

**Prepared Remarks at Clifford Chance
London, 19 February 2007**

**John G. Ruggie
Harvard University
United Nations**

Many thanks to UNA-UK for organizing this event, to the law firm Clifford Chance for being such gracious hosts, and to Irene Khan and Richard Lambert, both of whom I admire greatly, and who will set me straight when I'm done with my remarks.

It is also good to be back in London, the incubator for so many innovative corporate citizenship initiatives – not to mention being my son's birthplace.

I have been on quite a journey since my appointment as UN Special Representative for business and human rights, an exploration if you will. Tonight I want to share with you part of my trip report.

It was a journey in the literal sense: within the past year, I convened three regional multi-stakeholder consultations in Johannesburg, Bangkok, and Bogotá; civil society consultations on five continents; visits to the developing country operations of major transnationals in four industry sectors; four workshops of legal experts in London, Oslo, Brussels, and New York; two Geneva-based multi-stakeholder consultations, on the extractive and financial services industries; and discussions with representatives of all relevant multilateral institutions and some government officials.

But the intellectual journey in some respects was the more difficult. A divisive debate preceded my mandate, over a document called the Norms adopted by the UN Sub-Commission for Human Rights, an expert body. This was intended as non-voluntary code of conduct for all business enterprises. In that debate, factual claims about corporate obligations were so entangled with normative preferences and institutional interests that it was as if one were living in a Rashomon world – recalling Akira Kurosawa's classic 1950 film, where nothing looked the same when seen through different sets of eyes.

The Human Rights Commission, as the intergovernmental body was then called, declined to endorse the Norms, and instead asked the Secretary-General to appoint a special representative to assess the situation and find ways of moving the agenda forward – which is how I got into the act.

The first step in my exploration was to map the international standards – legal and otherwise – that currently govern corporate activities in relation to human rights. I submitted my mapping report a week ago. The next phase of work will be to develop views and recommendations for consideration by the Human Rights Council. But that will be the subject of future remarks, if Clifford Chance invite me back.

Tonight I want to touch on a few highlights of the mapping itself. Being at a distinguished law firm, I'll mainly emphasize some of the legal dimensions that caught my attention, and which may interest you as well.

By far the most consequential legal development is the potential extension to companies of liability for international crimes, imposed under domestic laws, but reflecting international standards in relation to genocide, crimes against humanity, and war crimes. Few companies may ever directly commit acts that amount to international crimes. But there is greater risk of their facing allegations of “complicity” in such crimes – which was the charge against *Unocal*, for example, for crimes allegedly committed by the Burmese army, one of its collaborators in a pipeline project. The web of potential liability for companies is gradually spreading through a complex three-step process.

The first is the expansion and refinement of individual responsibility for international crimes by the ad hoc tribunals for the former Yugoslavia and Rwanda, and by the International Criminal Court statute. The second is the incorporation of those international standards for individual criminal liability into domestic law. Third, where national legal systems already provide for criminal punishment of companies, the international standards for individuals may become extended, thereby, to corporate entities – essentially because corporations are “persons” in the legal sense.

The main driver is ratification of the ICC statute and the incorporation of its definitions into domestic law by states parties. But even in the US, which has not ratified the statute, the 9th Circuit Court of Appeals, in its

Unocal ruling, drew on principles of individual responsibility as defined by the international tribunals.

Apart from national incorporation of international standards, a number of legal systems are evolving independently towards greater recognition of corporate criminal liability for violations of domestic law. Most common law countries have such provisions, at least for some crimes. Many European civil law countries have moved beyond purely administrative regulation to adopt some form of criminal responsibility for corporations.

A quick word on corporate complicity. Mere presence in a country and paying taxes are highly unlikely to create liability for a company. But deriving indirect economic benefit from the wrongful conduct of others may do so, depending on such facts as the closeness of the company's association with those actors. Greater clarity currently does not exist. However, it does seem to be the case that even where a corporation did not intend for the crime to occur, and regrets its commission, it will not be absolved of liability if it knew, or should have known, that it was providing assistance, and that the assistance would contribute to the commission of a crime.

Numerous procedural impediments persist, including the *forum non conveniens* doctrine, and piercing the corporate veil to hold the parent company responsible remains difficult. But as the number of jurisdictions where claims can be brought against companies for international crimes increases, the simple laws of probability alone suggests that they will be subject to increased liability. As we speak, creative plaintiffs' lawyers are studying the most favorable jurisdictions in which to test this new construction of corporate liability.

However, there appears to be little movement in the responsibilities corporations may have under international law for other human rights violations. Some observers hold that the UN human rights treaties coupled with customary international law already impose direct legal responsibilities on companies. The UN Sub-Commission's Norms reflected this view, and attributed the entire spectrum of state duties under the treaties – to respect, protect, promote, and fulfill rights – to corporations within their “spheres of influence.”

Nothing prevents states from imposing international responsibilities directly on companies; the question is whether they have already done so.

Within the time and resource constraints under which we worked, we examined the UN treaties, the treaty body commentaries, expert opinion on the regional human rights systems, and secondary literature on customary international law. We found little evidence to support the claim that companies have direct human rights obligations under international law.

That fact leaves a sizeable protection gap for victims, because not all governments recognize all relevant human rights instruments. And when they do, some may be unable or unwilling to enforce their treaty obligations. At the same time, the absence of direct corporate responsibility offers limited comfort to companies, who even when innocent of wrongdoing may find themselves tried in the court of public opinion – by the standards of those international human rights instruments. Accordingly, this is an area that requires continued attention by all parties to reduce potential harm and risk alike.

I am pleased, therefore, that three leading international business associations – the IOE, ICC, and BIAC – submitted a policy paper to the mandate, in which they advise companies operating in weak governance zones that “all companies are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent.” I very much endorse that recommendation.

The important standard-setting role played by soft law in business and human rights is well-known – the ILO Declaration and OECD Guidelines on multinational companies perhaps being the most familiar in the business and human rights domain. My report also documents evolving practices in more operational soft law mechanisms – of which the most prominent are the Voluntary Principles on Security and Human Rights, the Kimberley Process Certification Scheme to stem the flow of conflict diamonds, and the Extractive Industries Transparency Initiative.

All of these initiatives have weaknesses, which are noted in my report. But they also represent conceptual and institutional innovations that merit reflection. They seek to close regulatory gaps that contribute to human rights abuses, like the illicit diamond trade. And they do so by setting operational standards and procedures for firms, together with regulatory action by governments, supported by transparency mechanisms.

Moreover, these initiatives are premised from the start on the idea that individual liability regimes don't take us far enough: that for some purposes the most sensible solution is to allocate shared responsibilities among the relevant social actors. Thus, these arrangements may include any combination of host and home states, corporations, civil society, industry associations, international institutions, and investor groups. And they establish mutual accountability mechanisms among those actors.

In short, these hybrid initiatives have direct effect, as opposed to working through states ratifying treaties and then adopting implementing legislation – or not, as the case may be. And they embody the principle of shared responsibility, supplementing the traditional human rights approach of imposing individual liability.

Beyond the legal sphere altogether, companies have adopted policies and practices voluntarily, triggered by their assessment of human rights-related risks and opportunities, often under pressure from civil society and local communities. We also conducted an extensive mapping of voluntary standards, as adopted by major corporations and industry initiatives. It demonstrates that leading firms today recognize an array of human rights, though often haphazardly, and they have adopted at least rudimentary accountability mechanisms, including internal and external reporting. Little of this existed as recently as five years ago.

Unfortunately, this substantial rate and scope of uptake has had limited impact on state-owned enterprises thus far, and determined laggards continue to find ways of avoiding scrutiny.

But even leading firms don't always fully meet expectations of twenty-first century accountability standards: relatively few conduct human rights impact assessments routinely; they rarely report systematically on how their core business strategies and operations impact the realization of rights; and a relatively small fraction use recognized assurance standards that allow the public to determine whether reported information is reasonably likely to be accurate.

At the end of the day, though, the biggest challenge is bringing such efforts to a scale where they become truly systemic interventions. For that to occur, states need to more proactively structure business incentives and

disincentives, while accountability practices must become more deeply embedded within market mechanisms themselves.

And so I turn, lastly, to states. Yes, you guessed it: we conducted a study. In fact, we conducted eight. We examined the commentaries of each of the seven UN treaty bodies, charged with interpreting the main UN human rights treaties. We looked for guidance on how they interpret the state duty to protect against human rights abuses by nonstate actors, including business. The eighth study was a questionnaire sent to all states, asking how they regulate, adjudicate, and otherwise influence corporate actions in relation to human rights.

Judging from the treaty body commentaries, and reinforced by the questionnaire survey of states, not all states appear to have internalized the full meaning of the state duty to protect and its implications with regard to preventing and punishing abuses by business enterprises. Insofar as the duty to protect lies at the very foundation of the international human rights regime, this uncertainty gives rise to concern.

Just as worrying is the fact that states seem not to be taking full advantage of the broader legal and policy tools at their disposal to contribute more fully to the protection against corporate abuse, including the exercise of permissible forms of extraterritorial jurisdiction over companies, especially those they support with taxpayer funds or by other means.

Lack of clarity regarding state duties also affects how corporate “spheres of influence” is understood – the idea being that within those spheres companies have special responsibilities. The concept has no legal pedigree beyond fairly direct agency relationships. But in exploring its potential utility as a practical policy tool, I discovered that it cannot easily be separated operationally from state duties. Where governments lack capacity or abdicate their duties, the corporate sphere of influence looms large by default, not due to any principled underpinning. Indeed, disputes between governments and businesses over just where the boundaries of their respective responsibilities lie are ending up in courts. This critical nexus requires greater attention.

So these are some of the highlights – some snapshots – from my recent journey. There is much more to tell, but I am eager to hear from Irene and Richard, and from all of you. As I draw my remarks to a close, I am

reminded of a poem called “Little Gidding” by T.S. Eliot. It includes the following lines:

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

To which I would only add that the exploration was necessary. Now let the real work begin. And let us do it together, in the recognition that the stakes are incredibly high – for human rights, for business, and for governance on our ever-smaller planet.

Thank you.