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Remarks for ICJ Access to Justice Workshop

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I am very pleased to be able to address this meeting on "Business, Complicity and Access to Justice", even though I am unable to be there in person. I would like to congratulate the organizers, the International Commission of Jurists, International Trade Union Confederation and the Friedrich Ebert Stiftung, in bringing together such a diverse group of participants from across southern Africa.

I have been asked to sketch out the contours of my UN mandate and how access to judicial remedy fits within it. I am pleased that my legal advisor, Rachel Davis, is joining you by telephone later today, as she will be able to answer any questions that you may have.

Mandate overview:

In June 2008, the UN Human Rights Council unanimously "welcomed" a policy framework for business and human rights that I had proposed – marking the first time a UN intergovernmental body has taken a substantive policy position on this subject. The Council 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. We are now working toward providing such guiding principles.

The “Protect, Respect and Remedy” 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 have adopted measures in certain core areas, such as labor standards. But beyond that, the business and human rights domain exhibits considerable legal and policy incoherence.

There is “vertical” incoherence, where governments sign on to human rights obligations but fail to implement them. Even more widespread is “horizontal” incoherence, where departments and agencies that directly shape business practices—including trade, investment, export credit, and corporate law—conduct their work in isolation from their government’s human rights obligations. Domestic policy incoherence inevitably is reproduced at the international level.

To take an example that is close to home, not long ago, the government of South Africa was confronted with a startling instance of how serious this lack of policy coherence can be when investors from Italy and Luxembourg took it to binding international arbitration under a bilateral investment treaty. The investors claim that certain

mining provisions of the Black Economic Empowerment Act amount to expropriation, entitling them to compensation. Why did the government sign up in the first place to an investment agreement that could threaten the country's post-*apartheid* foundational principle of social justice? An official policy review explains that, among other reasons, "the Executive had not been fully apprised of all the possible consequences of BITs," including for human rights.

The case demonstrates why governments cannot adequately discharge their human rights duties if they segregate business and human rights into a narrow conceptual and institutional box and ignore the issue in other business-related policy domains. Their duty to protect requires a more comprehensive understanding and coherent application. Therefore, a major objective of my mandate is to assist governments in recognizing these connections, driving the business and human rights agenda into those domains that most directly shape business practices, and fostering corporate cultures respectful of human rights.

Policy and legal coherence is especially important for conflict affected areas: the international human rights regime cannot 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. Redressing this situation is a mandate priority.

Thus, when I had the honor to address the UN General Assembly last week, I was pleased to be able to announce a new mandate project.

A small but representative group of states have agreed to participate in a series of informal and off-the-record brainstorming sessions on how to help companies operating in conflict-affected areas avoid becoming involved in human rights abuses. Confirmed participants include Belgium, Brazil, Canada, China, Colombia, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, the United Kingdom and the United States.

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, companies have found that meeting legal requirements alone may fall short of the universal expectation that they operate with respect for human rights—especially, but not only, where laws are inadequate or not enforced. Respecting rights is the very foundation of a company's social license to operate and the responsibility to respect is the baseline norm for all companies in all situations.

But relatively few companies have systems in place enabling them to demonstrate the claim that they respect human rights. An ongoing **human rights due diligence** process is required, whereby companies become aware of, prevent, and mitigate adverse human rights impacts.

I have outlined four core elements of human rights due diligence: 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 and reporting performance. Because companies can affect the entire spectrum of internationally recognized rights, the responsibility to respect applies to all such rights, although in practice some will be more relevant in particular contexts.

Access to effective remedy is the framework's third pillar. Without it, the rights of victims would be rendered weak or even meaningless. As part of the duty to protect, states are expected to take appropriate steps to prevent corporate-related human rights abuse, and to investigate, punish and provide redress when it occurs, through judicial and non-judicial mechanisms. Yet in practice there is a spectrum of roles that states play, from facilitating to directly undermining such access.

As this meeting will discuss, significant barriers to accessing effective judicial remedy persist. My mandate is focused on identifying legal and practical barriers that are particularly salient for victims of corporate-related human rights abuses, and on strategies to reduce them. On the legal side, I am examining the scope of national standards of civil and criminal corporate accountability, their application to complex group structures, and their interaction with individual liability. I am also looking into various jurisdictional doctrines, particularly in cases involving foreign plaintiffs.

Practical obstacles include those posed by costs, access to legal advice, "standing" rules, and evidentiary challenges – especially when more than one state is involved. My work on these issues is

framed by an understanding of the broader problems of weak or under-resourced judicial systems, such as corruption and lack of enforcement.

I am also exploring particular barriers faced by potentially vulnerable groups, such as indigenous peoples.

Non-judicial mechanisms play an important role alongside judicial processes. Yet a major obstacle to victims' accessing such mechanisms is the lack of information available about them. To help address this, I recently launched a global wiki called Business and Society Exploring Solutions (www.baseswiki.org). Available in all UN official languages, it is an interactive on-line forum for sharing, accessing and discussing information about relevant non-judicial mechanisms in this sphere.

This, in broad strokes, is the framework I have been asked to operationalize. The framework has already enjoyed considerable uptake by governments, businesses, international organizations, and NGOs, which I would like to illustrate briefly.

Uptake

Numerous national bodies have invoked the framework in their own policy assessments—including a UK parliamentary committee hearing on business and human rights; and the South Africa Human Rights Commission in its submission to the government's review of bilateral investment treaties.

The European Commission is drawing on it in a study of the human rights and environmental obligations applicable to European companies abroad; and the OECD is updating its Guidelines for Multinational Corporations and has invited my involvement.

The UK government, in two cases brought by NGOs under the OECD Guidelines, has cited the framework in findings against a UK-based oil trading company accused of human rights violations in the Democratic Republic of the Congo, and a UK-based mining company whose subsidiary was seen as failing to adequately consult in respect of its operations in the Indian state of Orissa.

The UN Special Rapporteur on Toxic Waste referenced the framework in making his case against an international commodities trading company accused of dumping toxic chemicals near Abidjan, Ivory Coast. The Permanent Forum on Indigenous Issues gave its support to the framework and is exploring its applicability to the challenges facing indigenous peoples in this area.

Our journey is far from over; indeed, it has only just begun. But these and other similar examples suggest that we are heading in the right direction.

ICJ's work on complicity and access to justice

In closing, I want to highlight one recent development that illustrates the timeliness of this meeting.

As some of you are all too aware, in the absence of other widely applicable tools, the U.S. Alien Tort Statute has become a *de facto*

ultimate recourse for victims of corporate-related human rights abuse. But while it clearly has some deterrent effect, this quirky 18th century statute cannot shoulder the world's burden.

Indeed, a few weeks ago, a US court concluded that while aiding and abetting corporate liability does exist under the ATS, the relevant standard is not whether the defendant **knew** that they were substantially assisting a human rights violation, but whether they **intended** to assist. Adoption of such a standard goes against the weight of international legal opinion, as outlined in my 2008 report to the UN Human Rights Council on corporate complicity as well as in the ICJ's work on this issue. And frankly, such an outcome would be absurd: as long as an I.G. Farben intended only to make money, not to exterminate Jews, it would make it permissible for such a company to keep supplying a government with massive amounts of Zyklon B. poison gas knowing precisely what it is used for.

What the decision demonstrates, if further demonstration were needed, is that we are far from a systemic solution to ensuring access to judicial remedy for individuals and communities affected by corporate-related abuse. A systemic approach needs to include greater enforcement of existing laws, clearer as well as sensible standards, and more innovative policy responses by both home and host states.

In this vein, the ICJ's project on access to judicial remedy can make an important contribution to clarifying the current state of law and

practice, identifying trends and emerging standards, highlighting gaps that demand action, and suggesting ways to close those gaps.

I look forward to hearing the outcomes of this meeting and to following your work in this area closely. My best wishes for a productive couple of days.

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