses typically occur amidst conflict. The Special Representative has found that all stakeholders want greater guidance on how to prevent corporate-related abuse in conflict affected areas. Therefore, he is exploring the possibility of working with an informal group of home and host States to generate ideas about effective approaches and tools States could employ to help achieve that end.

D. Summing up

44. Governments are the most appropriate entities to make the difficult decisions required to reconcile different societal needs. Yet, as the Special Representative noted in his 2008 report, most Governments take a relatively narrow approach to managing the business and human rights agenda. Human rights concerns remain poorly integrated into other policy domains that directly shape business practices. Therefore, a major objective of the Special Representative's renewed mandate is to assist Governments in recognizing those connections and advancing the business and human rights agenda beyond its currently narrow confines.

IV. THE CORPORATE RESPONSIBILITY TO RESPECT

45. In paragraph 4 (b) of resolution 8/7, the Human Rights Council asked the Special Representative "to elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders". This section summarizes the responsibility to respect and addresses several issues requiring further elaboration.

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

47. By near-universal is meant two things. First, the corporate responsibility to respect is acknowledged by virtually every company and industry CSR initiative, endorsed by the world's largest business associations, affirmed in the Global Compact and its worldwide national networks, and enshrined in such soft law instruments as the ILO Tripartite Declaration and the OECD Guidelines. Second, violations of this social norm are routinely brought to public attention globally through mobilized local communities, networks of civil society, the media including blogs, complaints procedures such as the OECD NCPs, and if they involve alleged

violations of the law, then possibly through the courts. This transnational normative regime reaches not only Western multinationals, which have long experienced its effects, but also emerging economy companies operating abroad, and even large national firms.[38]

48. 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.

49. Company claims that they respect human rights are all well and good. But the Special Representative has asked whether companies have systems in place enabling them to demonstrate the claim with any degree of confidence. He has found that relatively few do. What is required is an ongoing process of human rights due diligence, whereby companies become aware of, prevent, and mitigate adverse human rights impacts. The four core elements of human rights due diligence were outlined in his 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.[39]

50. 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 takes place. This might include the country's human 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 neighbour, and 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.

51. Companies do not control some of these factors, but that is no reason to ignore them. Businesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them, such as changes in government policy, shifts in consumer preferences, and even weather patterns. Controllable or not, human rights challenges arising from the business context, its impacts and its relationships can pose material risks to the company and its stakeholders, and generate outright abuses that may be linked to the company in perception or reality. Therefore, they merit a similar level of due diligence as any other risk.

52. Finally, companies need to know the substantive content of this due diligence process, 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

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[38] A good indicator is the Business and Human Rights Resource Centre's website, which posts human rights allegations about business operations in more than 180 countries and gets 1.5 million hits per month. http://www.business-humanrights.org/.

[39] A/HRC/8/5, paras. 56-64.

a fool's errand because companies can affect the entire spectrum of rights, as documented in the Special Representative's mapping of nearly 400 public allegations against companies.[40] Therefore, the responsibility to respect must apply to all such rights, although in practice some may be more relevant than others in particular contexts.[41]

53. 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 ILO Declaration on Fundamental Principles and Rights at Work. 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.

54. 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 will be relevant.

55. The Special Representative is planning consultations to further operationalize the corporate responsibility to respect human rights and related due diligence requirements. He will also continue to seek greater conceptual clarity on two sets of issues that have emerged in stakeholder discussions, addressed briefly below.

A. Responsibility to respect

56. A number of issues and dilemmas have been raised regarding the corporate responsibility to respect.

Demystifying human rights

57. One issue concerns the conceptual difficulties that even companies committed to internalizing human rights have faced in mastering this subject. Part of the problem is that international human rights instruments were written by States, for States. Their meaning for businesses has not always been understood clearly by human rights experts, let alone the engineers, security managers, and supply chain officers in companies who have to deal with the corporate responsibility to respect on the ground. But considerable advances have been made recently. In particular, an OHCHR publication, "Human Rights Translated", does what the title promises, by translating State-based text into language and examples that make sense in a

[40] See A/HRC/8/5/Add.2 and E/CN.4/2006/97, paras. 24-30.

[41] Companies may support their baseline human rights responsibilities with collaborative initiatives focused on specific areas of rights particularly relevant to their business, such as the Voluntary Principles on Security and Human Rights and the Fair Labour Association.

business context.[42] Similarly, the Business Leaders Initiative on Human Rights has developed a matrix mapping elements of the International Bill of Human Rights onto various business functions, making it more accessible to company staff.[43] The Special Representative will continue to engage developers and users of such tools, aiming to achieve further clarity and consistency while maintaining the integrity of the underlying human rights standards.

58. Confusion has also existed because the first generation of advocacy in business and human rights, culminating in the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,[44] so co-mingled the respective responsibilities of States and companies that it was difficult if not impossible to disentangle the two. Unsurprisingly, this approach was rejected by Governments and business alike. Here, too, there has been good progress: the "protect, respect and remedy" framework now provides a common platform of differentiated yet complementary responsibilities on the basis of which to move forward.

Positive acts

59. Some stakeholders have queried whether the responsibility to respect is a mere analogue to a "negative duty". The answer should be clear from the foregoing: the responsibility to respect requires companies to undertake human rights due diligence to become aware of, prevent and address adverse human rights impacts. Moreover, for companies to know they are not infringing on others' rights requires mechanisms at the operational level, to which affected individuals and communities can bring grievances concerning company-related impacts and which companies may need to establish where none exist. By definition, these are positive acts.

60. There will be variations in the details of due diligence and grievance mechanisms depending on specific situations, and the Special Representative will continue to explore them. But the underlying principles should be observed irrespective of situational factors.

Beyond respect?

61. In addition to legal compliance, the responsibility to respect human rights is the baseline responsibility of all companies in all situations. But some stakeholders maintain that more should be required of companies, while many companies claim already to be doing more.

62. Clearly, companies may undertake additional commitments voluntarily or as a matter of philanthropy. Moreover, some have developed new business opportunities by offering goods and services more closely aligned with basic needs, as in bottom-of-the-pyramid strategies and other

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[42] A joint project of the Castan Centre for Human Rights Law at Monash University, International Business Leaders Forum, OHCHR, and Global Compact Office; http://www2.ohchr.org/english/issues/globalization/business/docs/Human_Rights_Translated_web.pdf.

[43] http://blihr.org/.

[44] E/CN.4/Sub.2/2003/12/Rev.2.

types of inclusive business models. These are worthy endeavours that may contribute to the enjoyment of human rights. But what it is desirable for companies to do should not be confused with what is required of them. Nor do such desirable activities offset a company's failure to do what is required, namely to respect human rights throughout its operations and relationships.

63. Operating conditions may impose additional requirements on companies, for example, the need to protect employees in conflict affected areas, or from violence in the workplace. But this is more appropriately considered a specific operationalization of the responsibility to respect, and not a separate responsibility altogether.

64. More than respect may be required when companies perform certain public functions. For example, the rights of prisoners do not diminish when prisons become privatized. Here, additional corporate responsibilities may arise as a result of the specific functions the company is performing. But it remains unclear what the full range of those responsibilities might be and how they relate to the State's ongoing obligation to ensure that the rights in question are not diminished.

65. Beyond such situations, the picture becomes even murkier. A number of additional factors have been proposed for attributing greater responsibilities to companies. They include power, influence, capacity, and the notion that companies are "organs of society". While such factors may impose certain moral obligations on any person or entity, including business, they are highly problematic bases for assigning responsibilities to companies beyond respecting all rights at all times, for reasons the Special Representative elaborated in previous reports.[45]

International standards and national law

66. One of the toughest dilemmas companies face is where national law significantly contradicts and does not offer the same level of protection as international human rights standards. National authorities may demand compliance with the law, while other stakeholders may advocate adherence to international standards, as might the company itself, for reasons of principle or simple consistency of policy.

67. Where the country is under United Nations sanctions, or where the possibility exists of the company becoming complicit in international crimes committed by others, a company's own due diligence should generate warning signs or even flashing red lights. But the majority of cases do not fall into these categories, leaving companies caught in the middle unless they find ways to honour the spirit of international standards without violating national law.

68. Companies have grappled with this dilemma in relation to freedom of association. Some have encouraged workers to form their own representation within the company and facilitated elections of workers' representatives. Efforts have also been made to provide education on labour rights and train local management on how to respond constructively to worker grievances.

[45] See E/CN.4/2006/97, paras. 66-68, and A/HRC/8/5, paras. 65-72.

Companies have faced similar dilemmas in relation to gender equality, and most recently freedom of expression and the right to privacy in the Internet and telecommunications sectors, where the Global Network Initiative was recently formed to help guide companies.[46]

69. In sum, while there is now considerably greater shared understanding of many issues regarding the corporate responsibility to respect than there was only a year or two ago, for others further clarification is required and will be pursued in consultations.

B. Due diligence

70. A number of issues regarding human rights due diligence have emerged in stakeholder discussions; four are addressed here.

Life cycle

71. Due diligence is commonly defined as "diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation".[47] Some have viewed this in strictly transactional terms - what an investor or buyer does to assess a target asset or venture. The Special Representative uses this term in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.

Business role and size

72. The principles of human rights due diligence and its core elements should be internalized by all businesses, regardless of their nature or size. But the specific activities that companies must undertake to discharge this responsibility will vary in ways not yet fully understood.

73. For example, a bank's human rights due diligence for a project loan will differ in some respects from that of the company operating the project. Nevertheless, banks do have human rights due diligence requirements in this context, and human rights risks related to the projects are also risks to the banks' liability, returns and reputation. Beyond banks lies an even more complex array of other lenders, investors, and asset managers. Precisely how their respective due diligence differs requires further clarity.

74. Similarly, small- and medium-sized enterprises must consider their human rights impacts. But the scale and complexity of their due diligence can hardly mirror that of large transnational corporations.

75. Supply chains pose their own issues. It is often overlooked that suppliers are also companies, subject to the same responsibility to respect human rights as any other business. The challenge for buyers is to ensure they are not complicit in violations by their suppliers. How far

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[46] http://www.globalnetworkinitiative.org/.

[47] *Black's Law Dictionary*, 8th edition (2006).

down the supply chain a buyer's responsibility extends depends on what a proper due diligence process reveals about prevailing country and sector conditions, and about potential business partners and their sourcing practices. A growing number of global buyers are finding it necessary to engage in human rights capacity-building with suppliers in order to sustain the relationship.

76. The Special Representative will continue to explore how human rights due diligence might legitimately vary across businesses of different roles and sizes, as he provides a principled elaboration of human rights due diligence applicable to all businesses.

Free-standing?

77. Debate continues on how best to integrate human rights policies throughout a company. Some believe that human rights should be folded into existing due diligence processes, while others believe that human rights due diligence needs to be free-standing.

78. An advantage cited for free-standing procedures is that the relevant issues get the attention and professionalization they deserve. But a disadvantage may be that it is not connected to the rest of the company. In contrast, folding human rights due diligence into ongoing processes may put human rights on par with other key issues when managers evaluate potential projects, but the unique attributes of human rights may thereby get diminished.

79. A single model is unlikely to fit all situations. But two principles seem critical. First, companies must recognize that human rights are not merely another topic, but that it demands meaningful engagement with affected parties within and beyond the company. Second, oversight of compliance with a company's human rights policy must have its own direct line of access to corporate leadership. The Special Representative will draw on lessons from practical experience to inform further conceptual refinement of this issue.

Liability

80. Another question that has been raised, including by some corporate general counsel, is whether following these human rights due diligence requirements could increase the potential liability for firms by providing external parties with information they would not otherwise have had to use against the company.

81. This view seems to be more widespread in the United States than elsewhere, perhaps reflecting a more litigious tradition. But the case for it is not self-evident, even in the United States context. Under a variety of corporate governance regulations, companies are required to assess, manage and disclose material risks - as well as to evaluate the effectiveness of their systems for doing so - in order to avoid liability. As we have seen, involvement in human rights violations can be a material risk. Moreover, not knowing is itself a risk, and an unreliable defence. Beyond the legal sphere lie the value of reputation and the cost of operational disruptions. On sheer prudential grounds, therefore, a leading Wall Street law firm concluded

that the due diligence process elaborated by the Special Representative "encourages robust risk assessment that is … highly advisable from a business perspective in today's highly visible and transparent environment".[48]

82. There are two scenarios under which legal liability could flow from human rights due diligence, but the decisive factor in both is how the company responds to new information. In the first, the company gains knowledge of possible human rights violations it may commit or be involved in, does nothing to act on it, the violations occur, and word of the company's prior knowledge gets out. In the second, the company publicly misrepresents what it finds in its due diligence and that fact becomes known. But the point of human rights due diligence is to learn about risks that the company would then take action to mitigate, and not to ignore or misrepresent the findings.

83. Some have claimed that the more information there is in the public domain about a company's potential human rights impacts, the more fodder there might be for vexatious legal claims or public campaigns. But done properly, human rights due diligence should precisely create opportunities to mitigate risks and engage meaningfully with stakeholders so that disingenuous lawsuits will find little support beyond the individuals who file them. Moreover, recent experience shows that other social actors are quite capable of concluding and stating publicly that a company facing criticism has undertaken good faith efforts to avoid human rights harm, and that transparency in acknowledging inadvertent problems can work in its favour.[49]

84. The mandate's ongoing work, including the corporate law project, should shed further light on this question, and on what policy changes by States could ensure that companies are incentivized to undertake human rights due diligence.

C. Summing up

85. 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 responsibility to respect is not intended to carry the entire burden of the business and human rights agenda: it is bracketed by the State duty to protect on one side, and access to effective remedy on the other. We now turn to the latter.

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[48] Memorandum from Weil, Gotshal and Manges LLP, http://www.reports-and-materials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf, p. 5.

[49] The reaction to news reports in 2007 about child labour in a GAP supplier factory illustrates this point. NGOs were nuanced in their response, and Mary Robinson, former High Commissioner for Human Rights, noted GAP's transparency, swift response, and active participation in multi-stakeholder initiatives, and called the story "a two-day wonder". *The Economist*, 19 January 2008.

V. ACCESS TO REMEDY

86. 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. This section is divided into four parts. The first seeks to clarify ambiguities concerning States' obligations in this area. The second addresses the relationship between judicial and non-judicial mechanisms. The third and fourth parts describe the Special Representative's current work and thinking on judicial and non-judicial mechanisms.

A. State obligations

87. 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. Without such steps, the duty could be rendered weak or even meaningless. Remedy may be provided through judicial, administrative, legislative or other appropriate means. States may also be required to provide adequate reparation, including compensation, to victims.[50]

88. 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 United Nations 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 (General Assembly resolution 60/147, annex), "irrespective of who may ultimately be the bearer of responsibility for the violation".[51]

89. Some international and regional human rights bodies have addressed what States are expected to do in providing access to remedy for corporate-related abuse. For example, they have emphasized establishing effective complaints mechanisms for employment-related grievances; minimizing the potential for extractive companies to impair the ability of communities affected by their operations, especially indigenous peoples, to access remedial mechanisms; and ensuring that effective remedial processes exist for abuses by private companies carrying out "State functions". However, guidance continues to vary as to: whether States are expected to punish corporate entities directly, apart from individuals acting on their behalf; when States are expected to provide individuals with civil causes of action regarding corporate-related abuse; and whether and to what extent States should hold corporations accountable for alleged rights abuses overseas.

90. These complex issues are further elaborated in the addendum to this report.

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[50] 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.

[51] Principle 3 (c).

B. Interplay between judicial and non-judicial mechanisms

91. Judicial and non-judicial mechanisms sometimes are thought of as mutually exclusive, and in some circumstances, they may be. For instance, grievances that raise issues of criminal law in particular may necessitate judicial recourse. But typically the two mechanisms are more interactive, and may be complementary, reinforcing, sequential or preventive, as illustrated below:

(a) Non-judicial mechanisms often can be engaged earlier and faster than judicial processes, as well as in situations where a dispute does not amount to a legal cause of action;

(b) The prospect of litigation often incentivizes parties to reach a negotiated or mediated solution;

(c) Mechanisms at the national or international levels may offer alternatives where local courts or mediated processes fail, or are inadequate or absent;

(d) Mechanisms at the company level form an essential part of early warning and risk management to identify, mitigate and resolve grievances before they escalate and possibly entail extensive abuses and lawsuits.

92. Each type of mechanism has inherent advantages and disadvantages[52]. If effective remedies for business-related human rights abuses are to be improved, a range of options is required from which complainants can choose according to their needs and situations. Progress from the current patchwork to a more complete and deliberate system will require improvements in access to, and the effectiveness of, existing mechanisms; and new mechanisms where no effective ones are currently in prospect.

C. Judicial mechanisms

93. 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. However, significant barriers to accessing effective judicial remedy persist.[53] Most are well known, are not unique to business and human rights, and are the subject of ongoing capacity-building work by States in partnership with international institutions. The Special Representative's work focuses specifically on barriers that are particularly salient for victims of corporate-related human rights abuses.

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[52] See "Non-Judicial and Judicial Grievance Mechanisms for addressing disputes between business and society", prepared for the Special Representative's consultation on grievance mechanisms: www.business-humanrights.org/Documents/Non-judicial-and-judicial-mechanisms-Mar-2009.doc.

[53] 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.

94. With regard to civil claims, a complainant may not be able to obtain an effective remedy from a company through a host State's national courts because of a range of legal and practical impediments. There may be no available course of action. The courts may lack the capacity to handle complex claims. Costs are frequently prohibitive: even filing a case may be too expensive for poor individuals and communities, and cost allocation provisions like the "loser pays" may preclude many more claimants from bringing a case. In the event of a favourable judgement enforcement may be difficult, especially if the company lacks sufficient assets.

95. Where the company is a subsidiary of an overseas parent, additional factors can compound these barriers. The parent company may use its own leverage with the host Government or mobilize the home Government and international financial institutions. The alternative of filing a suit in the parent company's home State for the subsidiary's actions, or for the parent's own acts or omissions, can raise jurisdictional questions about whether it is the appropriate forum, and may trigger policy objections by both home and host State Governments. Moreover, the standards expected of parent companies with regard to subsidiaries may be unclear or untested in national law. Such transnational claims also raise their own evidentiary, representational, and financial difficulties.

96. As regards criminal proceedings, even where a legal basis exists, if State authorities are unwilling or unable to dedicate the resources to pursue allegations, currently there may be little that victims can do.

97. Legal and practical access barriers are often accentuated for "at risk" or vulnerable groups, whether companies are national or transnational. Such groups may include women, children and indigenous peoples, as well as those marginalized for other reasons in their interactions with companies.[54] Governments have a critical role - and in some cases, a duty - to raise awareness of the risks facing these individuals and communities, and to ensure that their rights are adequately protected, including by providing access to remedy.

98. The Special Representative will continue research and consultations on barriers to judicial remedy, as well as possible options to address them.

D. Non-judicial mechanisms

99. In his 2008 report, the Special Representative presented a set of grievance mechanism principles. Six should underpin all non-judicial grievance mechanisms: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency.[55] As a seventh principle specifically for company-level mechanisms, he stressed that they should operate through dialogue and mediation rather than the company itself acting as adjudicator. The remainder of this section looks at mechanisms at company, national and international levels.

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[54] The Lowenstein International Human Rights Law Clinic at Yale University is conducting research for the Special Representative on the challenges confronting artisanal miners in engaging with large-scale mining companies and in accessing effective remedy.

[55] A/HRC/8/5, para. 92.

Company level

100. Effective grievance mechanisms are an important part of the corporate responsibility to respect. They complement monitoring or auditing for human rights compliance. They also provide an ongoing channel through which the company gains early warning of problems and disputes and can seek to avoid escalation; many of now emblematic cases of corporate-related human rights abuse started out as far lesser grievances. Moreover, by tracking complaints, companies can identify systemic problems and adapt practices to prevent future harm and disputes.

101. The scale and complexity of dedicated mechanisms will depend on the extent of the companies' likely impacts. They need not be cumbersome to be effective and they may be partially outsourced or shared with other operations or companies, provided the grievance mechanism principles are met. An increasing number of companies, business associations and business-related organizations are developing grievance mechanisms or related guidance. The Special Representative welcomes the decision by the ICC, IOE and BIAC to pilot these principles with companies in different sectors, and hopes this will generate broader lessons.[56]

National level

102. National human rights institutions (NHRIs) and the NCPs of States adhering to the OECD Guidelines are potentially important avenues for remedy at the national level. In 2008, the Special Representative contributed to various meetings of national human rights institutions and addressed the annual meeting of NCPs.

103. While the mandates of some NHRIs may currently preclude them from work on business and human rights, for many it has been a question of choice, tradition or capacity. The Special Representative hopes that more NHRIs will reflect on ways they can address alleged human rights abuses involving business. He welcomes the decision of the International Coordinating Committee of NHRIs to establish a working group on business and human rights and looks forward to continued cooperation.

104. NCPs stress the need for operational flexibility that reflects national circumstances. But to ensure the credibility of the system as a whole, this ought to be delimited by minimum performance criteria in line with those set out by the Special Representative. Several NCPs, notably in the United Kingdom and Netherlands, have developed innovative governance structures, transparency measures and mediation capacity that merit attention. Moreover, Governments should consider ways to give more weight to NCP findings against companies. For example, since Governments are obliged to promote the OECD Guidelines under which NCPs operate, a negative finding logically might affect the company's access to government procurement and guarantees.

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[56] http://www.reports-and-materials.org/Joint-views-of-IOE-ICC-BIAC-to-Ruggie-Mar-2009.pdf.

105. Other bodies can also play important roles in providing remedy at the national level. Some may be issue-specific, for example focused on non-discrimination or labour rights. Others may be sector-specific, such as for example, the banking and telecommunications industry ombudsman systems in Australia. The Special Representative continues to explore promising models.

International level

106. A number of voluntary industry codes, multi-stakeholder initiatives and investor-led standards have established grievance mechanisms, and the above principles now provide a basis for assessing whether they meet the minimum criteria. But many initiatives lack grievance procedures, and there is evidence that this erodes their perceived legitimacy. The logical implication is for them to adopt such mechanisms.

107. A major barrier to victims' accessing available mechanisms, from the company or industry to the national and international levels, is the sheer lack of information available about them. This information deficit also makes it difficult to improve such mechanisms and to learn from past disputes and to avoid their replication.

108. With these barriers in mind, the Special Representative has launched a global wiki: Business and Society Exploring Solutions-A Dispute Resolution Community.[57] BASESwiki (www.baseswiki.org) is an interactive online 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, Spanish, Chinese and Russian portals; Arabic is under development. The Special Representative urges all stakeholders - business, NGOs, Governments, mediators, lawyers, academics and others - to help develop this important resource and to assist in bringing its benefits to those without internet access.

109. Various stakeholders have pressed for a new international institution to improve access to non-judicial remedy. Proposals include a clearing house to direct those with disputes towards mechanisms that might offer remedy; a capacity-building entity to help disputing parties use those mechanisms effectively; an expert body to aggregate and analyse outcomes, enabling more systemic learning and dispute prevention; and a grievance mechanism for when local or national mechanisms fail or are inadequate.

110. The first three suggestions hold promise of practical, achievable benefits, if done appropriately. Developing global information and resource platforms such as BASESwiki is an essential precursor to any of these roles.

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

111. The proposition of creating a single, mandatory, non-judicial but adjudicative mechanism at the international level inevitably poses greater difficulty. In handling complex disputes that involve diverse and economically unequal parties in remote locations, processes based solely on written submissions are unlikely to meet basic standards of fairness and rigor. The demands of appropriate investigations and/or hearings are likely to raise significant evidentiary, practical, financial and political challenges, while offering only limited prospects of remedies that are timely, enforceable and extend beyond a few complaints a year.

112. An alternative option would be to look to an existing body or network with international standing that could offer mediation of disputes involving human rights issues. If it had capacity to enable mediated processes in the locations where disputes arise, this could avoid many of the challenges noted above. At the same time, the mediation process would have to reflect the grievance mechanism principles set out by the Special Representative. Complainants might need advice and support to engage as equal participants in the process, and a funding model would be needed to avoid their facing prohibitive costs.

113. Arbitration by such entities might also be an option. In particular, companies operating in conflict affected areas should have a strong incentive to agree ex ante to use such mediation/arbitration bodies in the event of disputes with communities, and their investors and States should have a strong interest in seeing them do so. Arbitration would be subject to the same caveats as above, and should not preclude judicial recourse.

114. The Special Representative continues to explore options for institutional innovations where they hold promise of quantitative and qualitative improvements in access to effective remedy, with a view to future recommendations.

E. Summing up

115. Grievance mechanisms, judicial and non-judicial, form part of both the State duty to protect and the corporate responsibility to respect. They are essential to ensuring access to remedy for victims of corporate abuse. For States, they are also means of enforcing or incentivizing corporate compliance with relevant law and standards, and of deterring abuse. For companies, operational-level mechanisms have the added benefit of giving early warning of problems and helping mitigate or resolve them before abuses occur or disputes compound. But too many barriers exist to accessing judicial remedy, and too few non-judicial mechanisms meet the minimum principles of effectiveness. Further improvements, shared learning, and innovations are required.

VI. CONCLUSION

116. **The Special Representative is honoured and humbled by the task the Human Rights Council has set for him of operationalizing the "protect, respect and remedy" framework so as to provide concrete guidance for all relevant actors.**

117. **In the face of what may be the worst worldwide economic downturn in a century, however, some may be inclined to ask: with so many unprecedented challenges, is this the appropriate time to be addressing business and human rights? This report answers with a resounding "yes". It does so based on three grounds.**

118. **First, human rights are most at risk in times of crisis, and economic crises pose a particular risk to economic and social rights. Now more than ever, therefore, the business and human rights agenda matters. Any gains Governments believe can be had by lowering human rights standards for business are illusory, and no sustainable recovery can be built on so flimsy a foundation. Companies must weigh any corresponding temptations against the impact of declining public confidence in business, growing populism and an impending epochal shift in regulatory environments.**

119. **Second, it was noted earlier that the same types of governance gaps and failures that produced the current economic crisis also constitute what the Special Representative has called the permissive environment for corporate wrongdoing in relation to human rights. The necessary solutions for both similarly point in the same direction: Governments adopting policies that induce greater corporate responsibility, and companies adopting strategies reflecting the now inescapable fact that their own long-term prospects are tightly coupled with the well-being of society as a whole. Strengthening the international human rights regime against corporate-related abuse thereby contributes to, and gains from, the universally desired transition toward a more inclusive and sustainable world economy. Values are becoming a value proposition.**

120. **Third, the "protect, respect and remedy" framework identifies specific ways to achieve these objectives. For Governments, the key is to drive the business and human rights agenda more deeply into policy domains that directly shape business practices. For companies, the key is to become more fully aware of and responsive to their infringements on the rights of others. Access to effective remedy, judicial and non-judicial, is an essential component enabling individuals and communities to vindicate their rights - the very purpose of the human rights regime. More prosaically, it also serves as a signalling device, a feedback loop, alerting Governments, business and society as a whole when all is not well, while providing opportunities for early intervention and resolution before greater harm occurs.**

121. **In short, business and human rights is not an ephemeral issue to be considered at some future date. It is and must remain at the core of our common concerns today.**
