

Keynote address by Irene Khan
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on Business and Human Rights
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I am very grateful to Prof. Ruggie and the Office of the UN High Commissioner for Human Rights for inviting me to speak this morning. I do not purport to speak on behalf of any organization, far less civil society, but only as someone who has worked on the issue of human rights and business for some years.

As a practitioner in the business of business and human rights, I think it is important for us to begin by looking back. Think back to 2004. The business and human rights debate was at a stalemate. Human rights organizations and companies were lined up on opposite sides of that debate. We were strongly in support of the UN Norms on Business and Human Rights; most companies were vehemently opposed to it. Some governments were on our side but most were not. The UN Human Rights Commission did not adopt the Norms and instead asked the High Commissioner for Human Rights for a report which eventually led to the creation of the mandate of the Special Representative on Business and Human Rights and to the appointment of Prof. John Ruggie in that position.

Six years later, we are in a very different place, thanks to John's leadership. Through wide-ranging consultations, extensive research and analysis, he has shifted the landscape from a divisive debate into a consensus on a policy framework.

The journey has not always been easy, but along the way we have all – NGOs, companies, governments and the Special Representative - evolved our positions and perspectives to arrive to where we are now. As civil society actors, we have constructively engaged with the Special Representative. For his part, he has always been ready to listen to us.

We have not got everything we wanted but what has been achieved is impressive and significant and worth building on.

Governments, business and NGOs have all welcomed – and the UN Human Rights Council has unanimously endorsed - the policy framework, based on differentiated but complementary human rights responsibilities, and comprised of three elements: states' duty to protect human rights; companies' responsibility to respect human rights and victims' need for remedies.

The policy framework has already begun to make an impact on Governments and companies, as the Special Representative's report shows, and also in the advocacy strategy of NGOs. For instance, look at Amnesty International's recent report on the International Finance Corporation (IFC).

The Special Representative has established a good common ground from which he is now embarking on the drafting of Guiding Principles. This is both a moment of opportunity and of challenge.

It is an opportunity in that the Guiding Principles will consolidate the policy framework and through their language and form, communicate expectations about state and corporate

behavior - pulling governments and companies towards compliance, coherence and cooperation to prevent human rights abuse and remedy where it still occurs.

In the human rights field we know the power of this kind of soft law documents. We have seen the impact of the Guiding Principles on the Internal Displacement in setting the norms and standards and settling long standing disputes about rights and obligations. Similarly, the Guiding Principles on Business and Human Rights could set the direction on corporate accountability, and be the precursor to further international law development.

That is an exciting prospect but it is not without its challenges and risks. When I discussed today's meeting with some of my civil society colleagues, they were quick to point out that there is still lack of clarity in a number of areas, issues that need to be ironed out, areas that we would like to see strengthened, gaps that cause us concern. Is there a risk that we may lock ourselves in too early and below standard in areas where norms are still emerging, they ask?

Given the very divergent places from where the different stakeholders have come, the main focus of the process so far has been on building consensus. Consensus has entailed compromise in some cases, deliberate ambiguity in others. Will there be more compromises and what kind of compromises? In the human rights sector Guiding Principles are the gold standard – will there be a temptation to settle for less in order to gain agreement and so reduce the value of Guiding Principles?

These are some of the risks and concerns that my civil society colleagues aired with me, and I am putting them out openly on the table because it is important to understand and address those fears. I am sure Prof. Ruggie will respond to them in the course of the consultations.

But it would be wrong on our part as civil society to either prejudge the outcome or to allow our fears to cloud the opportunity to consolidate what has been gained and to clarify some of the grey areas with a view to strengthening human rights protection and reducing human rights abuse. To some extent it is really also up to civil society – through our engagement, advocacy, and intellectual contribution - to ensure that the Guiding Principles indeed become the gold standard on business and human rights.

From my perspective, I believe there are several strong points emerging from the policy framework which would benefit from consolidation in the Guiding Principles. There are also some areas that need to be clarified and strengthened.

First: the state's duty to protect. There are clear, concrete recommendations from the Special Representative on how states can better discharge their duty to protect, including through more coherent policy making, better use of corporate law, leveraging the state's own economic roles, and developing human rights sensitive bilateral investment treaties, host government agreements and ECAs. Incorporating them in Guiding Principles would give both clarity and authority, creating a bench mark for state performance and tool for advocacy.

It would be important however for the Guiding Principles to state clearly the primacy of States' human rights obligations over other kinds of obligations or policy interests. In the context of bilateral investment treaties and host government agreements the point is not to

balance competing claims between investors' rights and human rights but to acknowledge that the state's duty to protect human rights is overriding. Safeguarding the space for human rights policy is not an option for states but an obligation.

The obligation to uphold human rights does not disappear when the State privatizes its public functions. And when the State itself is involved in carrying out business activities, then it has even greater opportunity to live up to its obligations, and should be reminded by the international community to do so.

Second: the corporate responsibility to respect human rights. That it includes all human rights, applies to all businesses in all situations, exists independently of the states' duty to protect and entails refraining from abuse as well as complicity – by incorporating these aspects of the corporate responsibility, the Guiding Principles would bring clarity to the understanding of what state and society's expectation of business is in the area of human rights.

The question I would raise here is whether corporate responsibility should be reflected in the Guiding Principles as an evolution of social expectations or as an expectation of international law.

The ILO Declaration, the OECD guidelines and statements of the High Commissioner for Human Rights link the corporate responsibility to the Universal Declaration of Human Rights.

The Special Representative's reports point out that corporate responsibility is not a law-free zone. It has been acknowledged in virtually every voluntary and soft law instrument related to corporate responsibility and in some domestic legislation. To quote his reports it has achieved "near-universal recognition by all stakeholders". And of course, it has now been affirmed by the Council itself.

While there are good pragmatic reasons for putting forward the corporate responsibility to respect as a social norm, I think it is worth considering whether the Guiding Principles should reference the corporate responsibility to the Universal Declaration of Human Rights. That would give it a stronger normative basis.

The value of the human rights approach lies in its normative, legal framework. More generally, as policy recommendations are converted into Guiding Principles, we should not overlook the value that international law, human rights law, corporate and other relevant areas of law can bring, consolidating, clarifying and strengthening the issues.

Third: the translation of the corporate responsibility to respect into a *proactive* duty to exercise due diligence – that is an important principle.

As the Special Representative puts it in his most recent report, due diligence could be the game changer for companies. In particular, the emphasis on stakeholder engagement, communications and transparency is very welcome. Prof. Ruggie rightly points out that human rights risk management is different from other kinds of risk management because it is about people, not probabilities.

That conclusion should lead the Guiding Principles to both emphasize stakeholder relations and also to insist on respect for the protection – from state and corporate abuse - of human rights defenders and others who advocate on behalf of affected communities or seek remedies for them.

One issue that would benefit from greater clarity is whether and when companies must go beyond “respect”. The policy framework is clear about a baseline expectation, but in a climate of economic cutbacks where the state is ceding functions to private entities more and more, is there a risk that due diligence may not be adequate when companies take up quasi-state functions, such as running prisons? Or when companies operate in conflict zones where there is heightened risk of abuse and complicity with abuse?

The greatest challenge with corporate responsibility is how to ensure that companies are actually complying with human rights standards. When they undertake their due diligence exercise, what degree of transparency and independent monitoring will there be? The three elements of the policy framework are integrated, and the expectation is that the corporate responsibility to respect will be overseen and enforced by the State as part of its duty to protect. Obviously, the effective use of company law – requirements to report, directors’ duties the like – by the State, the State’s readiness to regulate, monitor, enforce incentivize or punish will be critical. But what happens when the State is weak and the company is failing its responsibility? That, unfortunately, is the reality in much of the world. The Guiding Principles will need to address that scenario.

That brings me to my fourth point - the extra-territorial dimension of the state’s duty to protect against human rights abuse by its companies overseas. Extra-territoriality has its limits but it is nevertheless crucial, given the globalized economy, the disparate capacity and will of states to adopt and enforce laws, to investigate or punish companies that abuse human rights, and the fact that the most egregious abuses occur in zones of weak governance.

Experts are divided on whether international law requires home states to prevent human rights abuses by their companies abroad. On which side of the divide will the Guiding Principles fall?

Some treaty bodies are encouraging governments to take regulatory action to prevent abuses by their companies abroad. Governments themselves are increasingly expanding their extra-territorial jurisdiction in areas such as anti-corruption, financial and banking sectors, environmental protection, and organized crimes. So, it is hard to justify that controlling corporate human rights abuse overseas is an option rather than an obligation for states.

Prof. Ruggie notes that there are good policy reasons for home states to encourage their companies to respect human rights abroad. He has helpfully suggested unpacking the notion of “extra-territoriality” – which can extend over a whole range of issues from extra-territorial implications of domestic law to extra-territorial legal jurisdiction – so as to distinguish between that which is permissible and that which is problematic.

I hope he will give a bold interpretation to the state’s duty to prevent human rights abuse by its companies overseas, particularly in conflict zones and zones of weak governance where not only do we see some of the worst human rights abuses, but where the host state is at its

weakest and the international community is increasingly taking an expanded role in protecting human rights and humanitarian activities.

The Council has asked the Special Representative to explore ways of strengthening international cooperation on business and human rights issues. Could innovative interpretations of international cooperation open up more possibilities for extra-territorial exercise of the state's duty to protect without raising concerns about sovereignty?

Another aspect of strengthening international cooperation in the Guiding Principles must surely be to look at the role of international financial institutions – both directly and through member states.

My final point is on remedies. While the Guiding Principles should seek to strengthen all three types of remedies (state-based judicial and non-judicial remedies and company grievance mechanisms) mentioned in the consultation document, the whole area of remedies is one where more work needs to be done in the period leading up to the Guiding Principles and following it. Given the enormous barriers to justice that victims face, this is one area of the mandate that would benefit from direct inter-action with affected communities.

One further question to consider is whether there is an investigative role for the UN to play as it has done in other areas of human rights abuse. Should the Guiding Principles open the path for considering this possibility – or at least not foreclose it? What might be the role of other special procedures, treaty bodies and the Universal Periodic Review process?

In the 1990s as a UNHCR official I was involved in the drafting process of the Guiding Principles on Internal Displacement. It started with much less agreed consensus than we now have on business and human rights. But it managed very successfully to combine principles that restated existing international law, those that were new applications of existing rules and those that were wholly new principles created by analogy to existing norms. Through a mix of the agreed, the accepted and the innovative, it skillfully overcame contention and tension, and strengthened the protection of the internally displaced persons.

I mention it because I think we can draw some useful lessons from that process for this one. The most important one is that we should not underestimate the normative power and political legitimacy of the Special Representative's mandate to push the frontiers.

The Special Representative is right to base the Guiding Principles largely on existing norms, but as the experience with the Deng principles show that still leaves considerable scope for creating a gold standard through creative drafting, astute diplomacy and skilful advocacy. Civil society has an important role to play in that process.

As you have said in one of your reports, John, "there is nothing to be gained by lowering standards – values are becoming a value proposition... The UN must lead by setting expectations and aspirations."