

***Protect, Respect and Remedy: A Discussion of John Ruggie's  
Business & Human Rights Framework – Strategies for Moving Forward***

**Friday May 23<sup>rd</sup> 2008, London**

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This report provides a summary of key issues discussed, and next steps identified, at the meeting “*Protect, Respect and Remedy: A Discussion of John Ruggie's Business & Human Rights Framework – Strategies for Moving Forward*” held on 23<sup>rd</sup> May 2008 at the Institute of Directors in London.<sup>1</sup>

Chatham House Rules applied to all discussions.

### **I. Background**

Situations where host governments are either unable or unwilling to assume their responsibilities are especially important to consider within the human rights and business debate (“the Debate”). Often these are places where protections against human rights violations are weak and widespread repression and violence occurs (aka volatile areas). In this environment, companies face a greater risk of committing or exacerbating human rights violations.

In June 2008, John Ruggie, the UN Special Representative for Business and Human Rights, presented his report “*Protect, Respect and Remedy: a Framework for Business and Human Rights*” to the UN Human Rights Council (HRC) for endorsement.<sup>2</sup> The report puts forward a conceptual and policy framework intended to anchor the business and human rights agenda and guide relevant actors in moving forward (“Framework”). The Framework consists of three pillars for action:

1. State duty to protect against human rights abuses by third parties (“Pillar 1”);
2. Corporate duty to respect human rights (“Pillar 2”); and
3. Access to effective remedies (“Pillar 3”).

A UN resolution has been finalized extending the human rights and business mandate for an additional three years. The resolution endorses the Framework and provides guidance for moving it into practice.

### **II. Objectives**

The overall objective of the meeting was to identify ways of minimizing human rights abuses caused by companies operating in volatile areas.

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<sup>1</sup> Please note that this summary is not intended to provide a comprehensive account of all discussions.

<sup>2</sup> The report was submitted to the UN Human Rights Council on 7 April 2008 and can be accessed at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A-HRC-8-5.doc>

Specific objectives included:

- i) Assessing the Framework and each of its three pillars;
- ii) Canvassing institutional, regulatory and policy approaches for minimizing business related human rights abuses occurring in volatile areas; and
- iii) Prioritising strategies to pursue over the next 12-months.

### **III. Process**

The meeting started with an overview of the topic followed by a question and answer session. This was then followed by two panel discussions, each with three speakers, and concluded with an open roundtable discussion.

The meeting brought together up to 30 representatives from industry, non governmental organisations (NGOs), academia, government and the legal sector. Participants were invited based on their expertise and involvement in working with business and human rights issues. The Participants List is attached as Annex "A."

### **IV. Conclusions**

Overall, participants proposed a number of actions that compliment the Framework whilst working both inside and outside of its parameters. All actors were seen to have a meaningful role to play in improving human rights and business, particularly Home States (*i.e.* countries where companies are domiciled or registered), companies, civil society and international organisations when it comes to volatile areas.

Other conclusions that can be drawn from the discussion include:

- The Framework was generally accepted as a focus point for anchoring discussions and moving the Debate forward. Participants identified strengths and weaknesses with respect to the three pillars – there was some disagreement over aspects of Pillar 3. A number of participants expressed the view that regulatory aspects required more attention, and that greater action at the international level and among international actors was required. Discussion also highlighted the need to have increased involvement of state-owned companies, national companies and non-OECD countries, namely China and India, in the Debate.
- With respect to Pillar 1, most participants appeared to envision Home States as able to play both a regulatory and policy role in minimizing corporate related human rights abuse in volatile areas. However, as referenced, other than a handful of leading countries, Home States are currently playing little or no role at all. We need to start by identifying the criteria to enable Home States to play an effective regulatory role. The baseline could be areas with violence, prevailing human rights abuses with no accountability, and mal-intended companies that act as "bottom feeders". Legal entry points both within and outside traditional Human Rights Law at national, regional and international levels should be utilised.
- With respect to Pillar 2, the 'due diligence' aspects presented in the report were seen as useful. Other specific strengths identified were: an articulation of the '*do no harm*' principle, (instances where a company cannot off-set

human rights abuses with philanthropy), business complicity (instances where a company facilitates, aids or abets another to commit human rights abuses) and constructive knowledge (instances where a company should have known that it was causing or contributing to human rights abuses). The participants suggested that there is a greater need to expose issues of wilful ignorance and intentional neglect by business of human rights violations. The *Red Flags*, a publication which lists nine liability risks for companies, was presented as a tool for business due diligence.

- Disagreement was expressed regarding the approach used in Pillar 3 for providing remedies and justice to victims. The concern expressed was that the Framework insufficiently focused on the victims' right to seek judicial redress for the wrongdoing. Participants stated that some type of regulatory regime at the international level, such as an international expert body on human rights, is required. Many participants vocalised that hard law is needed. Again, it was put forward that legal avenues outside of the human rights field need to be explored as there may be hard law remedies available. Focusing on improving corporate compliance via a regulatory route was identified as a good starting point for improving corporate accountability – if the company fails, then it should pay the penalty.

## V. Discussions Summary

### a) Introduction Session

This session identified the objectives of the meeting. An overview was provided of the Framework and each of the three pillars. The intention of the Framework was stated to create common reference points for moving the Debate forward into practice as previously the discourse has been fragmented.

In setting the stage for the meeting, overall comments were made with respect to the three pillars:

#### Pillar 1

- Home States have been interpreting their role narrowly when it comes to minimizing corporate human rights abuses caused by their companies extra-territorially *i.e.* outside their boundaries. Focusing on conflict zones (used interchangeably as “volatile areas”) would be a good way to advance discussions. This could include getting together like-minded states to do innovative thinking on what states should do in this specific context. In generating a ‘human rights and business in volatile areas’ policy, it was stressed that Home States should ensure the integration the policy throughout government divisions and not merely set up a Human Rights Office.
- Sweden and Denmark were put forward as leading countries and ones that currently provide advice to companies on conducting human rights assessments.
- From the Home States perspective, the *Red Flags* document could be used as starting point for advising companies of unacceptable activities that may attract legal liability.
- An odd disconnect between Home state provision of public finance through Export Credit Agencies (ECAs) and official development assistance agencies was identified. One priority area could be for Home States to provide training

to security forces used by companies or to use overseas development agencies to help build capacity so local people can respond to tensions that arise from large corporate projects.

- Home States should consider circumstances under which they can provide easier access to their courts for plaintiffs from host countries. The Democratic Republic of Congo (DRC) was proposed as a pilot study due to a HRC resolution in March which invited the government of the DRC to consider a number of special procedures.

## **Pillar 2**

- The objective of Pillar 2 was stated to identify the basic points of the corporate due diligence processes. Pillar 2 concerns the space beyond legal compliance and where social expectations exist (social licence to operate). It was put forward that the duty to respect human rights must become a core commitment and be promulgated throughout any company. In moving forward, business needs to put systems in place which can show that human rights are being respected. Apart from a few industry leaders, it was recognised that most companies do not appear to have human rights awareness/detection systems in place.

## **Pillar 3**

- Both judicial and non-judicial remedies which can provide access to justice for affected persons were suggested. Non-judicial remedies could include: alternative dispute resolution strategies, the OECD Guidelines, Equator Principles, etc.

### **b) Panel 1 - Assessment of the three pillars**

The objective of this panel was to provide an assessment of the three pillars as they relate to circumstances where the host state is unable or unwilling to assume its responsibilities. Speakers represented a cross-section of business, government and civil society perspectives. The analysis was intended to consider real examples such as extractives and corporate payments to security forces. Participants were asked to consider what constitutes good practice and where weaknesses in the Framework were seen to exist for which complimentary action could be undertaken.

#### Participants' comments regarding Pillar 1 and the Home States duty to protect in volatile areas included:

- A priority should be to distil what the duty to protect means in practical terms. Areas for developing this duty were stated to include:
  1. Focusing on government services to companies (e.g. ECAs) since there is a duty for states to not be complicit in HR violations;
  2. Using the above mentioned government obligation to take responsibility for national companies that commit serious international crimes;
  3. Improving the use of 'universal jurisdiction';
  4. Improving the national enforcement of UN Security Council sanctions; and
  5. Evaluating the Home States use of domestic criminal laws such as terrorism laws, corruption, money laundering, and the possession and

sale of stolen goods to prohibit the financing of conflict and payments to groups that commit violence.

- One question asked was whether or not the state duty to protect would require it to investigate and prosecute nationals committing severe crimes abroad? It was suggested that for volatile areas this was a requirement of the duty.
- A case for action needs to be built and clear recommendations developed for Home States which reflect both legal and policy related duties. In considering whether a legal or policy role by the home state is appropriate for a given context, a number of factors need to be considered. Legal measures should be taken for the most severe situations in which the most serious human rights abuses occur such as conflict areas. It was suggested that it may be helpful to focus on certain rights to help define the state role - i.e. 'right to life' where there is clearly a duty to investigate by Home states. However, it was stressed that dangers exist with respect to taking a purely legal approach - it should be clear as to what laws will apply in order to avoid fears of a sliding scale of corporate liability.

Participants' comments regarding Pillar 2 and the corporate duty to respect in volatile areas included:

- The framework was stated to be compelling. A strength was stated to be the clear delineation of the differences between the role of the state and the role of business when it comes to responsibility for human rights. However, it was stated that the dynamics between the two needed to be further clarified - governments must not assume that they are helping companies by not providing them with regulations and guidance.
- The articulation of the baseline expectation of 'do no harm' was supported by most participants, especially the standard that a company cannot off-set a human rights violation by doing good elsewhere (philanthropic efforts are irrelevant). The participants also endorsed the position that this baseline includes an active duty by companies to ensure that the harm does not occur in the first place.
- It was stated that the framework provided precision to the notion of 'due diligence'. This includes a comprehensive and coherent risk based approach that juxtaposes impact and consequences. It was also stated that concerns regarding impact and leverage, and the deconstruction of spheres of influence, are much clearer.
- The focus on business complicity and knowledge of contribution to human rights abuses were perceived as good starting points. It was suggested that the report could have gone further to acknowledge that wilful ignorance cannot be used as an excuse to the refusal to do human rights 'due diligence.'
- Participants suggested that some of the abuses documented in the past occurred as a result of low level accumulative disagreements between the local population and the company. It was suggested that a focus on early intervention at the local level could avoid the abuse in the first place. In addition companies should, with respect to their operations, incorporate local level input and subsequently measure their impact on the ground.

Participants' comments regarding Pillar 3 and access to international remedies included:

- It was put forward that there is a need for an authoritative body that specializes in human rights and can provide supra-national interpretation and guidance on these issues. This body was thought to be essential to interpret complex human rights issues and ensure consistency between approaches and decisions. It was highlighted that currently there is no competent body that can interpret human rights in terms of corporate responsibility. This office or mechanism could work to compliment other procedures operating at national, regional and international levels.
- A participant stated that a perceived weakness in the Framework was that it encouraged remedies and solutions before analyzing the problems at hand. It was stated that empirical work around legal cases and access to justice issues could provide some direction. In terms of approach, it was suggested that human rights is made up of sub-sets and that the best approach would be to find hard law (legal cases) to establish a footing and then build outwards to soft law.
- Participants agreed that grievance mechanisms need to be equitable and *bona fide* and focus on establishing the extra-territorial reach of Home States.
- It was again underscored that the human rights discourse is only one route to pursue remedies and that there is a need to explore how to affect the business and human rights debate through other routes – e.g. peace building, human security, corruption, terrorism.
- One participant questioned whether or not grievance mechanisms should be sector specific and questioned how they could be supported at the corporate level.

### **c) Panel 2 - Putting Policy and Theory into Practice**

The second panel explored practical strategies for moving policy ideas into practice in circumstances where the host state is unable or unwilling to assume its responsibilities. Strategies and good practices were presented from the institutional, legal and policy perspectives.

#### Institutional perspective

The Norwegian Council on Ethics (the Council) was discussed as one example of an institutional approach. This is an institutional body with powers to investigate cases and make recommendations to the Norwegian Minister of Finance regarding whether or not the Pension Fund should continue its investment in a company or divest from it on ethical grounds. The Council was established pursuant to a legislative act, passed in 2004, with the view to ensuring that Norwegian people do not participate in gross human rights violations.

Key points that were raised concerning the Council included:

- The 2004 legislative act led to the creation of an active shareholder engagement policy and the Council itself.
- The government maintains a list of companies which engage in industries considered to be morally wrong and these are automatically excluded from investment by the Pension Fund. One example includes companies that develop certain kinds of munitions.
- As part of its investment strategy, the Pension Fund seeks to maximise returns but not at the expense of human rights.

- The Council's assessment considers whether active engagement by shareholders will prevent human rights abuses from occurring in the present or in the future.
- An assessment begins with a request which can be submitted by civil society, government or individual. A fact-finding process is undertaken based on the request, including in-country work where necessary. Before the Council recommends exclusion or divestment to the Minister of Finance, companies are provided with an opportunity to respond to the recommendation.
- Aspects relating to the Council's recent decisions with respect to Total in Burma and Wal-mart were discussed, including the reasons for why divestment was not recommended for the former but was recommended for the latter.

#### Legal perspective

The focus was on legal strategies for pursuing companies for gross human rights abuses committed extra-territorially. Key points discussed included:

- One suggested entry point could be to focus on corporate compliance to respect human rights within the context of the use of security forces in weak governance areas.
- It was suggested that companies are strong at compliance and fulfilling legal regulation requirements, but will use endless tactics to fight legal proceedings. There are ways for companies to draw out litigation by using procedural technicalities which can make pursuing justice through the courts prohibitive.
- It was put forward that it would be useful to pursue hard remedies outside of traditional human rights law. One example of a regulatory entry point discussed is competition law and trying to strengthen compliance with that statutory framework.
- It was remarked that ambiguous legal terms should be avoided such as "proportionality" and hard law terms were favoured.

#### Policy perspective

A number of practical considerations were put forward from the policy perspective. Key points discussed included:

- The *Red Flags* publication was put forward as a practical tool for identifying a baseline and minimum standard for companies operating in volatile areas.
- It was stated that a significant challenge was due to the patchwork of remedies, which are fragmented, disjointed, and without an overall legal access point. It was suggested that the discussion around the Voluntary Principles is stuck especially when it comes to non-OECD countries and whether or not they will be let in.
- It was suggested that a respect for human rights entails different types of duties *i.e.* civil and political rights indicate negative duties, while social and cultural rights require positive duties. It was reaffirmed that a way forward could be to extend the reach of Home States and build on the nexus with a company based on nationality, universal jurisdiction and the articles of state responsibility.
- It was suggested that work mirroring the current access to justice efforts in the UK, would be helpful for building access to justice within a series of home states.

## VI. Next steps

Overall, a number of regulatory and non-regulatory strategies were identified for advancing the debate over the next 12-months.

These included:

### Overall Framework

- *Efforts to better define the context, factors and actors relevant to human rights and business operating in volatile areas to which hard law applies.* It was suggested that we should start by narrowing the focus to instances where hard law would be applicable and non-voluntary mechanisms warranted. We could then move outwards to soft law remedies. For this approach, the relevant actors and their roles would need to be clarified.
- *Survey existing laws, identify legal gaps, and communicate the need for new laws that can respond to these serious scenarios at the national and international level.* Participants recognized that some laws exist that guard against serious human rights harm caused by companies, but stressed that these are currently insufficient and under-utilised. It was discussed that new laws are required which focus on extra-territorial liability and are integrated with corporate regulatory requirements.
- *Explore improving or establishing regulatory mechanisms for human rights and companies.* This builds from suggestions made that companies respond better to 'compliance' through regulation rather than litigation, which they will fight to the end. Regulatory frameworks are also beneficial in that they are preventative and provide access to remedies for affected persons.
- *Explore the use of non-traditional human rights avenues to establish corporate human rights compliance.* This builds on the need to expand perceptions around the debate and consider its broader impacts outside human rights law. Possible non-traditional avenues include: Bilateral Trade Investment (BIT) agreements; Publish-What-You-Pay (PWYP) strategies and disclosure requirements; domestic criminal law relating to financial crimes and international crimes (e.g. plunder or theft of property); company law and specific provisions relating to parent and subsidiary disclosure requirements; corruption; money laundering, and terrorism.
- *Evaluate how the right to intervene in 'volatile areas' can be contextualised at the international level.* This considers how to foster better engagement by UN agencies within the context of this debate, especially those providing aid, peace keeping, security, or engaged in trade and development.

### Pillar 1

- *Get Home States to accept that their companies operating in volatile areas can commit human rights abuses.* At a policy level, participants stated that this type of recognition does not currently exist, and that Home States only perceive their companies as engines of economic growth. Changes in policy would require the integration of human rights concerns into trade and finance support provided by Home States. This would include an acceptance by them that ECAs act as an agent of the government.
- *Make Home States clarify the human rights expectations of companies.* State actors appear to be lagging behind in this debate, so it was suggested that would initially require capacity building and education within the

government and its relevant departments. This built on suggestions that cases where harm has occurred should continue to be pushed forward as they make governments take notice and encourage them to adopt and enforce policies and laws. It was emphasised that Home States need to understand that their silence on this issue does not help companies.

- *Undertake efforts to establish where the line between regulatory and non-regulatory action exists.* It was acknowledged that this depends on a number of factors previously mentioned (e.g. violence, type of business involved, severity of the human rights abuse, knowledge etc...).
- *Articulate a rigid outline of home states' obligations including clear recommendations for improvement.* It was proposed that to ensure home states play an effective role and in order to prevent them from circumventing or refusing to take responsibility, in depth requirements are necessary. Due to poor enforcement of existing laws, it should be clearly communicated to home governments that this must be a priority.
- *Draw lessons from Private Military Companies (PMCs) to clarify where Home State responsibility lies.* Currently some Home States do not accept a role or responsibility.

## **Pillar 2**

- *Better understand the barriers to engagement on the corporate side.* It was expressed that by doing so, we can know the best leverages for engaging companies. Possible entry points were suggested to include: ECAs (due diligence requirements), buyer's insurance and disclosure obligations.
- *Engaging in company work to develop a compliance tool for operating abroad that can be used to ensure standards are being met.* It was put forward that this should detail what is expected of companies. Additional efforts could include developing disclosure requirements for companies.
- *Increase the use of 'due diligence' by companies. Integrating this into corporate management systems, and monitoring performance and compliance.* This requires establishing more formal joined up thinking between companies and continuing to promote the integration of human rights into business practices.

## **Pillar 3**

- *Explore access to legal remedies at the international level including the creation of an expert body or mechanism.* Because no expert authority on business and human rights at exists, a gap has been created at the international level. Another suggestion was to explore amendments to the International Criminal Court so that jurisdiction over companies is created.
- *Conduct an evaluation of actual cases with a view to understanding how to provide justice to victims.* This builds on the recognition that there is a need to consider alternative legal mechanisms including legal avenues outside the realm of human rights law.

In concluding the meeting the group expressed an interest to continue with these types of interactive forums. The group was advised that the International Business Leaders Forum (IBLF) is in the stages of creating a virtual debating platform.