

3rd Annual Responsible Investment Forum
Keynote Address
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I am delighted to be here with you this morning. Many thanks for the important work you do to promote corporate responsibility. And a special thanks to the Social Investment Forum for weighing in strongly in support of my “protect, respect and remedy” policy framework last June, just as the UN Human Rights Council was considering it. They must have heard you, because the often divided Council was unanimous in welcoming it.

This marked the first time that the Council or its predecessor endorsed a policy position on business and human rights. The Council also extended my mandate for a further three years, with the task of “operationalizing” the framework—providing “practical recommendations” and “concrete guidance” on implementation to states, businesses, and other social actors.

Because we are just getting started on this next phase, I wanted to take the opportunity today to step back and reflect on the big picture, how the policy framework fits into it, and how it relates to your mission and activities.

Your aims and my mandate's overlap: to promote socially responsible behavior by companies wherever they operate, in my case with a focus specifically on human rights—the rights of every individual and every community to live the lives of dignity to which we are all entitled simply by virtue of being human. But you and I occupy different sites in this arena: you are, or represent, progressive owners of businesses. I advise the regulators: that is to say, states and the international community, although my mandate also asks me to provide guidance to other stakeholders.

So how does the universe of business and human rights look from a regulatory perch? The euphemism of choice is “fluid,” but three prominent features have shaped my approach to the mandate.

The first is what in each of my reports I have referred to as governance gaps—gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps create the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.

Broadly speaking, we can divide governance gaps into three types. One is structural: we have a global economy and globally integrated business enterprises, but a territorially fragmented system of public governance. Global businesses are not regulated globally; instead, each of their legally separate national emanations is subject to the jurisdiction in which it operates. Even as this fragmented system limits collective action by states, its foundational norm of sovereignty and non-intervention in the affairs of others also constrains the exercise of extraterritorial jurisdiction by one or a few.

A second type of governance gap affecting business and human rights stems from fragmentation within governments, or a lack of policy coherence. This may reflect insufficient understanding of the issues and their connection, or simply ideological preferences. There is “vertical” incoherence—states adopting human rights obligations with little regard for implementation, least of all for business-related issues. And there is “horizontal” incoherence, where states conduct policy in one area—let’s say investment policy, trade, or securities regulations—in splendid isolation from what often may well be an active, although typically small and weak, business and human rights program somewhere else in the government.

The third type of governance gap is capacity related. Here the state fails to implement the laws on its books, or never adopts the necessary legislation—because it lacks the means, fears the consequences of doing so in a competitive global economy, or because its leaders subordinate the public good to their private gain.

In light of these gaps, it isn’t surprising that the system of public governance has generated relatively few global mechanisms for business and human rights to date. Among them are the soft-law declarations adopted by the ILO and OECD (the latter is not global but permits complaints to be brought against companies domiciled in adhering countries no matter where they operate); and the Global Compact. They make useful, but relatively modest, contributions to reducing global governance gaps.

From a regulatory vantage, a second prominent feature of this arena is that the main international human rights groups, advocating on behalf of the victims of corporate-related human rights abuses, propose to solve the problem of governance gaps by imposing binding standards on companies directly under international law.

At first blush this appears compelling: it promises uniform standards applicable to all companies, regardless of where they are headquartered or do

business. But here's the catch: for such standards to become directly binding on companies they would have to be adopted by the same system of public governance that is unable or unwilling to respond effectively now. The proponents of this approach offer no explanation for how and why the problem, in effect, would solve itself in this manner.

As a wise professor of mine once wrote, "Necessities do not create possibilities. The possibility of effective action depends on the ability to provide the necessary means." None are provided in this scenario—at least none that would be of much help to victims anytime soon.

A third striking feature of today's global business and human rights arena is that the shortcomings and outright failures of the public governance system have created both opportunities and the need for non-governmental actors to move into the vacuum.

In my 2007 report to the Council, I stressed the potential of multi-stakeholder initiatives. But the most common systems of global private regulation of labor and human rights today operate within the extended networks of the same enterprise. They are also most likely to include the full regulatory cycle, from setting to enforcing standards and all the in-between steps. Enforcement itself is based in the private law of contracts. The Gap operates one such system, Wal-Mart another, comprising their outlets and global suppliers.

These self-regulatory systems intersect with other stakeholders, including civil society, the media, and governments. And they may draw on aspirational goals and even some of the standards produced by the public governance system. But they are crafted and operated so as to satisfy more proximate targets: their customers, investors, and the financial markets.

Private regulation helps fill governance gaps, so it's a good thing, right? The answer is yes, but.

First, the yes. Advocates of CSR, including you and I, have been urging for years that companies adopt their own initiatives. They help promote social standards, including human rights. And they have important roles to play even in societies with well-functioning rule of law institutions and regulatory policies. I don't think this forum requires further justification.

So let's turn to the "but." To state the obvious first, the vast majority of workers and communities live well beyond their orbit. However, even within their orbit, it is not unusual for workers in the same supplier factory, doing the

same work, to be covered by different regulatory systems stipulated by different global buyers – which seems a bit odd insofar as the rights in question are said to be universal.

These company-based systems are also highly variable, as I documented in my 2007 report. They may, but more often do not, meet internationally recognized standards even when those are explicitly invoked: in one case of creative hermeneutics, I found that freedom of association and collective bargaining became “engaging in dialogue with employees about issues of mutual interest.” These systems vary in transparency, or what they reveal publicly about their inner workings and outcomes. And they vary in how proactive they are in anticipating and seeking to prevent problems versus being reactive, moving only when confronted with some scandalous revelation in the press.

In addition, the drivers of these differences include factors that have little to do with the substantive problem addressed, the specific populations involved, or the particular industry sector. In my 2006 survey of the Fortune Global 500 firms, I found that what rights a company’s CSR policy recognizes, and which external stakeholders it acknowledges, is influenced by the political culture of its home base, be it the United States, Europe, Japan, or emerging market countries.

But it gets even more refined than this. Among companies domiciled in the same country and operating in the same industry, their particular market segments strongly shape their human rights and broader CSR programs—the obvious comparison being between premium brands, trading on cachet, and value brands, where low price dominates other concerns on the part of their consumers – the Gap and Wal-Mart difference, in essence.

In sum, yes, the existence of these private regulatory systems surely is a positive development. But the fact that their content and form are self-defined within firms and highly market-segmented among them limits their ability to help get us to the tipping point in the creation of an effective global business and human rights regime.

That is my quick read of the global regulatory landscape. It explains why I keep saying there is no single silver bullet. And it describes the logic behind my “protect, respect, and remedy” policy framework—which the Human Rights Council endorsed, and which enjoys strong support from the business community, international labor, and more recently leading human rights organizations.

The framework builds on strengths and targets weaknesses in the existing architecture, and it seeks to connect the individual parts better so they add up to more of a systemic response with cumulative effects. The framework comprises three core principles: first, the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; second, 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 third, greater access by victims to effective remedies.

The first principle is the state duty to protect. It has both legal and policy implications. International law provides that states are required to take all appropriate steps to prevent, investigate, redress and punish abuse by private actors, including business, affecting persons within their territory or jurisdiction. The extraterritorial implications of this legal duty are murkier. Current opinion from international human rights bodies suggests that states are not required to exercise extraterritorial jurisdiction over business abuse, but nor are they generally prohibited from doing so.

Governments are the most appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. Yet, as I noted earlier, most governments, whether host or home states, take a relatively narrow approach to managing the business and human rights agenda. Often human rights concerns are kept apart from, or heavily discounted in, other policy domains that directly shape business practices, including commercial policy, investment policy, securities regulation, and corporate governance. Inadequate domestic policy coherence is, of course, replicated at the international level.

Therefore, the human rights policies of states in relation to business need to be pushed beyond their narrow institutional confines. Governments need actively to promote a corporate culture respectful of human rights at home and abroad. And they need to consider human rights impacts when they sign trade and investment agreements, and when they provide export credit or investment guarantees for overseas projects in contexts where the risk of human rights challenges is known to be high.

The second principle is the corporate responsibility to respect human rights – put simply, not to infringe on the rights of others. The responsibility to respect exists even where laws are absent or not enforced because it is also a social responsibility, recognized as such by virtually every voluntary business initiative, soft law instruments such as the ILO Tripartite Declaration and the OECD Guidelines, and the UN Global Compact.

Companies can affect the entire spectrum of internationally recognized rights, as my mapping of some 400 public allegations against companies has shown. Therefore, the responsibility to respect must apply in relation to all such rights, although some may weigh more heavily in particular contexts. There are situations in which companies may have additional responsibilities—for example, where they perform public functions, or because they have undertaken them voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations.

Yet how do companies know they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence? In fact, relatively few do. What is required, therefore, is a due diligence process whereby they become aware of, prevent, and address adverse human rights impacts on an ongoing basis throughout the life of the operation. The only reliable way for companies to generate awareness and develop satisfactory mitigation measures is to engage their workers and affected communities in this process.

For the substantive content of due diligence companies should look, at a minimum, to the international bill of human rights—the Universal Declaration and the two Covenants—as well as the core conventions of the ILO, because the principles they embody are the most universally agreed upon by the system of public governance. The Office of the High Commissioner for Human Rights has issued a reference guide to business, entitled “Human Rights Translated,” which explains and illustrates universally recognized human rights in business contexts.

If companies operate in conflict zones, they will also need to consider international humanitarian law to avoid situations where they could be accused of complicity, or worse. I have submitted a detailed report on the meaning of complicity in the corporate context to the Council.

Access to remedy is the third principle. Even where institutions operate optimally, disputes over adverse human rights impacts of company activities are likely to occur, and victims will seek redress. Currently, access to formal judicial systems is often most difficult where the need is greatest. Non-judicial mechanisms are seriously underdeveloped—from the company level up through national and international spheres. And access to them is hampered by the lack of readily available information about them. Just last week, we launched a wiki intended to build up and disseminate knowledge about non-judicial mechanisms available world-side, including the resources and experts that can support their use. We are also hoping to announce a pilot project soon of company-based grievance mechanisms for affected communities.

My friends, there is so much more to be said on these subjects. But you have a full agenda ahead of you, so let me conclude with a few thoughts about how you can help advance the mandate's efforts.

In your capacity as investors, fund managers, and consultants, your attention to two areas is particularly important. The first concerns human rights due diligence processes by companies. I have suggested that its components include human rights policies, impact assessments, integration within core business functions, monitoring, and transparency. However, the most telling measure of a company's responsibility to respect human rights is not some set of static outputs, but rather the quality of its due diligence, and whether it makes a difference to the way the company operates. You are well placed to assess whether a company meets the quality test and to leverage change where it is not, and I encourage you to do so.

Second, I have stressed the importance of effective grievance mechanisms, including at the company level. Contrary to the fears of some, there is little evidence that they lead to a rush of ill-founded or vexatious complaints. On the contrary, they provide an essential risk management tool by which a company can identify early on concerns about their impacts, and where possible resolve them before they escalate into protests, campaigns, or lawsuits. Extensive research and consultations have identified certain criteria of effective grievance mechanisms: they must be legitimate, accessible, equitable, rights-compatible, transparent, and have predictable processes. Again, you are in a position to benchmark company performance against these criteria and incentivize better practice against them.

Finally, two areas of your advocacy role vis-à-vis governments are especially relevant to my mandate. One is corporate disclosure, of material that actually *is* material to human rights. Trust and confidence are critical to the social legitimacy of business, and disclosure is a critical element in their achievement. The other is the pressing need to establish widely across different jurisdictions, as the new Companies Act has done in the UK, that directors "having regard" to "the impact of the company's operations on the community and the environment" is a fiduciary duty they owe to the company, not a violation.

The financial sector collapse of 2008 offers many lessons about responsible corporate behavior and how to achieve it—or not. One is clear above all others: business as usual isn't good enough for anybody, including business itself. All relevant players, everywhere, must learn to do many things differently. I am honored to have a small role to play in this historic transformation, and once again thank you for your important contributions, and for your support.