

**Keynote Remarks at Extraordinary Plenary
Voluntary Principles on Security & Human Rights
Department of Foreign Affairs & International Trade
Ottawa, Canada
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15 September 2011**

I am very pleased to be here with you today. This is my fourth or fifth VPs plenary – I’ve lost track – so it’s beginning to feel like a family reunion. I have always cared deeply about this initiative because it deals with the most palpable and widely recognized of all human rights: the physical security and integrity of the person. It can make the difference between positive relations between company and community, and situations where lives might be at risk.

You understand better than I that managing this challenge was made more difficult by the fact that many foundational issues of the VPs were left unaddressed when the initiative was launched under time pressure in 2000.

But I do know from personal experience that the VPs are well positioned to help bring about desired change. In 2007 I visited the human rights training center of the once notorious 16th army brigade in Casanare, Colombia. I spent time with BP and people in the surrounding community. I met with the Colombian National Committee for the VPs, and the country’s Vice President, who had direct oversight responsibility. I addressed the convening of a parallel initiative for other industry sectors, called the Guías Colombia. It was an impressive demonstration of what can be done at the country level.

This past year you welcomed a number of new participants. And I understand that new governance rules are expected to be settled at this Plenary. Congratulations! You’re on a roll now.

I’d like to do two things this morning. First, to reflect on what’s happened in the wider world of business and human rights since you last met. And second, to offer some observations on next steps for the VPs.

Let me begin with my UN mandate on business and human rights. It started in 2005, amidst deep divisiveness and little prospect of progress. Yet by 2008 the UN Human Rights Council unanimously welcomed the “Protect, Respect and Remedy” Framework I proposed for better managing business and human rights challenges. The Council also extended my mandate for three years and asked me to “operationalize” this Framework. On June 16 of this year, the

Council was again unanimous in “endorsing” the Guiding Principles for Business and Human Rights I proposed. These set a standard of practice that is now expected of all governments and businesses with regard to business and human rights. The Council decision marked two firsts: it was the first time that it had endorsed a normative text on business and human rights; and it was the first time that it used the verb “endorse” in connection with any normative text that governments did not negotiate themselves. Thanks to extensive research, 47 international consultations, numerous bilaterals in capitals and informals with Council members, coupled with support from all stakeholder groups including business, the mandate had built up the credibility and trust for governments to have willingly outsourced a task they normally guard jealously.

The UN Framework rests on three pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulations, and adjudication; the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and greater access by victims to effective remedy, judicial and non-judicial.

Under the state duty to protect, the Guiding Principles recommend how governments should provide greater clarity of expectations and consistency of rules for business in relation to human rights. Under the corporate responsibility to respect, the GPs provide a road map for companies to know and show that they are respecting human rights, built around human rights due diligence and acting on its findings. Access to remedy focuses on ensuring that where business-related human rights harm does take place, there is both adequate accountability and effective redress. This can include grievance mechanisms that companies operate or participate in. Heightened due diligence and stronger measures by governments as well as companies are called for in conflict-affected areas, where the worst forms of corporate-related human rights abuse and the greatest legal risks to companies tend to occur. As we speak, the United Nations is establishing a five person inter-regional expert group to oversee the implementation and further operationalization of the Guiding Principles.

The GPs are now the most authoritative global standard for business and human rights. In addition to their endorsement by the Human Rights Council, they have also migrated to other international standard setting bodies.

The OECD has updated its Guidelines for Multinational Enterprises, adhered to by 42 countries including non-members like Brazil. Two innovations are particularly relevant for you. First, the OECD added a chapter on human rights that explicitly drew on and is fully aligned with the second pillar of the

UN GPs – the corporate responsibility to respect rights. Second, it added the provision that companies should carry out risk-based due diligence in order to identify and address their adverse impacts in all areas covered by the OECD Guidelines, not only human rights, and that they do so not only with regard to their own activities, but also their business relationships including supply chains.

Elsewhere, the International Finance Corporation has updated its sustainability policy and the corresponding performance standards they require clients to meet. For the first time, these now explicitly reference the business responsibility to respect human rights, which inevitably leads companies back to the due diligence processes described in the UN GPs. The IFC performance standards get tracked by the Equator Banks, of which there are now 72 worldwide, and by several national export credit agencies.

Lastly, ISO26000 is a social responsibility standard adopted last year by 93 percent of the membership of the International Organization for Standardization, including China. It, too, has a human rights chapter that drew on and is closely aligned with the UN Framework. ISO plays a critical role in reaching companies that are new to this agenda, particularly in Asia.

In each instrument, the corporate responsibility to respect human rights is the core operating principle for business. It is defined as not infringing on the rights of others. Meeting this responsibility requires companies to conduct adequate risk-based due diligence, the basic elements of which are also agreed upon. Where harm does occur companies should address it, including through operational-level grievance mechanism. Finally, companies are expected to communicate their performance.

This convergence provides companies with greater clarity and predictability than in the past as to their baseline responsibility for human rights. At the same time, it provides authoritative benchmarks for stakeholders to assess companies' claims that they respect human rights. It also has consequences for non-compliance. Stakeholders now have more specific human rights grounds for bringing grievances against companies to such mechanisms as the OECD National Contact Points and the World Bank's complaints procedures. And in the case of the IFC and its ripple effects on Equator Banks and export credit agencies, in some cases companies' access to capital could be affected. In short, a clearer and firmer set of expectations has taken hold at the international level.

In the realm of hard law, there have been several new instances of what are called 'foreign direct liability' cases, brought in the UK, the Netherlands and Canada. But perhaps the most intriguing question concerns the future of the U.S. Alien Tort Statute. The 2nd Circuit Court has issued two blockbuster rulings. In

one, the Court held that the standard for corporate complicity – or aiding and abetting – requires plaintiffs to show that the company had the purpose of facilitating the alleged offenses – whereas the weight of international legal jurisprudence is that the standard is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of the offense. In a second case the same Court ruled that the ATS didn't apply to companies at all.

Both opinions are hotly debated and they are contradicted by other appeals courts, so the questions are likely to end up with the U.S. Supreme Court. If the ATS ultimately were declared inapplicable to companies, one would expect plaintiffs to start bringing cases against individual company officials – who, as the 2nd Circuit Court stressed, without question are subject to liability under the Statute and, of course, under state tort law. This evolving liability debate bears close watching by all companies.

Now let me turn to next steps for the VPs. I am only stating the obvious when I say that expanding the number and diversity of participants is your greatest need, in the government and company pillars alike – and as those expand, presumably in the NGO pillar as well. I suspect that you all have similar lists of candidates in mind. So let me briefly address two other issues: the role of governments, and the issue of assurance.

Not only should more governments be invited into the VPs, especially host country governments, but all governments must do more on the ground where it matters most. I convened a group of states under my mandate to explore business and human rights issues in the context of conflict zones. We found it hard to identify “good practices” by states, as I had hoped, because there are so few systematic practices of any kind.

When operating in difficult environments, companies need granular advice and assistance from home and host states alike. They need to be able to count on the in-country government-to-government interface that is a critical component of the VPs – for example, to address the challenges of security sector reform, or to provide assistance in managing the predictable influx of people and corresponding demand for infrastructure when a new site opens. In my experience, most embassies are not well instructed or equipped for these tasks. In addition, home governments of companies need to be honest with them when their activities approach critical thresholds, and promote corrective measures if they are crossed.

The issue of assurance is complex. But it may be useful to focus on the objectives it is intended to achieve. Within the VPs initiative, one aim surely is to protect the collective brand, especially as more participants come on board that

have operated under different traditions and requirements. Another is to foster peer-to-peer learning that is intended to drive continuous improvement; using similar benchmarks facilitates that process. In other voluntary initiatives, the Secretariat plays a useful role in this connection.

The greater challenge is what gets communicated externally. But even here the purpose is clear: to establish the credibility of the initiative with stakeholders. Now, some people may ask, why should we care what they think?

A pragmatic answer lies in the classic definition of a stakeholder, which goes back to a 1984 book by Edward Freeman. A stakeholder is any group or individual whom your actions can affect significantly, and who in turn can affect your operations significantly. With that definition in mind, you will all recognize that stakeholder-related risks in your sector have risen rapidly.

In my 2010 report to the Human Rights Council, I cited a Goldman Sachs study of 190 projects operated by the major international oil companies. It showed that the time for new projects to come on stream nearly doubled in the previous decade, causing significant cost inflation. Goldman attributed the delays to what they called “technical and political complexity.” In my report, I also referred to an independent analysis of a subset of those projects, which indicated that non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the largest single category. It further estimated that one company may have experienced a \$6.5 billion “value erosion” over a two-year period from stakeholder-related sources.

My colleague Rachel Davis has conducted follow up research including interviews with a number of companies represented in this room. We learned, for example, that in the mining industry an operation with capital expenditures in the \$3-\$5 billion range suffers losses of roughly \$20 million per week of delayed production, in net present value terms. These costs typically aren’t aggregated into a single category or number that would catch the attention of senior management or boards; they tend to be rolled into operating costs – which is ironic if not perverse, because the positive things companies do to try and prevent such losses do show up as direct costs.

We also learned that perhaps the single most overlooked cost is the staff time that has to be devoted to managing conflicts with communities. We are told that the working assumption in the extractives is about 5 percent of an asset manager’s time. Yet there are many instances where it gets to be as high as 50 and even 80 percent. And if those conflicts are left unattended they may escalate, which can lead to property damage and injury, or worse, to community members

and company employees. Then come the major advocacy campaigns and law suits.

We've all seen this movie, the original and its sequels. It's called "Everybody Loses." The fact is that we live in a world of mobilized – or at least highly mobilizeable – stakeholders in all but a few remaining spots on the planet. Adequate communication with external stakeholders is intended to demonstrate to them that companies are living up to their commitments – thereby establishing the kind of relations between companies and communities that the VPs are intended to achieve and sustain.

To sum up, it's been an eventful year for business and human rights. It has been equally eventful for the VPs and the year ahead for your initiative looks promising. As I said at the outset, I keep popping up in your midst because your mission is important and I am eager to advance it. Thank you for your forbearance in permitting me to do so. And a special thanks to the Government of Canada for hosting this plenary, and for its generous and steadfast support throughout my mandate.

I wish you every success.