HARVARD UNIVERSITY
JOHN F. KENNEDY SCHOOL OF GOVERNMENT

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Dear Colleagues,

Many thanks for your email of 17 March 2006, and for the attached position paper commenting on my first interim report as Special Representative of the Secretary-General on the subject of business and human rights.

I appreciate deeply the fact you engaged my report at a substantive level, as well as the thoughtful and constructive spirit in which your comments are offered. Because your paper is more than half the length of my report itself, I hope you will forgive me if I do not address every point you raise. Nevertheless, I fear that if I left some of your claims unanswered, anyone who has not read my report in detail might be misled as to its core arguments and position, and hence I shall focus on those issues below.

1. In your "Critique 1" you claim that I hold the state-centric view "that international human rights law imposes obligations only on States," and you go on to say that this view "fails to recognize the precedents in international criminal law of imposing human rights obligations on *individuals*" (italics in original).

It is true that I believe state obligations to capture much of the prevailing human rights picture today. Any examination of current state practice and binding international commitments leads to the inescapable conclusion that only a limited range of human rights obligations attach directly to non-state actors. At the same time, however, I note two exceptions in my report, which may have escaped your attention. I make brief reference to the evolving obligations of individuals under international law in paragraph 62. And I explicitly address emerging standards governing corporate actions in paragraph 64, where I state "there is fluidity in the applicability of international legal principles to acts by companies… [M]ost of it involves quite narrow, albeit highly important, areas of

international criminal law, with some indication of a possible future expansion in the extraterritorial application of home country jurisdiction over transnational corporations." I would not want your readers to have missed these references.

Subject to confirmation of preliminary funding commitments, I plan to convene a brainstorming session of legal experts later this year with the aim of achieving greater clarity regarding these issues and related jurisdictional questions.

2. Your "Critique 2" addresses what is perhaps the most central point in my critique of the Norms, and I take slight issue with your rendition. You state that "contrary to the interpretation of the Special Representative, the Norms place primary responsibility for the fulfillment of human rights on States and do not demand business to be 'co-equal duty bearers'." While this statement may accurately describe the intentions of the Norms' authors, I conclude in my report that it is not the result that would follow from the Norms' implementation. My argument proceeds in several steps.

The problem begins with the fact that the Norms offer no principled basis for attributing human rights obligations to companies that rests on or reflects their particular social roles. In effect, the Norms attach all state-based obligations that are remotely related to business activities to corporations as well, and then claim that, through some undefined process, these are now also binding on firms within their sphere of influence.

I find this sweeping assertion to be highly problematic on sheer logical grounds if no other. Yes, corporations are organs of society, but they are specialized organs, not microcosms of the social whole. Therefore, apart from acts that constitute international crimes or complicity in crimes – and these matters themselves are not fully settled – the character and limits of corporate obligations ought to reflect their social role, especially when it comes to positive obligations.

The Norms do allow that some civil and political rights may not pertain to companies. But they articulate no actual principle for reaching that conclusion, or for their imposing higher obligations on corporations in several instances than states have accepted for themselves. In this critical foundational respect, then, the Norms employ a purely ad hoc procedure – perhaps reflecting their authors' analytical hunches or policy preferences, but not any principled rule that I can discern.

Without a principled differentiation of the responsibilities of states and companies, the concept of "spheres of influence" is left to carry the entire burden. But in legal terms, this is a burden it cannot sustain on its own: it needs to sit on top of a solid basis for assigning obligations to corporations in the first place. Once that is established, then we can scan the horizon utilizing the sphere of influence construct as a practical guide. In short, "spheres of influence" is a second-order construct, not a primary basis for attributing obligations.

Finally, lacking a principled or role-based differentiation, in actual practice the allocation of responsibilities under the Norms could come to hinge entirely on the relative

capacities of states and corporations in particular situations – so that where states are unable or unwilling to act, the job ipso facto would be transferred to corporations.

Professor Philip Alston, former Chair of the United Nations Committee on Economic, Social and Cultural Rights, identifies both the problem and its resulting dilemma; I regret that I did not see his new book before writing my report:

> "If the only difference is that governments have a comprehensive set of obligations, while those of corporations are limited to their 'spheres of influence'…how are the latter [obligations] to be delineated? Does Shell's sphere of influence in the Niger Delta not cover everything ranging from the right to health, through the right to free speech, to the rights to physical integrity and due process? But if the private sphere is distinguished from the public sphere by virtue of its emphasis on autonomy, risk-taking, entrepreneurship, and the rational pursuit of self-interest, what are the consequences of saddling it with all of the constraints, restrictions, and even positive obligations which apply to governments?"[1]

My fear is that the Norms' inevitable slide down the slippery slope of attributing obligations based on relative influence or capacity would generate endless strategic gaming on the part of governments and companies alike, as well as undermining efforts to build indigenous social capacity and to make governments more responsible to their own citizenry – which is surely the best guarantor of human rights.

So by asking me to build my mandate on the Norms, as you and other human rights groups have done on numerous occasions, you are asking me, in essence, to build it on what I regard as the analytical equivalent of quicksand – quite apart from the obvious political fact that neither governments nor business have shown any interest in basing my mandate on the Norms. Needless to say, I have every intention of taking advantage of the useful elements produced by the Norms effort, which were acknowledged by the Human Rights Commission and are identified in my report.

3. I share your view of the importance of consulting with all stakeholders on how best to achieve progress. As you know, throughout this past autumn I held consultations with civil society organizations, business groups, individual companies, government representatives and international officials, as well as with the Human Rights Commission in informal session. I am convening regional consultations in Africa, Asia, and Latin America, beginning with one in Johannesburg next week, even though these are not mandated and require my raising funds from supportive governments. My aim is to provide greater opportunities for voices from the global South to be heard directly in these deliberations than is possible in Geneva-based processes. I have also begun to make site visits to the overseas operations of companies, in order to gain a better understanding of characteristic challenges in different industries and different countries. My first visit was to mining operations and community groups in Peru this past January. Funding and time permitting, I plan to continue these broad-based consultations for the remainder of my mandate.

4. I close with an observation regarding our respective conceptions of my mandate, because I sense that they may be somewhat different. In your position paper you anchor your support and advocacy for the Norms in a project that you trace back to the Draft Code on Transnational Corporations of the 1980s and ultimately to the New International Economic Order of the 1970s. My mandate, as I read it, is not to devise new ways or grounds for regulating transnational corporations *per se;* rather, it is to strengthen the promotion and protection of human rights as they relate to transnational corporations and other business enterprises by identifying and advocating the adoption of *whatever* measures work best in creating change where it matters most: in the daily lives of people. This is the "principled pragmatism" of which I wrote in my report. It has guided me from the moment I accepted this important assignment, and I shall abide by it through to the mandate's end.

Once again, many thanks for your engagement. I would be immensely grateful if you would post this letter on your website alongside your commentary on my report.

With best regards,

John G. Ruggie

Kirkpatrick Professor of International Affairs and Director, Mossavar-Rahmani Center for Business and Government, Kennedy School of Government; Affiliated Faculty Member, Harvard Law School; Special Representative of the UN Secretary-General for business and human rights.

[1] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Alston, ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), pp. 13-14.