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The State Duty to Protect and Domestic Legal Reform,"
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My thanks to the South African Institute for Advanced Constitutional, Public, Human Rights and International Law for convening this workshop, and for inviting me to address you today. I apologize that I can't be with you in person but am delighted to be able to speak to you through the marvels of technology.

Your discussion is focused on the State duty to protect and domestic legal reform in the business and human rights context. The State duty to protect lies at the core of the international human rights regime. It constitutes one of the three foundational principles of the policy framework I proposed to the UN Human Rights Council for moving the business and human rights debate forward—and which the Council welcomed unanimously this past June. I will return to it in a moment. But first let me describe my UN mandate briefly, because not everyone may be equally familiar with it.

The mandate had its origins in a divisive debate generated by a text called the draft Norms on Transnational Corporations and Other Business Enterprises, presented to the then UN Commission on Human Rights in 2004, by an expert subsidiary body. This text sought to impose on companies, directly under international law, essentially the same range of human rights duties that States have accepted for themselves. The two were separated only by the slippery distinction between States as primary and corporations as secondary duty bearers, and by the elastic concept of corporate spheres of influence, within which companies were said to have these duties.

Business was vehemently opposed to the draft Norms, human rights advocacy groups strongly in favor. The Commission declined to adopt the document, and declared that it had no legal status. Instead, in 2005, it requested the UN Secretary-General to appoint a Special Representative on the issue of business and human rights, with the goal of moving beyond the stalemate. Kofi Annan appointed me to the post and Ban Ki-moon has continued the assignment.

This past spring, in my final report under that mandate, I proposed a conceptual and policy framework as a new way to understand and advance the business and human rights agenda. As noted, the Council "welcomed" the framework and extended my mandate for another three years, tasking me with "operationalizing" the framework in order to provide concrete guidance to States and businesses. The framework was also supported by the major international business associations and by leading international human rights organizations. So a new consensus has emerged that we can now build upon.

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 manage the risk of human rights harm with a view to avoiding it; and third, greater access by victims to effective remedies.

Let me turn to the State duty to protect. It has both legal and policy implications. International human rights bodies indicate that States are required to act with due diligence to protect against corporate-related rights abuse affecting individuals within their territory or jurisdiction. This is a duty of conduct rather than result. It involves taking steps to prevent, investigate, redress and punish abuse. Thus, apart from situations where corporate conduct may be attributed directly to the State, it will not be held responsible for corporate abuse under international human rights law if it took all reasonable steps to protect against it.

While States have discretion to decide what form these measures should take, it is generally accepted that both regulation and adjudication of corporate activities vis-à-vis human rights are appropriate in order to fulfill the duty to protect.

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 prohibited from doing so provided that certain elements are present. Indeed, there is growing encouragement, including by UN Treaty Bodies, for home States to take regulatory action to prevent abuse by their companies overseas. One approach is parent-based regulation, which creates incentives for parent companies to exercise greater scrutiny over their subsidiaries abroad while minimizing the problem of one State "intervening" in the domestic affairs of another. In my 2008 report, I note strong policy grounds for home States to exercise greater oversight when they provide export credit and investment assistance.

More detailed guidance is needed on what is entailed by "due diligence" in the State context. The concept was affirmed in the Velasquez-Rodriguez decision of the Inter-American Court of Human Rights. Velasquez found that States could be held responsible for private acts where they fail to take steps to prevent or respond to violations. The case concerned violations by state-sponsored forces, but the Court noted that States have similar obligations to prevent or respond to private acts not directly attributable to the State.

The UN Human Rights Treaty Bodies, whose commentaries I surveyed in detail, have invoked the concept in varying degrees. And as you no doubt know, the African Commission on Human and Peoples' Rights has also adopted it. The Commission has highlighted that States have positive obligations under the African Charter to prevent and sanction private violations of human rights. And it has explained that the due diligence standard provides a way to measure the threshold of action and effort which a State must demonstrate to fulfill its duty to protect against abuse by non-state actors.

The best known application of this principle to business and human rights in Africa is the decision by the Commission on a communication from the Social and Economic Rights Action Centre regarding Nigeria. It concerned that State's alleged failure to protect against abuse by an oil consortium comprised of state owned and private enterprises. The Commission found that the State had failed in its duty to protect, and among other things recommended more independent oversight of the petroleum industry. More generally, it also said that the duty to protect requires States to create and maintain an appropriate legal and regulatory framework enabling individuals to realize their rights freely.

My own work underscores the importance of the last point. I have found that most governments tend to take a narrow approach to managing the business and human rights agenda. It is often segregated within its own conceptual and (typically weak) institutional box—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.

Therefore, the human rights policies of states in relation to business need to be pushed beyond their narrow confines. Governments need actively to encourage a corporate culture that is 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.

Domestic policy incoherence is replicated at the international level. Therefore, we need greater guidance from international human rights bodies as to the nature, scope and content of State's human rights duties in these economic policy areas—and condemnation when States fail to fulfill them. This guidance should also carry over into the policies of trade, investment and financial institutions.

In its resolution welcoming the "protect, respect, and remedy" framework and extending my mandate, the Human Rights Council asked me provide concrete and practical recommendations on ways to strengthen the fulfillment of the State duty to protect. Here are some of the issues I intend to pursue further, several of which are also on your agenda at this conference.

First, access to judicial remedies for victims of corporate-related abuse looms large—it tends to be most restricted or inadequate where it is most needed. Learning more about obstacles and exploring possible legal and policy tools will be one key component of my work on remedy, but obviously also has clear connections with the State duty to protect.

Second, I will continue to examine the extent to which certain elements of international investment agreements may constrain the ability of host governments to adopt policies consistent with their human rights obligations, without fear of violating treaties or contracts. Some of you may have attended a recent meeting in Johannesburg on this issue that I convened jointly with the International Finance Corporation, as part of a series of consultations on the potential consequences for human rights policy of stabilization provisions in host government agreements.

Third, in my 2008 report I discuss the importance of States taking steps to encourage a corporate culture that is respectful of human rights, including through the use of corporate law tools. I will be exploring such tools in greater depth, thanks to pro bono research by some of the world's leading corporate law firms, as well as through expert consultations.

Fourth, it is self-evident that the current international human rights regime cannot possibly be expected to function as intended in countries torn apart by civil war or other serious social strife. It is therefore unsurprising that some of the most egregious corporate-related human rights abuses have occurred in conflict zones. Home

States, host States, and corporations all need, and many seek, greater guidance on how to prevent such abuses. To this end, I am looking into the possibility of inviting an informal group of interested home and host States to identify tools, policies and approaches that States could use to avoid or mitigate companies contributing to conflict.

Let me draw my remarks to a close with an observation on binding international human rights obligations for companies. My good friend David Kinley is giving a presentation on this subject, and if I were there I suspect that we would have a spirited debate. Here's my take. Of all aspects of managing the business and human rights agenda, our understanding of the State duty to protect is the most detailed and least contested. Yet even about it we still have as many questions as we have answers. The inference I draw from that fact is that we ought to resist succumbing to what the great sociologist Max Weber called a "means-ends reversal," turning the quest for binding obligations into an end in itself before sorting out what means—legal and non-legal, different bodies of law, various areas of public and self-regulation—are the most promising for which contexts.

There is an old saying in my country that if you're a hammer all the world's problems look like nails. But we know they're not. So we should handle the matter pragmatically, by identifying the specific attributes of the different challenges we face, laying out the full array of tools, and then selecting the ones that provide the best mix of effectiveness and feasibility. This, it seems to me, is the quickest and surest way of achieving sustained progress. And judging from the positive reactions it has elicited, the "protect, respect, and remedy" framework seems like a good place to start.

In conclusion, many thanks again for inviting me to participate vicariously in your conference. I wish you every success, and I look forward to learning about the outcome of your discussions.