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Thank you for inviting me to participate in this important hearing. As a political scientist whose academic work has focused on how institutions of governance evolve over time, it is always a special privilege for me to visit the EU.

You invited me in my capacity as the Special Representative of the United Nations Secretary-General for business and human rights. This morning, I propose to summarize where my UN work stands and then address briefly a policy conundrum I have encountered along the way with which the EU has also grappled. Perhaps we can work to resolve it together.

Mandate Update

At its June 2008 session, the United Nations Human Rights Council unanimously “welcomed” a policy framework for business and human rights that I proposed. This marked the first time the Council or its predecessor, the Commission, had taken an actual policy position on this subject. The Council also extended my mandate until 2011, with the task of “operationalizing” the framework – providing “practical recommendations” and “concrete guidance” to states, businesses and other social actors on its implementation.

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 for victims to effective remedy, judicial and non-judicial.

The state duty to protect is grounded in international human rights law. States have long known what is required of them in relation to abuse by state agents. And most states have adopted measures and established institutions in certain core areas of business and human rights, such as labor standards and workplace non-discrimination. But beyond that, the business and human rights domain exhibits considerable legal and policy incoherence, as elaborated in my 2008 Report to the Human Rights Council.

There is “vertical” incoherence, where governments sign on to human rights obligations but then fail to adopt policies, laws, and processes to implement them. Even more widespread is “horizontal” incoherence, where economic or business-focused departments and agencies that directly shape business practices – including trade, investment, export credit and insurance, corporate law and securities regulation – conduct their work in isolation from, and largely uninformed by, their government’s human rights agencies and obligations. Domestic policy incoherence inevitably is reproduced at the international level.

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

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

The framework’s second pillar is the corporate responsibility to respect human rights. Companies know they must comply with all applicable laws to obtain and sustain their legal license to operate.

However, over time companies have found that legal compliance alone may not ensure their social license to operate, particularly where the law is weak. The social license to operate is based in prevailing social norms that can be as important to a business' success as legal norms. Of course, social norms may vary by region and industry. But one has acquired near-universal recognition by all stakeholders, including business: the corporate responsibility to respect human rights – or, put simply, to not infringe on the rights of others. The responsibility to respect is the baseline norm for all companies in all situations.

Company claims that they respect human rights are all well and good, but do they have systems in place enabling them to demonstrate the claim with any degree of confidence? In fact, relatively few do. What is required, therefore, is an ongoing **human rights due diligence** process, whereby companies become aware of, prevent, and mitigate adverse human rights impacts.

I outlined four core elements of human rights due diligence in my 2008 Report: having a human rights policy, assessing human rights impacts of company activities, integrating those values and findings into corporate cultures and management systems, and tracking as well as reporting performance. Because companies can affect the entire spectrum of internationally recognized rights, as I have documented, the responsibility to respect must apply to all such rights, although in practice some are likely to be more relevant in particular contexts.

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. Without access to remedy, the rights of victims would be rendered weak or even meaningless. For states, remedy is a means of enforcing and incentivizing corporate compliance with relevant law and standards, and of deterring abuse. For companies, operational-level grievance mechanisms provide early warning of problems and help mitigate or resolve them before abuses occur or disputes compound and escalate.

Significant barriers to accessing effective judicial remedy persist. My mandate is focused specifically on identifying barriers that are particularly salient for victims of corporate-related human rights abuses, and on strategies to reduce those barriers.

Non-judicial mechanisms play an important role alongside judicial processes. They may be particularly useful in a country where courts are unable, for whatever reason, to provide adequate and effective access to remedy. Yet they are also important in societies with well-functioning rule of law institutions, where they may provide more immediate, accessible, affordable, and adaptable points of initial recourse. The mandate's focus is on how to strengthen existing mechanisms, and identifying where new ones might be required.

A major obstacle to victims' accessing non-judicial mechanisms, from the company or industry level on up to national and international levels, is the lack of information available about them. To reduce these barriers, I recently launched a global wiki. It is called Business and Society Exploring Solutions – A Dispute Resolution Community (www.baseswiki.org). Available in all UN official languages, it is an interactive, on-line forum for sharing, accessing and discussing information about non-judicial mechanisms that address disputes between companies and their external stakeholders.

This, in broad strokes, is the framework I have been asked to operationalize, and the strategic directions in which we are headed. Even before further operationalization, the framework has enjoyed considerable uptake by governments, businesses, international organizations, and NGOs – including by several EU member states.

Mandatory vs. Voluntary

There is no single silver bullet solution to the challenge of reducing the incidence of business-related human rights harm, and punishing those who violate legal and social norms. Instead, all the

major actors – states, business, and civil society – must learn to do many things differently. Before closing, I want to address one of those things: it concerns the mandatory vs. voluntary debate.

The debate as a whole is so stale as not to warrant much further discussion. But I want to draw attention to one element that has not been adequately aired, because it poses an impediment to progress.

We can all agree that some mix of mandatory and voluntary measures is required. But governments and other governance institutions do not always fully appreciate the roles they must play even when they promote strictly voluntary means. Some draw the inference that *any* further step by them would contravene the principle of voluntarism and transgress into the mandatory realm. But this is a fallacy, and it can lead to unintended and undesirable consequences for business and human rights. Consider three scenarios of how this might happen in the context of corporate social responsibility policies adopted by states and other public bodies.

Public Objectives, Private Means

The first concerns blurring the distinction between policy objectives and the means of pursuing them. Not wishing to single out anyone in particular, let me illustrate my point by constructing a hypothetical argument around a widely used EU definition of CSR: “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”

Let’s assume that some hypothetical public body acts on this definition, by adopting a policy encouraging companies to engage in CSR. The avowed policy *objective* at stake is for companies to integrate social and environmental concerns, reflecting the need for them to respect applicable norms, including human rights. The preferred *means* are voluntary. Of course, critics of voluntary approaches may question whether such means are capable of achieving the objective. But leave that aside and, for the sake of the

argument accept that they could. You still would be confronted with a serious problem: every company has to decide for itself which social and environmental “concerns” are of most concern, and what the verb “integrate” means. As companies go about making these decisions without further guidance, the policy *objective* in effect begins to slide into the voluntary realm as well.

Surely this outcome is not intended. But it is the inevitable result of reifying the distinction between mandatory and voluntary measures. Even within the realm of voluntary approaches, public authorities have roles that are essential to making voluntarism work.

Forgive the political science terminology, but the minimum requirement for public policy of any kind is that it serves as a focal point around which the expectations of relevant social actors can converge. In the case of public policies promoting voluntary CSR, this role might include indicating what outcomes are intended, fostering common understandings of what key concepts mean and entail, supporting the social vetting of company practices before they are granted the accolade “best practice,” and helping to disseminate those standards.

The thoroughly voluntary Global Compact performs some of these roles at the international level, and there are good examples at national levels in the EU. But not all CSR policies meet the minimum requirement of constituting a policy in this sense – typically out of fear of moving beyond voluntarism. And so, a reified conception of what constitutes voluntary measures indeed can lead to policy outcomes that move beyond the voluntary sphere – but in this instance, ironically in the direction of *laissez-faire!* That won’t help us solve business and human rights challenges.

Conflict Affected Areas

In a second scenario, fear of transgressing into the mandatory realm can actually lead public authorities to increase the risks companies face. Consider the case of firms operating in conflict

affected areas. Many of them would welcome affirmative assistance and guidance from home states or international entities on how to avoid getting drawn into local conflicts or become involved in the human rights abuses that are so common in conflict zones. Company-based or even multistakeholder initiatives can take them only so far. The OECD has developed a generic risk-assessment tool for companies operating in weak governance zones, but what companies need is real-time information and advice.

There are also strong policy reasons for home states – or groups of home states – to provide assistance to their companies in such situations. Doing so gets home states out of the untenable position of being associated with possible overseas corporate abuse: for example, if the venture involves official export credit or investment insurance. And it can provide much-needed support to host states that lack the capacity to implement fully an effective regulatory environment on their own.

But many states and other public authorities are reluctant to go there because of a misconception that companies invariably prefer state inaction to action, even where they are facing such difficult and often politically charged situations.

International Standards and National Law

My final scenario is the all-too-real dilemma that companies face in countries where national law significantly contradicts and does not offer the same level of protection as international human rights standards. Companies have struggled with this dilemma in relation to freedom of association, gender equality, and most recently freedom of expression and the right to privacy in the internet and telecommunications sectors.

Clearly, business cannot resolve this dilemma on its own. Competitive dynamics being what they are, progress requires collective action and collective action by companies, in turn, can be encouraged and facilitated by states and other public authorities. But

many of those authorities treat this challenge as though it were radioactive, leaving companies to fend for themselves.

Conclusion

Let me conclude with two observations. First, the international community is still in the early phases of adapting the international human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm. But one thing is clear even at this stage: business as usual isn't good enough for anybody, including business itself. That includes perpetuating reified conceptions of voluntary and mandatory means, thereby impeding innovative solutions.

Second, the “protect, respect and remedy” framework endorsed by the Human Rights Council now provides a common platform of differentiated yet complementary duties of states and responsibilities of business on the basis of which we can advance the business and human rights agenda. Of course, we will succeed only if the relevant actors – including states and organizations of states – act to make it happen.

I am deeply appreciative of the strong support my mandate has received from a number of countries in the EU. And I look forward to continuing to work with this historic Union as a whole to achieve our common aim.

Thank you.