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**IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251
OF 15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL”**

**“Business and Human Rights:
Mapping International Standards of Responsibility and Accountability
for Corporate Acts”**

**Report of the Special Representative of the Secretary-General (SRSG)
on the issue of human rights and transnational corporations and other
business enterprises**

Summary

This report responds to various elements of subparagraphs (a) through (c) as well as (e) of the mandate (Commission on Human Rights resolution 2005/69): “standards of corporate responsibility and accountability...with regard to human rights”; “the role of States in effectively regulating and adjudicating” business activities; the subject of corporate “complicity”; and identifying some prevailing if not “best” practices by states and companies. The four addenda to this report provide greater detail. A companion report (A/HRC/4/74) explains the key issues involved in conducting human rights impact assessments, as per subparagraph (d).

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
<i>Introduction</i>	1 – 9	3
I. State Duty to Protect	10 – 18	5
II. Corporate Responsibility and Accountability for International Crimes	19 – 32	7
III. Corporate Responsibility for Other Human Rights Violation under International Law.....	33 – 44	11
IV. Soft Law Mechanisms	45 – 62	14
V. Self-Regulation	63 – 81	18
<i>Conclusion</i>	82 – 88	23

INTRODUCTION

1. There is no magic in the marketplace. Markets function efficiently and sustainably only when certain institutional parameters are in place. The preconditions for success generally are assumed to include the protection of property rights, the enforceability of contracts, competition, and the smooth flow of information. But a key requisite is often overlooked: curtailing individual and social harms imposed by markets. History demonstrates that without adequate institutional underpinnings markets will fail to deliver their full benefits and may even become socially unsustainable.¹

2. In recent decades, especially the 1990s, global markets expanded significantly as a result of trade agreements, bilateral investment treaties, and domestic liberalization and privatization. The rights of transnational corporations became more securely anchored in national laws and increasingly defended through compulsory arbitration before international tribunals. Globalization has contributed to impressive poverty reduction in major emerging market countries and overall welfare in the industrialized world. But it also imposes costs on people and communities – including corporate-related human rights abuses, for reasons detailed in the SRSG’s interim report.²

3. These are challenges posed not only by transnational corporations and private enterprises. Evidence suggests that firms operating in only one country and state-owned companies often are worse offenders than their highly visible private sector transnational counterparts. Clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed.

4. Realigning the relationships among social institutions is a long-term process. While governments representing the public interest must play key roles, they need to be joined by other social actors and to utilize other social institutions to achieve this goal, including market mechanisms themselves. The Commission on Human Rights recognized the scope and complexity of the challenge when it established this multifaceted mandate.

5. The mandate asks the SRSG to “identify and clarify,” to “research” and “elaborate upon,” and to “compile” materials – in short, to provide a comprehensive mapping of current international standards and practices regarding business and human rights. Resolution 2005/69 also invites him to submit his “views and recommendations” for consideration by the Council. This report is devoted to the first task: mapping evolving standards, practices, gaps and trends.

¹John McMillan, *Reinventing the Bazaar: A Natural History of Markets* (Norton, 2002).

²E/CN.4/2006/97, paragraphs 20-30.

6. The report is organized into five clusters of standards and practices governing corporate “responsibility” (the legal, social, or moral obligations imposed on companies) and “accountability” (the mechanisms holding them to these obligations). For ease of presentation, the five are laid out along a continuum, starting with the most deeply rooted international legal obligations, and ending with voluntary business standards. A brief discussion of trends and gaps concludes the report. The clusters are:

- I. State duty to protect;
- II. Corporate responsibility and accountability for international crimes;
- III. Corporate responsibility for other human rights violations under international law;
- IV. Soft law mechanisms;
- V. Self-regulation.

7. This report draws on some two-dozen research papers produced by or for the SRSG.³ He also benefited from three regional multi-stakeholder consultations in Johannesburg, Bangkok, and Bogotá; civil society consultations on five continents; visits to the operations of firms in four industry sectors in developing countries; four legal expert workshops; two multi-stakeholder consultations, on the extractive and financial services industries; and discussions with representatives of all relevant multilateral institutions and some government officials.⁴

8. Addenda 1 through 4 provide greater detail on some of the issues posed in resolution 2005/69. A companion report (A/HRC/4/74) addresses the important subject of human rights impact assessments, as requested in subparagraph (d) of the mandate.

9. Because the SRSG has had fewer than 18 months to pursue this mandate, the job is not yet completed. For instance, research to date on “corporate spheres of influence” (subparagraph (c)) suggests only that it lacks legal meaning; further work is required to see if it can become a useful policy tool. More important, because factual claims about corporate obligations in the prior debate were so entangled with normative preferences and institutional interests, the SRSG has focused on producing a solid and objective evidentiary foundation. However, this has afforded him little opportunity to develop the “views and recommendations” he was invited to submit and which should rightly form part of this mandate’s conclusion. Therefore, the SRSG would welcome the opportunity of an additional year to build on the extensive work already done and submit clear options and proposals for the Council’s consideration.

³Those produced by or at the request of the SRSG are posted on his home page on the Business and Human Rights Resource Centre’s website at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

⁴The SRSG also received substantive written submissions from a number of organizations, including Allens Arthur Robinson; BankTrack; Business Leaders Initiative on Human Rights; EarthRights International; Global Witness; Halifax Initiative; Interfaith Center on Corporate Responsibility; International Commission of Jurists; International Council on Metals and Mining; International Network for Economic, Social & Cultural Rights; International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD; Lovells; Rights & Democracy, Canada; Tebtebba Foundation & Forest Peoples Programme.

I. STATE DUTY TO PROTECT

10. Many claims about business and human rights are deeply contested. But international law firmly establishes that states have a duty to protect against nonstate human rights abuses within their jurisdiction, and that this duty extends to protection against abuses by business entities.⁵ The duty to protect exists under the core United Nations human rights treaties as elaborated by the treaty bodies, and is also generally agreed to exist under customary international law.⁶ Moreover, the treaty bodies unanimously affirm that this duty requires steps by states to regulate and adjudicate abuses by all social actors including businesses.⁷

11. The earlier UN human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), do not specifically address state duties regarding business. They impose generalized obligations to ensure the enjoyment of rights and prevent nonstate abuse. Thus, ICERD requires each state party to prohibit racial discrimination by “any persons, group or organization” (Art. 2.1(d)). And some of the treaties recognize rights that are particularly relevant in business contexts, including rights related to employment, health, and indigenous communities.

12. Beginning with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979, and including the Convention on the Rights of the Child (CRC) and the recently adopted Convention on the Rights of Persons with Disabilities, business is addressed more directly. CEDAW, for example, requires states to take all appropriate measures to eliminate discrimination against women by any “enterprise” (Art. 2(e)), and in the context of “bank loans, mortgages and other forms of financial credit” (Art. 13(c)). The treaties generally give states discretion regarding the modalities for regulating and adjudicating nonstate abuses, but emphasize legislation and judicial remedies.

13. The treaty bodies elaborate upon the duty to protect. General Comment 31 by the Human Rights Committee is one recent example. It confirms that under the ICCPR

⁵Beyond the national territory, the duty’s scope will vary depending on the state’s degree of control. The UN human rights treaty bodies generally view states parties’ obligations as applying to areas within their “power or effective control.”

⁶States also have duties to respect, promote and fulfill rights, but the most business-relevant is the duty to protect because it focuses on third party abuse. See Addendum 1. Where corporations perform public functions or are state-controlled, the secondary rules of state attribution may also hold the state responsible for the abuse. See the International Law Commission’s articles on “Responsibility of States for Internationally Wrongful Acts,” adopted in November 2001. <http://daccessdds.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement>.

⁷Drawing on the language of subparagraph (b) of the mandate, this section uses “regulation” to refer to treaty body language recommending legislative or other measures designed to prevent or monitor abuse by business enterprises, and “adjudication” to refer to judicial or other measures to punish or remediate abuse.

“the positive obligations on states parties to ensure Covenant rights will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities...”⁸ It further explains that states could breach Covenant obligations where they permit or fail “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”

14. The Committees express concern about state failure to protect against business abuse most frequently in relation to the right to non-discrimination, indigenous peoples’ rights, and labor and health-related rights. But the duty to protect applies to all substantive rights. The Committees tend not to specify the precise content of required state action, but generally recommend regulation through legislation and adjudication through judicial remedies, including compensation where appropriate.

15. Current guidance from the Committees suggests that the treaties do not require states to exercise extraterritorial jurisdiction over business abuse. But nor are they prohibited from doing so.⁹ International law permits a state to exercise such jurisdiction provided there is a recognized basis: where the actor or victim is a national, where the acts have substantial adverse effects on the state, or where specific international crimes are involved.¹⁰ Extraterritorial jurisdiction must also meet an overall reasonableness test, which includes non-intervention in other states’ internal affairs.¹¹ Debate continues over precisely when the protection of human rights justifies extraterritorial jurisdiction.

16. The regional human rights systems also affirm the state duty to protect against nonstate abuse, and establish similar correlative state requirements to regulate and adjudicate corporate acts.¹² Indeed, the increasing focus on protection against corporate abuse by the UN treaty bodies and regional mechanisms indicates growing concern that states either do not fully understand or are not always able or willing to fulfil this duty.

⁸HRC, General Comment 31, paragraph 8.

⁹Some treaty bodies seem to be encouraging states to pay greater attention to preventing corporate violations abroad. For example, CESCR has suggested that states should take steps to “prevent their own citizens and companies” from violating rights in other countries. General Comment 15, paragraph 33.

¹⁰Under the principle of “universal jurisdiction” states may be obliged to exercise jurisdiction over individuals within their territory who allegedly committed certain international crimes. It is unclear whether and how such obligations extend jurisdiction over juridical persons, including corporations. See Addendum 2.

¹¹Of course, the entire human rights regime may be seen to challenge the classical view of non-intervention. The debate here hinges on what is considered coercive. See Addendum 2 for details.

¹²For an overview, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006), chap. 9; on Africa, see Nsongurua Udombana, “Between Promise and Performance: Revisiting States’ Obligations under the African Human Rights Charter” (2004) 40 *Stanford Journal of International Law* 105.

17. The SRSG's questionnaire survey of states, asking them to identify policies and practices by which they regulate, adjudicate, and otherwise influence corporate actions in relation to human rights, reinforces those concerns.¹³ No robust conclusions can be drawn because of the low response rate. But of those states responding very few report having policies, programs or tools designed specifically to deal with corporate human rights challenges. A larger number say they rely on the framework of corporate responsibility initiatives, including such soft law instruments as the OECD Guidelines or voluntary initiatives like the Global Compact. Very few explicitly consider human rights criteria in their export credit and investment promotion policies or in bilateral trade and investment treaties, points at which government policies and global business operations most closely intersect.¹⁴

18. In sum, the state duty to protect against nonstate abuses is part of the international human rights regime's very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.

II. CORPORATE RESPONSIBILITY AND ACCOUNTABILITY FOR INTERNATIONAL CRIMES

19. But states are not the only duty bearers under international law.¹⁵ Individuals have long been subject to direct responsibility for the international crimes of piracy and slavery, although in the absence of international accountability mechanisms they could be held liable only by national legal systems. The International Military Tribunals established after World War II confirmed that individuals bear responsibility for crimes against peace, war crimes, and crimes against humanity, and also imposed accountability on those within their jurisdiction – including corporate officers. With the entry into force of the Statute of the International Criminal Court (ICC) in 2002, a permanent forum now exists in which individuals can be held directly accountable for genocide, crimes against humanity, and war crimes if states parties fail to act.¹⁶

20. Long-standing doctrinal arguments over whether corporations could be “subjects” of international law, which impeded conceptual thinking about and the attribution of direct legal responsibility to corporations, are yielding to new realities. Corporations increasingly are recognized as “participants” at the international level,

¹³See Addendum 3.

¹⁴Perhaps uniquely, Norway manages the global portfolio of its government pension fund in accordance with ethical guidelines, which has led to disinvestments in two major transnational companies, one on human rights grounds. <http://odin.dep.no/etikkradet/english/>.

¹⁵This section provides partial responses to subparagraphs (a) and (c) of the mandate.

¹⁶International legal responsibility attaches to individuals for a wider range of acts than those covered by the ICC Statute.

with the capacity to bear some rights and duties under international law.¹⁷ As noted, they have certain rights under bilateral investment treaties; they are also subject to duties under several civil liability conventions dealing with environmental pollution. Although this has no direct bearing on corporate responsibility for international crimes, it makes it more difficult to maintain that corporations should be entirely exempt from responsibility in other areas of international law.

21. The ICC preparatory committee and the Rome conference itself debated a proposal that would have given the Court jurisdiction over legal persons (other than states), but differences in national approaches prevented its adoption. Nevertheless, just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today.

22. Indeed, corporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes – imposed through national courts.

23. Individual responsibility under international law may arise by directly committing or instigating a crime, or for crimes committed by subordinates that a superior had reason to know would be committed but failed to prevent. The international tribunals have also imposed liability for “aiding and abetting” a crime, or for engaging in a “common purpose” or “joint criminal enterprise.”¹⁸ No one-to-one mapping can be assumed between standards for natural and legal persons. But national courts interpreting corporate liability for international crimes have drawn on principles of individual responsibility – as the US Court of Appeals for the Ninth Circuit did in its *Unocal* ruling.¹⁹

24. At the same time, the number of jurisdictions in which charges for international crimes can be brought against corporations is increasing, as countries ratify the ICC statute and incorporate its definitions into domestic law. Where national legal systems already provide for criminal punishment of companies the international standards for

¹⁷Rosalyn Higgins, current President of the International Court of Justice (ICJ), and Theodor Meron, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY), both have used the term “participants.” Already in 1949, the ICJ stated: “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community.” *Advisory Opinion on Reparations for Injuries suffered in the service of the United Nation*, [1949] ICJ Rep 174 at 179.

¹⁸“Common purpose” applies where an individual participates in a common design involving the perpetration of a crime, and shares an intention to commit the crime. The ICTY has also developed the doctrine of “joint criminal enterprise” which applies where a crime other than the intended one occurs, and where the individual foresaw the risk but continued to participate.

¹⁹*Doe v Unocal*, 395 F.3d 932 (9th Cir, 2002). The case settled and the decision was vacated.

individuals may be extended, thereby, to corporate entities.²⁰ Even some ICC non-parties have incorporated one or more of the statute's crimes into their domestic laws, with potential legal implications for corporations.²¹

25. Domestic incorporation may also have an extraterritorial dimension. Several countries provide for extraterritorial jurisdiction with respect to international crimes committed by or against their nationals; and a few rely on "universal jurisdiction" to extend their laws regardless of nationality links.²² Again, if they also permit criminal punishment of firms, those extraterritorial provisions could be extended to corporations.

26. Apart from national incorporation of international standards, a number of legal systems are evolving independently towards greater recognition of corporate criminal liability for violations of domestic law. Most common law countries have such provisions, at least for economic and some violent crimes. Many European civil law countries have moved beyond purely administrative regulation to adopt some form of criminal responsibility for corporations.

27. In this fluid setting, simple laws of probability alone suggest that corporations will be subject to increased liability for international crimes in the future. They may face either criminal or civil liability depending on whether international standards are incorporated into a state's criminal code or as a civil cause of action (as under the US Alien Torts Claims Act, or ATCA). Furthermore, companies cannot be certain where claims will be brought against them or what precise standards they may be held to because no two national jurisdictions have identical evidentiary and other procedural rules. Finally, civil proceedings may be brought for related wrongs under domestic law, such as assault or false imprisonment.²³ In short, the risk environment for companies is expanding slowly but steadily – as are remedial options for victims.

28. Adding to the uncertainty for corporations, significant national variation remains in modes of attributing corporate liability. Given the difficulty of establishing a corporate "mind and will" in criminal cases, a number of jurisdictions have adopted a "corporate culture" approach. In Australia, where a firm's culture expressly or tacitly

²⁰For a detailed survey of 16 countries from a cross-section of regions and legal systems, see Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law—Executive Summary* (2006) available at www.fao.no/liabilities. Of the 16, 11 were states parties to the ICC and 9 had fully incorporated the statute's three crimes; of these, 6 already provided for corporate criminal liability. Research has not been completed on all 104 countries that had ratified the Rome Statute as of November 2006.

²¹The Fafo survey cites the examples of Japan, India, the United States, Indonesia, and Ukraine. The first three generally apply criminal laws to corporations.

²²Of the 16 countries in the Fafo survey, 11 provide for a nationality link, 5 rely on universal jurisdiction, and several do both; 9 of these provide for some form of corporate criminal liability in their domestic laws.

²³"Note on the work of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes," 22 January 2007 (on file with SRSG).

permitted the commission of an offence by an employee, the firm may be held liable.²⁴ In the US, federal sentencing guidelines take corporate culture into account in assessing monetary penalties.²⁵

29. There are also national differences in attributing liability within transnational corporate structures. The doctrine of separate corporate personality treats each member of a corporate group as a legally distinct entity. No uniform formula exists for “piercing the corporate veil” that separates a subsidiary from its parent company in order to hold the parent responsible for the subsidiary’s acts. One alternative that has attracted attention is for the home country to impose civil liability on the parent company for its acts and omissions regarding activities by its subsidiaries abroad.²⁶ The rules governing extraterritorial jurisdiction suggest that such provisions are permissible.

30. Few legitimate firms may ever directly commit acts that amount to international crimes. But there is greater risk of their facing allegations of “complicity” in such crimes. For example, of the more than forty ATCA cases brought against companies in the US – now the largest body of domestic jurisprudence regarding corporate responsibility for international crimes – most have concerned alleged complicity, where the actual perpetrators were public or private security forces, other government agents, or armed factions in civil conflicts.²⁷

31. Corporate complicity is an umbrella term for a range of ways in which companies may be liable for their participation in criminal or civil wrongs. With nuanced differences, most national legal systems appear to recognize complicity as a concept. The international tribunals have developed a fairly clear standard for individual criminal aiding and abetting liability: knowingly providing practical assistance, encouragement or moral support that has a substantial effect on the commission of the crime.²⁸ Where national courts adopt this standard it is likely that its application to corporations would closely track its application to individuals, although the element of “moral support” may pose specific challenges.²⁹

²⁴See Australian Criminal Code Act 1995 (Cth), sections 12.3(2)(c) and (d).

²⁵The 2005 Federal Sentencing Guidelines permit judicial consideration of whether a corporation has an “organizational culture that encourages ethical conduct and a commitment to compliance with the law”: §8B2.1(a).

²⁶See *Connelly v RTZ Corporation plc* [1998] AC 854, and *Lubbe v Cape plc* [2000] 4 All ER 268 (House of Lords, UK).

²⁷The Supreme Court’s only decision under ATCA, *Sosa v Alvarez-Machain* 542 US 692 (US, 2004), does not preclude such liability for corporations, and the weight of current US judicial opinion appears to support it – although there is disagreement among lower courts over its content and, in some cases, its existence.

²⁸*Prosecutor v Furundžija*, Judgment, No IT-95-17/1 (ICTY Trial Chamber, Dec 10, 1998) and *Prosecutor v Akayesu*, Judgment, No ICTR-96-4-T (ICTR Trial Chamber Sept 2, 1998). It is unknown whether the ICC will adopt this standard.

²⁹When applying the individual standard to corporations, the Court in *Unocal* did not adopt the element of “moral support.”

32. “Moral support” can establish individual liability under international law, and the tribunals have extended it to include silent presence coupled with authority. But a company trying in good faith to avoid involvement in human rights abuses might have difficulty knowing what counts as moral support for legal purposes. Mere presence in a country and paying taxes are unlikely to create liability. But deriving indirect economic benefit from the wrongful conduct of others may do so, depending on such facts as the closeness of the company’s association with those actors. Greater clarity currently does not exist. However, it is established that even where a corporation does not intend for the crime to occur, and regrets its commission, it will not be absolved of liability if it knew, or should have known, that it was providing assistance, and that the assistance would contribute to the commission of a crime.

III. CORPORATE RESPONSIBILITY FOR OTHER HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL LAW

33. The emerging corporate responsibility for international crimes is grounded in growing national acceptance of international standards for individual responsibility. Although it continues to evolve, there is observable evidence of its existence. In contrast, what if any legal responsibilities corporations may have for other human rights violations under international law is subject to far greater existential debate.³⁰

34. At national levels, there is enormous diversity in the scope and content of corporate legal responsibilities regarding human rights.³¹ A systematic mapping would require a comprehensive country-by-country study not only of the direct applicability of international law, but also of a range of relevant national measures: constitutional protections of human rights, legislative provisions, administrative mechanisms, and case law. However, preliminary research has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under customary international law.³²

35. The traditional view of international human rights instruments is that they impose only “indirect” responsibilities on corporations – responsibilities provided under domestic law in accordance with states’ international obligations. In contrast, some observers hold that these instruments already impose direct legal responsibilities on corporations but merely lack direct accountability mechanisms. For example, the UN Sub-Commission on the Promotion and Protection of Human Rights, explaining that its proposed Norms “reflect” and “restate” existing international law, attributed the

³⁰This section responds to subparagraph (a) of the mandate.

³¹For a study of 7 jurisdictions conducted for the SRSG, see Allens Arthur Robinson, *Brief on Corporations and Human Rights in the Asia Pacific Region* (August 2006), <http://www.reports-and-materials.org/Legal-brief-on-Asia-Pacific-for-Ruggie-Aug-2006.pdf>.

³²For one recent study, see Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press, 2006); also see state survey in Addendum 3.

entire spectrum of state duties under the treaties – to respect, protect, promote, and fulfil rights – to corporations within their “spheres of influence.”

36. This section looks for evidence of direct corporate legal responsibilities under the international sources featured in this debate: the International Bill of Human Rights – the UDHR and the two Covenants – and the other core UN human rights treaties and the ILO core conventions. It also notes major trends within the regional human rights systems. Nothing prevents states from imposing international responsibilities directly on companies; the question is whether they have already done so.

37. The UDHR occupies a unique place in the international normative order. Its preamble proclaims that “every individual and every organ of society...shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”³³ In Professor Louis Henkin’s famous words: “Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.”³⁴ Henkin surely is correct that the Declaration’s aspirations and moral claims were addressed, and apply, to all humanity – and as we shall see in section V, companies themselves invoke it in formulating their own human rights policies. But that does not equate to legally binding effect.

38. Many UDHR provisions have entered customary international law. While there is some debate, it is generally agreed that they currently apply only to states (and sometimes individuals) and do not include its preamble. Most of its provisions have also been incorporated in the Covenants and other UN human rights treaties. Do these instruments establish direct legal responsibilities for corporations? Several of them include preambular, and therefore non-binding, recognition that individuals have duties to others. But the operational paragraphs do not address the issue explicitly.³⁵

39. The treaties do say that states have a duty to “ensure respect” for and “ensure the enjoyment” of rights. Some have argued that this implies a direct legal obligation for all social actors, including corporations, to respect those rights in the first place. How can this claim be tested? One means is by examining the treaty bodies’ commentaries, as they are charged with providing authoritative interpretations. Although their mandate is to define state responsibilities, several have exhibited growing interest in the role of business itself with regard to human rights.

³³ Adopted as General Assembly Resolution 217 (III), 10 December 1948.

³⁴ Louis Henkin, “The Universal Declaration at 50 and the Challenge of Global Markets,” *Brooklyn Journal of International Law*, 17 (April 1999), p. 25.

³⁵ Common Article 5(1) of the ICCPR and ICESCR provides that the Covenants should not be interpreted as implying “for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights ... recognized herein”. But it was not intended to establish substantive legal obligations on individuals or groups, nor have the treaty bodies interpreted it as such. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005): 111-119.

40. Where the treaty bodies discuss corporate responsibilities, it is unclear whether they regard them as legal in nature. CESCR's most recent General Comment on the right to work, for example, recognizes that various private actors, including national and multinational enterprises, "have responsibilities regarding the realization of the right to work" – that they "have a particular role to play in job creation, hiring policies and non-discriminatory access to work."³⁶ But then, in the same Comment, the Committee appears to reiterate the traditional view that such enterprises are "not bound" by the Covenant. Similarly, the HRC's most recent General Comment concludes that the treaty obligations "do not...have direct horizontal effect as a matter of international law" – that is, they take effect as between nonstate actors only under domestic law.³⁷

41. In short, the treaties do not address direct corporate legal responsibilities explicitly, while the treaty bodies' commentaries on the subject are ambiguous. However, the increased attention the Committees are devoting to the need to prevent corporate abuse acknowledges that businesses are capable of both breaching human rights and contributing to their protection.³⁸

42. On purely logical grounds, a stronger argument could be made for direct corporate responsibilities under the ILO core conventions: their subject matter addresses all types of employers, including corporations; corporations generally acknowledge greater responsibility for their employees than for other stakeholders; and the ILO's supervisory mechanism and complaints procedure specify roles for employer organizations and trade unions. But logic alone does not make law, and corporations' legal responsibilities under the ILO conventions remain indirect.

43. At the regional level there is greater diversity. The African Charter is unusual because it imposes direct duties on individuals, but opinions vary on their effect and whether they apply to groups, including corporations. Expert commentary suggests that the Inter-American Court may have moved away from the traditional view when it recognized that non-discrimination "gives rise to effects with regard to third parties," including in private employment relationships, "under which the employer must respect the human rights of his workers."³⁹ The Inter-American Commission has limited itself to condemning nonstate actor abuses. The European Court of Human Rights has

³⁶CESCR, General Comment 18, paragraph 52. For similar remarks see CESCR, General Comments 14 (paragraph 42) and 12 (paragraph 20). See also CRC, General Comment 5, paragraph 56, which says that the state duty to respect "extends in practice" to nonstate organizations.

³⁷HRC, General Comment 31, paragraph 8.

³⁸Additionally, UN Security Council panels that assess the effectiveness of sanctions have specifically considered the role of corporations in violations.

³⁹*Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, 17 September 2003, paragraph 146, http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.doc.

generally adopted the traditional view, imposing far-reaching obligations to protect on states but leaving to them the choice of means.⁴⁰

44. In conclusion, it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations. Even so, corporations are under growing scrutiny by the international human rights mechanisms. And while states have been unwilling to adopt binding international human rights standards for corporations, together with business and civil society they have drawn on some of these instruments in establishing soft law standards and initiatives. It seems likely, therefore, that these instruments will play a key role in any future development of defining corporate responsibility for human rights.

IV. SOFT LAW MECHANISMS

45. Soft law is “soft” in the sense that it does not by itself create legally binding obligations. It derives its normative force through recognition of social expectations by states and other key actors.⁴¹ States may turn to soft law for several reasons: to chart possible future directions for, and fill gaps in, the international legal order when they are not yet able or willing to take firmer measures; where they conclude that legally binding mechanisms are not the best tool to address a particular issue; or in some instances to avoid having more binding measures gain political momentum.

46. This section maps three current types of soft law arrangements that address corporate responsibility and accountability for human rights: the traditional standard-setting role performed by intergovernmental organizations; the enhanced accountability mechanisms recently added by some intergovernmental initiatives; and an emerging multi-stakeholder form that involves corporations directly, along with states and civil society organizations, in redressing sources of corporate-related human rights abuses.⁴²

47. A prominent example of soft law’s normative role is the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, endorsed not only by states but also global employers’ and workers’ organizations. It proclaims that all parties, including multinational enterprises, “should respect the Universal Declaration of Human Rights and the corresponding international Covenants.”⁴³

48. The OECD Guidelines for Multinational Enterprises perform a similar role. They acknowledge that the capacity and willingness of states to implement their

⁴⁰See Clapham, note 13 above.

⁴¹Some soft law instruments may contain elements that already impose, or may come to impose, obligations on states under customary international law, which would give them binding effect independent of the soft law instrument itself.

⁴²This section responds to subparagraphs (a) and (e) of the mandate.

⁴³Tripartite Declaration, para. 8.

international human rights obligations vary. Accordingly, they recommend that firms “respect the human rights of those affected by their activities consistent with the host government’s obligations and commitments”⁴⁴ – the commentary expressly indicating that these include the host state’s international commitments.⁴⁵

49. Both instruments are widely referenced by governments and businesses and may, in due course, crystallize into harder forms. Thus, soft law’s normative role remains essential to elaborating and further developing standards of corporate responsibility.⁴⁶

50. Several intergovernmental initiatives recently have focused not only on promulgating standards for companies, but also on ways to enhance accountability for compliance. For example, due to civil society demands, anyone can now bring a complaint against a multinational firm operating within the OECD Guidelines’ sphere to the attention of a National Contact Point (NCP) – a non-judicial review procedure. Some NCPs have also become more transparent about the details of complaints and conclusions, permitting greater social tracking of corporate conduct, although the NCPs’ overall performance remains highly uneven. And the OECD Investment Committee has expanded its oversight of the NCPs, providing another opportunity to review their treatment of complaints.

51. For its part, the International Finance Corporation (IFC) now has performance standards that companies are required to meet in return for IFC investment funds. They include several human rights elements.⁴⁷ Depending on the project, the IFC may require impact assessments that include human rights elements, and community consultation. Client compliance is subject to review by an Ombudsman, who may hear complaints from anyone adversely affected by an IFC-funded project’s social or environmental

⁴⁴OECD Guidelines, General Policies II.2. (Revised 2000) The commentary notes the Universal Declaration “and other human rights obligations.”

⁴⁵Because many of the most serious corporate-related human rights violations take place in what the OECD describes as weak governance zones, the SRSG asked the world’s largest representative business organizations to consult their membership and produce recommendations that could help close this governance gap. The International Organization of Employers and the International Chamber of Commerce collaborated with the Business and Industry Advisory Committee to the OECD on a set of proposals, including the following advice to companies that moves beyond the Guidelines’ current requirement: “All companies have the same responsibility in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent.” IOE, ICC, BIAC, “Business and Human Rights: The Role of Business in Weak Governance Zones,” December 2006, paragraph 15, available at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

⁴⁶One area where greater clarity is needed is indigenous peoples’ rights. The current lack of consensus on the practical implications of “consent” – in the formula of “free, prior and informed consent” to large-scale projects – is a major challenge for indigenous communities, business and governments alike.

⁴⁷Fundamental labor rights, the health and safety of surrounding communities, avoidance of involuntary resettlement, the rights of indigenous peoples, and protection of cultural heritage.

consequences.⁴⁸ The IFC standards also have accountability spillover effects, as they are tracked by banks adhering to the Equator Principles, which are responsible for some two-thirds of global commercial project lending.⁴⁹

52. Beyond the intergovernmental system, a new multi-stakeholder form of soft law initiatives is emerging. Most prominent among them are the Voluntary Principles on Security and Human Rights (VPs), promoting corporate human rights risk assessments and training of security providers in the extractive sector; the Kimberley Process Certification Scheme (Kimberley) to stem the flow of conflict diamonds; and the Extractive Industries Transparency Initiative (EITI), establishing a degree of revenue transparency in the taxes, royalties and fees companies pay to host governments.

53. Driven by social pressure, these initiatives seek to close regulatory gaps that contribute to human rights abuses. But they do so in specific operational contexts, not in any overarching manner. Moreover, recognizing that some business and human rights challenges require multi-stakeholder responses, they allocate shared responsibilities and establish mutual accountability mechanisms within complex collaborative networks that can include any combination of host and home states, corporations, civil society actors, industry associations, international institutions and investors groups.

54. These hybrids seek to enhance the responsibility and accountability of states and corporations alike by means of operational standards and procedures for firms, often together with regulatory action by governments, both supported by transparency mechanisms. Kimberley, for instance, involves a global certification scheme implemented through domestic law, whereby states ensure that the diamonds they trade are from Kimberley-compliant countries by requiring detailed packaging protocols and certification, coupled with chain-of-custody warranties by companies.

55. In these collaborative ventures, there is no external legislative body that sets standards and no separate adjudicative body to assess compliance. Both functions are internalized within the operational entity itself. But without such mechanisms, how can they be judged?

56. These initiatives may be seen as still largely experimental expressions of an emerging practice of voluntary global administrative rulemaking and implementation, which exist in a number of areas where the intergovernmental system has not kept pace with rapid changes in social expectations. Because they are relatively new and few in number, no definitive standards yet exist by which to assess them. But among the key

⁴⁸Although the IFC standards have been criticized for “not going far enough,” they exceed the human rights requirements of the so-called Common Approaches among OECD member states’ export credit agencies.

⁴⁹Critics charge that Equator banks themselves lack transparency in how they implement the principles.

criteria suggested by those who study them professionally are the perceived credibility of their governance structures, and their effectiveness.⁵⁰

57. The credibility of their governance structures, in turn, is said to hinge on three factors: participation, transparency, and ongoing status reviews. Thus, regarding participation, civil society and industry members collaborated with states to develop the standards for, and now participate in, the governance of the VPs, EITI, and Kimberley. Concerning transparency, EITI and Kimberley have established detailed public reporting requirements for participants as well as multi-stakeholder monitoring. And in terms of participant compliance, Kimberley carries out peer reviews of member states, often spurred by civil society reports of government-related performance shortfalls; EITI recently established a validation process by which non-compliant members may have their status publicly reduced; and Kimberley actually removed one government, effectively shutting it out of the international diamond trade – a measure permitted under World Trade Organization rules.

58. None of the initiatives examined here embodies all of these standards fully. But each exhibits some, and participants appear to realize, albeit sometimes reluctantly, that the initiatives' credibility rests on them.⁵¹

59. The effectiveness of these initiatives can be measured in two ways. One is their operational impact on the ground. It is generally acknowledged that Kimberley has reduced the flow of conflict diamonds to one percent of the total market, from three or four; the Nigeria Extractive Industries Transparency Initiative reports that it gained taxpayers the equivalent of US\$1 billion in 2004 and 2005;⁵² and the VPs have been implemented most extensively at the country level in Colombia – which is not yet even a formal participant in the process, but where several thousand armed forces members have gone through company-supported human rights training.⁵³ Thus, even though their participants admit that substantial improvements are required, these initiatives have a significant operational impact.

60. A second measure of effectiveness is whether they serve as examples for others. Indeed, the relative ease with which they can be established, in contrast with treaty-

⁵⁰For case studies and discussions of advantages and risks of these novel approaches to international regulation, see the symposium on “Global Governance and Global Administrative Law in the International Legal Order,” *European Journal of International Law*, 17 (February 2006).

⁵¹The VPs plenary is going through a difficult period persuading all companies that the credibility of the initiative depends on explicit participation criteria. Even the strictly voluntary Global Compact adopted such criteria; as a result several hundred companies have been “delisted.”

⁵²Luka Binniyat, “NIETI Saves Nigeria \$1 Billion – Okogwu,” *Vanguard* (Lagos), January 2, 2007.

⁵³Indications are that Colombia will become the first host country to join the VPs. The government has established a National Committee for the VPs, including companies. The government and companies have incorporated VP language into their agreements for public security forces protecting company operations. Both parties have established reporting systems for alleged abuses. And some companies use VP-related criteria in annual performance reviews of managers.

based instruments, together with their perceived potential have directly inspired parallel efforts in related fields, including rules regarding private security forces and also for businesses beyond the extractive sector.⁵⁴

61. One final feature of recent innovations in soft law arrangements – both the intergovernmental and multi-stakeholder variety – should be noted. As they strengthen their accountability mechanisms, they also begin to blur the lines between the strictly voluntary and mandatory spheres for participants. Once in, exiting can be costly. No company has to accept IFC financing or Equator banks' loans, but if they do, certain performance criteria become required for continued funding. Countries are free to join the EITI or not, but if they do then extractive companies are required to issue public reports of their payments to governments. Suspension or expulsion from Kimberley has a direct economic impact on countries and companies. VPs language – and in some cases the actual text – has been incorporated into legal agreements between governments and companies. And once the VPs adopt participation criteria, non-compliance similarly could lead to expulsion.

62. In sum, the standard-setting role of soft law remains as important as ever to crystallize emerging norms in the international community. The increased focus on accountability in some intergovernmental arrangements, coupled with the innovations in soft law mechanisms that involve corporations directly in regulatory rulemaking and implementation, suggests increased state and corporate acknowledgment of evolving social expectations and a recognition of the need to exercise shared responsibility.

V. SELF-REGULATION

63. In addition to legal standards, hard or soft, the SRSR's mandate includes evolving social expectations regarding responsible corporate citizenship, including human rights. One key indicator consists of the policies and practices that business itself adopts voluntarily, triggered by its assessment of human rights-related risks and opportunities, often under pressure from civil society and local communities. This section maps such standards of self-regulation.⁵⁵

64. However, mapping the entire universe of "business enterprises" is impossible. More than 77,000 transnational corporations currently span the globe, with roughly 770,000 subsidiaries and millions of suppliers.⁵⁶ Those numbers are dwarfed by local firms, and an even bigger informal sector in developing countries.

⁵⁴Drawing on the VPs precedent, the Swiss government and the International Committee of the Red Cross are leading an effort to elaborate recommendations and best practices for states with regard to private military and security forces. The pilot phase of *The Colombia Guidelines*, based on the VPs text, was just launched, aiming to extend the model to such non-extractive sectors as food and beverages.

⁵⁵The section responds to subparagraphs (a) and (e) of the mandate.

⁵⁶UNCTAD, *World Investment Report, 2006*, at: www.unctad.org/wir.

65. Therefore, the SRSG conducted studies of a subset of business entities to determine how they perceive corporate responsibility and accountability regarding human rights. One was a questionnaire survey of the Fortune Global 500 firms (FG500), which are under social scrutiny as the world's largest companies. The second ("business recognition study") consisted of three parts: actual policies, rather than questionnaire responses, of a broader cross-section of firms from all regions (including developing countries) screened as likely to have policies that include human rights; eight collective initiatives that include human rights standards, like the Fair Labor Association (FLA) or the International Council on Metals and Mining (ICMM); and the rights criteria employed by five socially responsible investment funds (SRI).⁵⁷

66. Such a mapping barely could have been done five years ago because few corporate human rights policies existed. Uptake has been especially rapid among large global firms, a group still predominantly domiciled in Europe, North America, and Japan. Newer entrants from other regions lag behind, though it is unclear whether this lag reflects a fundamental difference or merely timing. Numerous firms in the business recognition study only recently joined initiatives like the Global Compact and are only beginning to develop human rights policies. And the FG500 survey demonstrates that there is substantial policy diffusion in this domain: fewer than half of the respondents indicate having experienced "a significant human rights issue" themselves, yet almost all report having policies or management practices in place relating to human rights.

67. All FG500 respondents, irrespective of region or sector, include non-discrimination as a core corporate responsibility, at minimum meaning recruitment and promotion based on merit. Workplace health and safety standards are cited almost as frequently. More than three-fourths recognize freedom of association and the right to collective bargaining, the prohibition against child and forced labor, and the right to privacy. European firms are more likely than their US counterparts to recognize the rights to life, liberty, and security of person; health; and an adequate standard of living.

68. The survey asked the FG500 firms to rank order the stakeholders their human rights policies or practices encompass – in effect, to indicate the companies' conception of their "sphere of influence." Employees were ranked highest (99 percent); suppliers and others in their value chain next (92.5 percent); then the communities in which companies operate (71 percent); followed by countries of operation (63 percent). The only significant variations are that the extractive sector ranks communities ahead of suppliers, while US and Japanese firms place communities and countries of operations far lower than European companies.

69. Companies reference international instruments in formulating their policies. Among the FG500, ILO declarations and conventions top the list, followed by the UDHR. UN human rights treaties are mentioned infrequently. The Global Compact is cited by just over half, the OECD Guidelines just under. More than 80 percent also say they work with external stakeholders on their human rights policies. NGOs top that list,

⁵⁷The FG500 survey is summarized in Addendum 3; the other three studies are reported in Addendum 4. Sampling and other methodological issues are discussed there.

followed by industry associations. Intergovernmental organizations are a distant third – except for US firms, which rank them fifth, behind labor unions and governments.

70. The broader cross-section of companies parallels the FG500 in recognizing labor standards. But their recognition of other rights is consistently lower: the highest, at 16 percent, is the right to security of the person, encompassing both the right to life and the freedom from cruel and unusual punishment.⁵⁸ For areas covered by social, economic, and cultural rights these companies tend to emphasize their philanthropic contributions.

71. Firms in both samples participate in one of the eight collective initiatives.⁵⁹ The recognition of rights by these initiatives closely reflects industry sectors: for example, those in manufacturing focus more on labor rights, whereas the extractive initiatives emphasize community relations and indigenous rights. Moreover, they draw on international standards: the FLA and Social Accountability 8000 meet or exceed most core ILO rights, while Equator banks track the IFC's performance standards. The SRI indices mirror the overall high recognition of labor rights, and several exhibit a particular concern for rights related to indigenous peoples, as well as the right to a family life.

72. How do these companies and other business entities respond to social expectations regarding accountability? Most FG500 firms say they have internal reporting systems to monitor their human rights performance. Three-fourths indicate that they also report externally, but of those fewer than half utilize a third-party medium like the Global Reporting Initiative (GRI). Some form of supply chain monitoring is relatively common. But only one-third say they routinely include human rights criteria within their social/environmental impact assessments. The business recognition study generally matches this pattern.

73. Similarly, each of the collective initiatives requires some form of reporting; the ICMM utilizes the GRI. Most have remediation requirements for noncompliant participants, and four prescribe grievance mechanisms for employees or community members. Five extend human rights requirements to supply chain practices, with accountability mechanisms ranging from periodic audits to certifying individual factories or global brands.

74. In short, leading business players recognize human rights and adopt means to ensure basic accountability. Yet even among the leaders, certain weaknesses of voluntarism are evident. Companies do not necessarily recognize those rights on which they may have the greatest impact. And while the rights they do recognize typically draw on international instruments, the language is rarely identical. Some interpretations are so elastic that the standards lose meaning, making it difficult for the company itself, let alone the public, to assess performance against commitments.

⁵⁸Numeric differences in responses between the two samples are partially explained by the FG500 study relying on questionnaire responses, whereas the business recognition study examined actual company policies, but this does not account for order of magnitude differences.

⁵⁹See Addendum 4 for details.

75. There are also variations in the rights companies emphasize that seem unrelated to expected sectoral differences, which appear instead to reflect the political culture of companies' home countries. For example, European-based firms are most likely to adopt a comprehensive rights agenda, including social and economic rights, with US firms tending to recognize a narrower spectrum of rights and rights holders.

76. Where self-regulation remains most challenged, however, is in its accountability provisions. The number, diversity, and uptake of instruments have grown significantly. But they also pose serious issues about the meaning of accountability and how it is established. Only three can be touched on here: human rights impact assessments, materiality, and assurance.

77. For businesses with large physical or societal footprints, accountability should begin with assessments of what their human rights impact will be. This would permit companies and affected communities to find ways of avoiding negative impacts from the start. Several SRI funds strongly promote human rights impact assessments coupled with community engagement and dialogue. However, relatively few firms conduct these assessments routinely – and only a handful seem ever to have done a fully-fledged human rights impact assessment (HRIA), in contrast to including selected human rights criteria in broader social/environmental assessments.⁶⁰ And apparently only one company – BP – has ever made public even a summary of an HRIA. No single measure would yield more immediate results in the human rights performance of firms than conducting such assessments where appropriate.

78. The concept of materiality refers to the content of company reporting – whether it conveys information that really matters. The number of firms reporting their social, environmental and human rights profiles – called “sustainability reporting” – has risen exponentially.⁶¹ But quality has not matched quantity. Far fewer companies report systematically on how their core business strategies and operations impact on these “sustainability” issues. Instead, anecdotal descriptions of isolated projects and philanthropic activity often prevail. Moreover, only a handful of companies combine social and financial reporting, despite the fact that the former has “sustainability” implications for the latter.⁶² The GRI provides standardized protocols to improve the quality and comparability of company reporting, but fewer than 200 firms report “in

⁶⁰The difference and its significance are described in a companion report, A/HRC/4/74.

⁶¹Some estimates range as high as 3,000. “Trends in non-financial reporting,” Global Public Policy Institute, Berlin, Research Paper Series No. 6, 2006, available at <http://gppi.net/fileadmin/gppi/nonfinancialreporting01.pdf>. But the trend appears to have levelled off, perhaps reaching a saturation point.

⁶²The United Kingdom adopted a new company law in November 2006, which will require large listed companies to include, as part of their directors' report, information on environmental matters, employees, social and community issues and “essential” business partners. Information must be provided “to the extent necessary for an understanding of the development, performance and position of the company's business.” Section 417(5).

accordance with” GRI guidelines, another 700 partially, while others claim to use them informally.⁶³

79. Assurance helps people to know whether companies actually do what they say. A growing proportion of sustainability reports (circa 40 percent) include some form of audit statement, typically provided by large accounting firms or smaller consultancies.⁶⁴ Two global assurance standards have emerged, one giving companies more control over what is assured (ISAE3000), and the second empowering the assurance provider to consider stakeholder concerns in determining what is material and therefore should be included in public reports (AA1000AS).⁶⁵ Both help the public determine whether the information reported is reasonably likely to be accurate, based on such factors as the quality of the management, monitoring, data collection, and other systems in place to generate it, as well as its materiality. A growing but still small fraction of the largest companies use these standards.

80. Supply chain assurance faces the greatest credibility challenges. Global brands and retailers, among others, have developed supplier codes to compensate for weak or unenforced standards in some countries – because global social expectations require them to demonstrate adherence to minimum standards. But without independent external assurance of some sort these systems lack credibility, especially for companies with questionable performance records. Standards for supply chain auditing are highly variable. Among the most trusted are the FLA’s brand certification and SA8000 factory certification systems, both of which involve multi-stakeholder governance structures. Similar to the hybrid initiatives discussed in the previous section, the credibility of voluntary accountability mechanisms is enhanced by processes involving participation, transparency, and review – which these two systems embody.⁶⁶

81. For several reasons, the initiatives described in this section have not reached all types of companies. First, because many of the tools were developed for large firms,

⁶³As of August 2006, data provided by GRI.

⁶⁴Association of Chartered Certified Accountants and CorporateRegister.com, “Toward Transparency: Progress on Global Sustainability Reporting, 2004”; and “KPMG International Survey of Corporate Responsibility Reporting, 2005” (both on file with SRSG).

⁶⁵International Auditing and Assurance Standards Board ISAE3000, and AccountAbility AA1000AS.

⁶⁶A test of this proposition is currently under way. The Business Social Compliance Initiative, a European network of retailers, industry and importing companies, has formed a strategic alliance with SA8000 and become an “organizational stakeholder” in GRI. That ought to generate credibility benefits. At the same time, the world’s four largest supermarket chains, Wal-Mart, Tesco, Carrefour, and Metro are launching their own initiative with no external stakeholder involvement and, to date, no transparency. The proposition would predict difficulties ahead. During a recent US court case against Wal-Mart for alleged labor violations in overseas suppliers’ factories, a company attorney stated that its supplier code of conduct “creates certain rights for Wal-Mart. It does not create certain rights and obligations on behalf of Wal-Mart.” While the claim may be legally correct, it leaves unanswered the question of just what promises to workers and consumers the company’s code is intended to convey, and how the public can be assured that the promise is being kept. (Josh Gerstein, “Novel Legal Challenge to Wal-Mart Appears to be Faltering on Coast,” <http://www.nysun.com/article/45009>).

national and transnational, they are not directly suitable for small and medium sized enterprises. Existing tools need to be adapted or new ones developed. Second, as noted even large developing country firms are just beginning to be drawn into this arena. Third, a more serious omission may be major state-owned enterprises based in some emerging economies: with few exceptions, they have not yet voluntarily associated themselves with such initiatives, nor is it well understood when the rules of state attribution apply to their human rights performance.⁶⁷ Finally, as is true of all voluntary – and many statutory – initiatives, determined laggards find ways to avoid scrutiny. This problem is not unique to human rights, nor is it unprecedented in history. But once a tipping point is reached, societies somehow manage to mitigate if not eliminate the problem. The trick is getting to the tipping point – a goal to which this mandate is dedicated.

CONCLUSION

82. The permissive conditions for business-related human rights abuses today are created by a misalignment between economic forces and governance capacity. Only a realignment can fix the problem. In principle, public authorities set the rules within which business operates. But at the national level some governments simply may be unable to take effective action, whether or not the will to do so is present. And in the international arena states themselves compete for access to markets and investments, thus collective action problems may restrict or impede their serving as the international community's "public authority." The most vulnerable people and communities pay the heaviest price for these governance gaps.

83. There are lessons to be drawn from earlier periods. The Victorian era of globalization collapsed because governments and business failed to manage its adverse impact on core values of social community. Similarly, the attempt to restore a laissez-faire international economy after World War I barely made it off the ground before degenerating into the destructive political "isms" that ascended from the left and right, and for which history will remember the first half of the twentieth century – all championed in the name of social protection against economic forces controlled by "others." There are few indications that such extreme reactions are taking root today, but this is the dystopia states and businesses need to consider – and avoid – as they assess the current situation and where it might lead. Human rights and the sustainability of globalization are inextricably linked.

84. This report has identified areas of fluidity in the business and human rights constellation, which in some respects may be seen as hopeful signs. By far the most consequential legal development is the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards. But this trend is largely an unanticipated by-product of states' strengthening the legal regime for individuals, and its actual operation will reflect variations in national practice, not an ideal solution for anyone. No comparably consistent hard law

⁶⁷See note 6, above.

developments were found in any other areas of human rights, which leaves large protection gaps for victims as well as predictability gaps for companies – who may still get tried in “courts of public opinion.”

85. Considerable innovation was found in soft law initiatives, both intergovernmental and, even more so, the multi-stakeholder hybrids. In the latter, individual states most directly concerned with a pressing problem collaborate directly with business and civil society to establish voluntary regulatory systems in specific operational contexts. In addition, self-regulation by business through company codes and collective initiatives, often undertaken in collaboration with civil society, also exhibits innovation and policy diffusion. All of these approaches show some potential, despite obvious weaknesses. The biggest challenge is bringing such efforts to a scale where they become truly systemic interventions. For that to occur, states need to more proactively structure business incentives and disincentives, while accountability practices must be more deeply embedded within market mechanisms themselves.

86. Judging from the treaty body commentaries, and reinforced by the SRSB’s questionnaire survey of states, not all state structures as a whole appear to have internalised the full meaning of the state duty to protect, and its implications with regard to preventing and punishing abuses by nonstate actors, including business. Nor do states seem to be taking full advantage of the many legal and policy tools at their disposal to meet their treaty obligations. Insofar as the duty to protect lies at the very foundation of the international human rights regime, this uncertainty gives rise to concern.

87. Lack of clarity regarding the implications of the duty to protect also affects how corporate “sphere of influence” is understood. This concept has no legal pedigree beyond fairly direct agency relationships. But in exploring its potential utility as a practical policy tool the SRSB has discovered that it cannot easily be separated operationally from the state duty to protect. Where governments lack capacity or abdicate their duties, the corporate sphere of influence looms large by default, not due to any principled underpinning. Indeed, disputes between governments and businesses over just where the boundaries of their respective responsibilities lie are ending up in courts. The soft law hybrids have made a singular contribution by acknowledging that for some purposes the most sensible solution is to base initiatives on the notion of “shared responsibility” from the start – a conclusion some moral philosophers have also reached with regard to global structural inequities that cannot be solved by individual liability regimes alone.⁶⁸ This critical nexus requires greater clarification.

88. The extensive research and consultations conducted for this mandate demonstrate that no single silver bullet can resolve the business and human rights challenge. A broad array of measures is required, by all relevant actors. Mapping existing and emerging standards and practices was an essential first step. What flows logically from the current report is the need for a strategic assessment of the major legal

⁶⁸Iris Marion Young, “Responsibility and Global Labor Justice,” *Journal of Political Philosophy*, 12 (No. 4, 2004).

and policy measures that states and other social actors could take, together with views and recommendations about which options or combinations might work best to create effective remedies on the ground. But because the mandate made only 18 months available to the SRSG, it has not been possible for him to build on his work and submit to the Council the “views and recommendations” Resolution 2005/69 invited. Therefore, he would welcome a one-year extension to complete the assignment. As has been his custom throughout, he would continue to hold transparent consultations with all stakeholders during this process and in advance of submitting his views and recommendations in his next (and final) report to the Council.

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