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**REPORT OF THE SUB-COMMISSION ON THE PROMOTION
AND PROTECTION OF HUMAN RIGHTS****Report of the United Nations High Commissioner on Human Rights
on the responsibilities of transnational corporations and related
business enterprises with regard to human rights* ******Summary**

The present report is submitted in response to Commission decision 2004/116. The report considers the scope and legal status of existing initiatives and standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights as well as outstanding issues that require further consideration by the Commission. The report reviews existing initiatives and standards on corporate social responsibility from a human rights perspective, noting that there are gaps in understanding the nature and scope of the human rights responsibilities of business. Based on the consultative process undertaken in the compilation of the report, the High Commissioner makes conclusions and recommendations to assist the Commission in identifying options for strengthening standards on business and human rights and their implementation.

* The annexes to the present report are circulated in the language of submission only.

** This report has been submitted late in order to include the most up-to-date information available.

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Introduction

1. In its decision 2004/116, the Commission recommended to the Economic and Social Council that it request “the Office of the United Nations High Commissioner for Human Rights to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia, the draft norms contained in [document E/CN.4/Sub.2/2003/12/Rev.2] and, identifying outstanding issues, to consult with all relevant stakeholders in compiling the report, including States, transnational corporations, employers’ and employees’ associations, relevant international organizations and agencies, treaty monitoring bodies and non-governmental organizations, and to submit the report to the Commission at its sixty-first session in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation”. The present report is submitted in response to that request.

2. In May 2004, the Office of the United Nations High Commissioner for Human Rights (OHCHR) began a consultation process as a first step in implementing the Commission’s decision. The consultation process took two principal forms. First, OHCHR sent requests to relevant stakeholders seeking their written responses to the issues raised in the Commission’s decision. On 19 May 2004, OHCHR sent notes verbales to all Member States. In June 2004, OHCHR sent letters to a selection of the organizations and bodies identified in the decision, namely transnational corporations, employers’ associations, employees’ associations, relevant international organizations and agencies, treaty monitoring bodies and non-governmental organizations. The present report refers to representatives of these organizations and bodies by the general term “stakeholders”.

3. OHCHR requested States and other stakeholders to supply information on three issues drawn on the Commission’s decision, namely:

(a) Existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights;

(b) The scope and legal status of these initiatives and standards;

(c) Any outstanding issues.

4. In view of the fact that many other stakeholders were interested in contributing to the High Commissioner’s report, OHCHR accepted contributions from other stakeholders who forwarded information. To this end, OHCHR dedicated a web site to information on the report and the consultation process.¹ A list of stakeholders contacted and written responses received are included in annex I. The full text of those responses is available on the OHCHR web site.

5. In addition to seeking written input into the report, OHCHR also consulted directly with stakeholders on the issues raised in the Commission’s decision. The High Commissioner and OHCHR staff met with stakeholders on their request and participated in meetings organized by them. On 22 October 2004, OHCHR held a public consultation with stakeholders in cooperation with the Global Compact Office. The consultation provided a forum for stakeholders to meet

and discuss the three issues identified in the Commission's decision. Over 50 entities participated (see the list in annex I). In cooperation with the Global Compact Office, OHCHR prepared a background document and a report on this consultation, which are available on the web site of the Global Compact Office.²

6. The present report refers to the term "Responsibilities of transnational corporations and related business enterprises with regard to human rights" by the short hand term "business and human rights". The present report uses the term "consultation process" to refer to the process of seeking and receiving written and oral submissions on the issues raised in the Commission's decision.

I. THE SCOPE AND LEGAL STATUS OF EXISTING INITIATIVES AND STANDARDS

Existing initiatives and standards

7. Initiatives and standards relevant to corporate social responsibility have increased rapidly over the last 15 years. The consultation process alone identified over 200 existing initiatives and standards. Annex II contains a description of the initiatives and standards that stakeholders raised most frequently in the consultation process. Existing initiatives and standards can be categorized as follows:

(a) *International instruments.* International instruments such as treaties and declarations can be directed at States but of relevance to business - such as the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions - and directed specifically at business - such as the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises;

(b) *Nationally based standards.* Nationally, legally based standards include constitutional provisions, national laws and national regulations of relevance to business activities. Nationally based standards can also have extraterritorial effect, such as the United States Alien Tort Claims Act;

(c) *Certification schemes.* Certification schemes are programmes established by an organization, group or network requiring adherence to a set of principles. Upon adherence, the scheme is generally monitored independently to ensure compliance. The Worldwide Responsible Apparel Production (WRAP) certification programme, the SA8000 certification scheme and the Kimberley Process Certification Scheme are examples;

(d) *Voluntary initiatives.* Voluntary initiatives include codes of conduct, directives, policies, third-party and self-reporting initiatives established by individual companies, groups of companies, intergovernmental organizations or civil society groups and adopted by business on a voluntary basis. The Secretary-General's United Nations Global Compact provides an example of a voluntary initiative backed by the United Nations. Intergovernmental voluntary initiatives include the Voluntary Principles on Security and Human Rights for the extractive and energy sectors and the Extractive Industries Transparency Initiative. Non-governmental voluntary

initiatives include the Global Sullivan Principles, the Caux Round Table Principles for Business and International Peace Operations Associations Code of Conduct. In the consultation process, individual companies - BASF, BP, Gap, Nexen, Pfizer, Rio Tinto, Shell, SONOFON, Storebrand and Telefonica - provided information on their voluntary initiatives;

(e) *Mainstream financial indices.* These are sets of social and environmental indices based on objective criteria against which companies are monitored as a means of changing the nature of business activities through investors and markets. Examples include the FTSE4Good Index and the Goldman Sachs Energy Environmental and Social Index;

(f) *Tools, meetings and other initiatives.* These initiatives seek to promote greater understanding of and respect for human rights in a variety of forms including methodologies for undertaking human rights impact assessments, management tools, training manuals, workshops, pilot projects, multi-stakeholder consultations, public-private partnerships and so on. The Business Leaders' Initiative for Human Rights (BLIHR) and the Danish Institute for Human Rights Human Rights and Business Project provide examples in this category.

Scope and legal status

8. The widely varying existing initiatives and standards make any comparison of their scope and legal status a complex task. Nonetheless, the following criteria can be helpful to compare the scope and legal status of different initiatives and standards and make sense of the current business and human rights landscape. In relation to scope, the following criteria are relevant:

(a) *Objectives.* Initiatives and standards on business and human rights might seek to protect human rights, promote human rights or a mixture of the two. For example, the Secretary-General's Global Compact is promotional in character in that it asks companies to embrace, support and enact a set of core principles including two on human rights. Some initiatives are both promotional and protective; for example, certification schemes or the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy aim to encourage the positive contribution of business while minimizing and resolving risks and difficulties. The OECD Guidelines create a system of national focal points to resolve specific issues arising in implementation;

(b) *Source.* The source of an initiative and standard - government, intergovernmental, business, civil society - can be relevant to determining its reach and authority. For example, initiatives and standards agreed or adopted in the context of the United Nations or ILO can carry significant authority given the international and intergovernmental character of these organizations;

(c) *Human rights coverage.* The level of specificity of references to human rights in initiatives and standards provides an important indication of scope from a human rights perspective. Many initiatives and standards refer to human rights in general terms; however relatively few actually set out specific human rights provisions that are relevant to the activities of business. For example, the OECD Guidelines on Multinational Enterprises refer to human rights in only broad terms, while the ILO Tripartite Declaration refers to specific workers' rights;

(d) *Territorial coverage.* Territorial coverage of initiatives and standards is often difficult to ascertain but important in any consideration of the practical scope of an initiative or standard. Constitutional provisions and national law, for example, generally apply within national boundaries; however States, are increasingly considering laws of extraterritorial reach. Given the membership of ILO, the Tripartite Declaration and the Declaration on Fundamental Principles and Rights at Work have international coverage. At the same time, a voluntary initiative of a large company could have relatively wide territorial coverage if that company has activities in many countries;

(e) *Company coverage.* The number of companies actually and potentially subject to an initiative or standard is also a relevant consideration in determining scope. Some initiatives relate to one company, others are open to adherence by more than one company while others seek adherence within particular sectors. Thus, for example, the Voluntary Principles on Security and Human Rights for the extractive and energy sectors or the World Wide Responsible Apparel Production (WRAP) initiative have sectoral coverage, while others, such as the OECD Guidelines and the ILO Tripartite Declaration, potentially have a wide coverage of companies that go beyond any particular sector;

(f) *Implementation and monitoring.* Initiatives and standards apply a range of implementation or monitoring mechanisms. Some voluntary initiatives, such as the Global Compact, do not envisage monitoring as such. International instruments such as human rights treaties or the United Nations Convention against corruption envisage national monitoring, including at times through the application of sanctions. Other initiatives such as the Global Reporting Initiative employ verification methodologies such as reporting. Market mechanisms such as the FTSE4Good Index use independent measuring techniques.

9. The following criteria are relevant to understanding the legal status of initiatives:

(a) *Binding on companies.* Constitutions and national legislation in many States include human rights responsibilities that are binding on companies. Companies themselves might also make human rights initiatives binding through inclusion of specific terms to that effect in contracts;

(b) *Binding on States.* International treaties such as the principal human rights treaties are binding on States parties. While international declarations are not binding on States, they do indicate a level of commitment on behalf of the State to uphold the principles in the instrument;

(c) *Non-binding.* The bulk of existing initiatives on business and human rights fall within the category of non-binding.

A comparison of initiatives and standards

10. The table in annex III compares the scope and legal status of existing initiatives and standards identified in annex II.³ Of these, the consultation process highlighted four initiatives and standards which warrant closer comparison. These initiatives and standards are: the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; the OECD Guidelines for Multinational Enterprises; the United Nations Global Compact; and the

draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights” (draft Norms) (E/CN.4/Sub.2/2003/12/Rev.2). Not only did these initiatives and standards attract considerable attention in the consultation process; their international character makes them particularly relevant to the Commission’s work in this area.

11. The OECD Guidelines are recommendations to business from the 30 OECD member States and eight adhering non-member States⁴ concerning conduct in many areas of business ethics. The recommendations cover a broad range of issues from compliance with local laws and regulations, safeguarding of consumer interests, abstaining from anti-competitive practices and meeting host country tax liabilities. A separate recommendation relates to human rights generally, asking business to “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”. Further, the commentary to the Guidelines stresses the relevance of the Universal Declaration of Human Rights. The Guidelines also include recommendations in relation to workers’ human rights such as: freedom of association, the right to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced or compulsory labour and non-discrimination in employment and occupation. The 38 adhering States - which represent the source of most of the world’s foreign direct investment and are home to most major multinational enterprises - have committed themselves to promote these guidelines among multinational enterprises operating in or from their territories. The OECD Guidelines therefore have considerably wide territorial and company coverage, going beyond the territorial reach of the 38 adhering States.

12. While essentially promotional in character, the OECD Guidelines include a form of monitoring mechanism and so could also be considered to have a protective element. The mechanism consists of National Contact Points appointed by adhering States who are charged with promoting the Guidelines and handling enquiries in the national context. One of their responsibilities is to contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances.

13. In terms of legal status, the OECD Guidelines are purely voluntary recommendations to business; however adhering States are committed to promoting them. In spite of their significant reach, the OECD Guidelines are recommendations of 38 States and so do not have universal authority. In relation to implementation, the OECD reports that a recent survey asked managers of international companies to list influential international benchmarks for corporate behaviour; 22 per cent mentioned the Guidelines without prompting. The OECD Guidelines have been translated into 26 languages and over 60,000 web pages refer to them. Fifteen countries refer to the Guidelines in the context of their export credit and investment guarantee programmes. As of June 2004, National Contact Points had considered 79 specific instances of issues. Some of these dealt with company conduct in OECD countries, but most considered the conduct of multinational enterprises in non-OECD countries.

14. In comparison, the ILO Tripartite Declaration of Principles provides guidance to multinational enterprises as well as to domestic business, Governments and workers’ organizations on labour-related aspects of corporate social responsibility. It covers several areas related to workers’ human rights, namely: employment promotion; freedom of association and the right to organize; collective bargaining; equality of opportunity and treatment; security of employment; training; wages, benefits and conditions of work; and safety and health. The ILO

Tripartite Declaration does not cover other areas of human rights. Given the universal nature of the ILO and its tripartite structure, the territorial and company reach of the Declaration is technically broader than that of the OECD Guidelines, although in practice, at least the company coverage of the two might in fact be more similar given the concentration of foreign direct investment in and between the States adhering to the OECD Guidelines. Importantly, the Declaration was adopted on a tripartite basis and thus has its origins in the support of Governments, employers and workers. The ILO Tripartite Declaration is voluntary for business, although the ILO conventions it refers to are binding on States parties. The near universal membership of the ILO emphasizes the international authority of its source. The ILO Tripartite Declaration is essentially promotional in character; however, the Guidelines also encourage business entities to establish voluntary conciliation procedures for the settlement and prevention of industrial disputes.

15. The United Nations Global Compact is a learning forum revolving around ten principles derived from key international instruments, focusing on human rights, labour standards, the environment and corruption. One of the Global Compact's founding premises is that, without the private sector's active involvement, there is the danger that universal principles will remain unimplemented. Consequently, the Global Compact seeks to underpin the global economy with universal values defined by international instruments. The first two principles of the Global Compact concern human rights. First, businesses should support and respect the protection of internationally proclaimed human rights and second, businesses should make sure that they are not complicit in human rights abuses. As an initiative of the Secretary-General, the Global Compact potentially has wide territorial coverage with local Global Compact networks in over 50 countries. The company coverage is also considerable, with over 1,700 formal participants, most of which are companies.

16. The Global Compact is purely voluntary for businesses, although the "internationally proclaimed human rights" it refers to are generally binding on States. In contrast with the OECD Guidelines and the ILO Tripartite Declaration, the Global Compact has no monitoring mechanism, relying on public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share action in pursuing the ten principles. According to the Global Compact Office, a recent study undertaken on the Global Compact's impact to date found that it had had a significant impact on corporate behaviour, especially in helping to hasten positive change.

17. While each of these initiatives and standards do include references to the promotion and protection of human rights, the treatment corresponds to the relevance of human rights in relation to the overall objectives and scope in each initiative. Thus, the ILO Tripartite Declaration specifically includes workers' human rights, but not others, while the Global Compact refers to human rights generally without going into any specificity of which human rights are relevant. The references to "human rights" in the OECD Guidelines also lack specificity. As a result, there is still a gap in understanding what the international community expects of business when it comes to human rights.

The draft Norms

18. The draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights” (draft Norms) attempt to impose direct responsibilities on business entities as a means of achieving comprehensive protection of all human rights - civil, cultural, economic, political and social - relevant to the activities of business. The draft Norms identify specific human rights relevant to the activities of business, such as the right to equal opportunity and non-discrimination, the right to security of persons, the rights of workers, and refers to the rights of particular groups such as indigenous peoples. The draft Norms also set out responsibilities of business enterprises in relation to environmental protection and consumer protection. As an initiative of a United Nations expert body, the draft seeks wide territorial coverage. It also seeks broad company coverage as appears from the reference in its title to “transnational corporations and other business enterprises”. The draft envisages a range of implementation mechanisms of both a promotional and protective character such as self-reporting and external verification. The Commission has indicated that the draft Norms contain “useful elements and ideas for consideration by the Commission” but, as a draft proposal, it has no legal standing.

19. The draft Norms is an attempt in filling the gap in understanding the expectations on business in relation to human rights. However, the consultation process revealed a wide range of opinions amongst stakeholders on the value and content of the draft. Employer groups, many States and some businesses were critical of the draft while non-governmental organizations and some States and businesses as well as individual stakeholders such as academics, lawyers and consultants were supportive.

20. The main arguments both against and in favour of the draft Norms are summarized below. The stakeholders critical of the draft Norms argued that:

(a) The draft Norms represents a major shift away from voluntary adherence by business to international human rights standards and the need for this shift has not been demonstrated;

(b) The style of the draft Norms is unduly negative towards business. The tone of the draft is unbalanced and does not adequately take into account the significant positive contributions of business towards the enjoyment of human rights;

(c) The recognition of legal obligations on business to “promote, secure the fulfilment of, respect, ensure respect of and protect human rights” is baseless and a misstatement of international law - only States have legal obligations under international human rights law;

(d) The human rights content of the draft Norms is vague and inaccurate. For example, the reference to international treaties and other instruments in the preambular paragraphs and under the definitions includes documents that are only recommendations, have low levels of ratification, are not self-executing or are not human rights instruments. Those documents are therefore not indicative of the state of international human rights law;

(e) The legal responsibilities on business identified in the draft Norms go beyond the standards applying to States. In particular, the wording of the draft Norms imposes duties on business to meet standards under treaties that a State in which a company was operating might not have ratified;

(f) The draft Norms require business to undertake balancing decisions more appropriate to the role of Governments. Some human rights require Governments to decide on the most appropriate form of implementation, balancing often competing interests. The democratic State is in a more appropriate position to make such decisions than companies;

(g) The imposition of legal responsibilities on business could shift the obligations to protect human rights from Governments to the private sector and provide a diversion for States to avoid their own responsibilities;

(h) The implementation provisions of the draft Norms are burdensome and unworkable. The vagueness of some of the provisions in the draft Norms would make it difficult for a tribunal to adjudicate any communication that came before it and the reporting requirements in the draft Norms are burdensome. The binding approach adopted in the draft Norms could also be counter-productive, drawing away from voluntary efforts and focusing on the implementation of only bare minimum standards;

(i) The draft Norms duplicate other initiatives and standards, particularly the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration.

21. Those stakeholders welcoming the draft Norms argued that they:

(a) Are the most comprehensive, clear and complete initiative or standard on business and human rights that goes beyond labour standards;

(b) Add to, rather than duplicate, existing initiatives and standards by attempting to identify the responsibilities of business in relation to specific human rights;

(c) Provide a common set of standards for all business in relation to human rights and a level playing field for competing companies;

(d) Provide a tool for evaluating current and future practices. The draft Norms offer a template of relevant rights and responsibilities against which companies can review and assess their activities in relation to human rights to assist them in understanding how operations can affect individuals and communities;

(e) Establish the right balance between the obligations of States and companies with regard to human rights. The draft Norms do not challenge the role of the State as primary duty bearer for human rights, but the draft does indicate that companies have secondary responsibilities with regard to human rights within their respective spheres of activity and influence;

(f) Provide a normative framework and template for action by States, assisting States in establishing national legislation by identifying specific areas where the State should regulate the activities of corporations in order to meet its obligations to protect human rights;

(g) Attempt to deal with the situation where a company is operating in a State which is unwilling or unable to protect human rights. The identification of direct international legal obligations applicable to business envisaged by the draft attempts to address a situation where the State has either failed to legislate effectively, or is unable to protect human rights in the particular situation;

(h) Address the current fatigue and mistrust amongst civil society in relation to voluntary initiatives which work for the well-intentioned and, although of significant value, do not cover all companies (many companies do not have a human rights policy). Voluntary initiatives are both inconsistent in their treatment of human rights and insufficient to mitigate comprehensively all threats to the enjoyment of human rights;

(i) Offer the possibility of a remedy to victims of human rights violations. This builds on voluntary initiatives which are not supervised by an independent body and which do not necessarily guarantee a right to a remedy in the case of clear violations.

22. While views on the document are divided, it is relevant to note that the draft Norms, having the status of a draft proposal, could be subject to review and consideration by the Commission. In this context, it is relevant to note that the Business Leaders' Initiative on Human Rights is currently "road-testing" the draft Norms with companies from different international business sectors with the objective of demonstrating ways in which to implement human rights. Those business entities engaged in the "road-testing" are committed to understanding better the draft Norms as well as to finding methods of applying the content of the document by defining what is "essential", "expected" and "desirable" behaviour for all companies. The process will continue until December 2006.

II. OUTSTANDING ISSUES

23. The following outline of "outstanding issues" is based on three general assumptions. The first is that business, like all actors in society, has to operate in a responsible manner, including through respecting human rights. This can be drawn from the Universal Declaration of Human Rights⁵ and also reflects the reality in many countries, where national legislation outlines the responsibilities of business with regard to human rights.⁶ Internationally, many companies participate in the United Nations Global Compact, which stipulates that those companies should support and respect internationally proclaimed human rights. Similarly, many businesses have already adopted voluntary guidelines and codes of conduct and are seeking greater clarity on how they can avoid problems and positively affect the enjoyment of human rights in their activities.

24. Second, business has an enormous potential to provide an enabling environment for the enjoyment of human rights through investment, employment creation and the stimulation of economic growth. The activities of business have also threatened human rights in some situations and individual companies have been complicit in human rights violations.⁷ The clarification of responsibilities of business with regard to human rights could help prevent human rights problems from arising, help States regulate business entities more effectively and at the same time assist in channelling the benefits of business towards the promotion of human rights.

25. Third, the broad review of existing initiatives and standards on business and human rights in the previous section indicates that there remains a gap in understanding the nature and scope of responsibilities of business with regard to human rights. While corporate social responsibility initiatives have grown rapidly over the last ten years, the human rights dimensions of those initiatives have not developed at an equal pace nor have they developed consistently. This, in turn, could lead to inconsistent practices between companies and across nations.

26. With this in mind, the following section identifies “outstanding issues” in order to assist the Commission in identifying “options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation”, as stipulated by decision 2004/116.

What are the responsibilities of business with regard to human rights?

27. In considering the responsibilities of business with regard to human rights, it is important to reiterate that States are the primary duty bearers of human rights. While business can affect the enjoyment of human rights significantly, business plays a distinct role in society, holds different objectives, and influences human rights differently to States. The responsibilities of States cannot therefore simply be transferred to business; the responsibilities of the latter must be defined separately, in proportion to its nature and activities.

28. The Global Compact has identified responsibilities of business in connection with two principles:

(a) Principle One: Businesses should support and respect the protection of internationally proclaimed human rights;

(b) Principle Two: Businesses should make sure that they are not complicit in human rights abuses.

29. This provides a useful starting point for understanding the responsibilities of business with regard to human rights, suggesting three forms of responsibility. The first two responsibilities - to “respect” and to “support” human rights - relate to the acts and omissions of the business entity itself. The third responsibility on business entities - to “make sure they are not complicit” in human rights abuses - concerns the relationship between business entities and third parties.

30. A responsibility to “respect” human rights is comparatively unproblematic and requires business to refrain from acts that could interfere with the enjoyment of human rights. For example, a private detention centre institution should refrain from inflicting cruel, inhuman and degrading treatment on people detained.

31. More complex issues arise in relation to the responsibility to “support” human rights. For example, the responsibility to “support” human rights suggests that business entities carry positive responsibilities to promote human rights. On the one hand, business entities have a great and sometimes untapped potential to promote human rights through investment, and promotion of economic growth and the underlying conditions required for the enjoyment of human rights. A responsibility to “support” human rights could help channel this. On the other

hand, accepting that business has positive responsibilities to use its influence to promote human rights could sit uneasily with the traditional discretion of States to make appropriate choices and exercise balance in designing policies to fulfil human rights.⁸ In this context, it is relevant to note that business entities already carry positive responsibilities in other areas of national law, for example in the law of negligence when discharging a duty of care to employees or local communities. This could provide guidance when clarifying the positive responsibilities on business to “support” human rights.

32. Similarly, subdividing the responsibility to “support” human rights into subcategories of responsibilities could be helpful. For example, the Committee on Economic, Social and Cultural Rights has subdivided the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights into obligations to respect, protect and fulfil (promote, provide and facilitate) economic, social and cultural rights. The responsibilities to “support” human rights could therefore be clarified by considering what business could do to protect, promote, provide and facilitate human rights. These sub-responsibilities could then be classified as “essential”, “expected”, or “desirable” conduct of business entities.

33. The responsibility on business entities to “make sure they are not complicit in human rights abuses” similarly raises complex issues. Corporations often act with other partners in joint ventures or with national and local governments which could lead to allegations of complicity if the partner itself has abused human rights. One definition of “complicity” states that a company is complicit in human rights abuses if it authorizes, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse.⁹

34. Four situations illustrate where an allegation of complicity might arise against a company. First, when the company actively assists, directly or indirectly, in human rights violations committed by others; second, when the company is in a partnership with a Government and could reasonably foresee, or subsequently obtains knowledge, that the Government is likely to commit abuses in carrying out the agreement; third, when the company benefits from human rights violations even if it does not positively assist or cause them; and fourth, when the company is silent or inactive in the face of violations.¹⁰ As with the responsibility to “support” human rights, the duty on business to act or not act in each of these situations might not always be clear. Questions arise as to the extent of knowledge that the business entity had or should have had in relation to the human rights abuse and the extent to which it assisted through its acts or omissions in the abuse.

35. National and international criminal law has elaborated the doctrine of complicity as a basis for criminal liability, including criminal liability for legal persons for their complicity in crimes. The doctrine of complicity under national and international criminal law could therefore provide guidance in the further elaboration of this responsibility.¹¹

What are the boundaries of the responsibilities of business with regard to human rights?

36. In contrast to the limits on States’ human rights obligations, the boundaries of the human rights responsibilities of business are not easily defined by reference to territorial limits. While a small business might have relatively limited influence over the enjoyment of human rights within

a particular country, a large company might influence the enjoyment of human rights across boundaries. Defining the boundaries of business responsibility for human rights therefore requires the consideration of other factors such as the size of the company, the relationship with its partners, the nature of its operations, and the proximity of people to its operations.

37. A helpful means to understand the scope and boundaries of the responsibilities of business is the non-legal concept of “sphere of influence”. The concept has not been defined authoritatively; however the “sphere of influence” of a business entity tends to include the individuals to whom it has a certain political, contractual, economic or geographic proximity. Every business entity, whatever its size, will have a sphere of influence; the larger it is, the larger the sphere of influence is likely to be.¹² It is relevant to note that the Global Compact asks participating business entities “to embrace, support and enact, within their sphere of influence” its ten principles.

38. The notion of “sphere of influence” could be useful in clarifying the extent to which business entities should “support” human rights and “make sure they are not complicit in human rights abuses” by setting limits on responsibilities according to a business entity’s power to act. Importantly, “sphere of influence” could help clarify the boundaries of responsibilities of business entities in relation to other entities in the supply chain such as subsidiaries, agents, suppliers and buyers by guiding an assessment of the degree of influence that one company exerts over a partner in its contractual relationship - and therefore the extent to which it is responsible for the acts or omissions of a subsidiary or a partner down the supply chain.¹³ At the same time, “sphere of influence” should help draw the boundaries between the responsibilities of business and the obligations on States so that business entities do not take on the policing role of Government. Finally, the notion of “sphere of influence” could ensure that smaller business entities are not forced to undertake over-burdensome human rights responsibilities, but only responsibilities towards people within their limited sphere of influence.

39. The Commission might wish to consider and develop further the concept of “sphere of influence”.

In relation to which human rights does business have responsibility?

40. There are many sources of human rights that could be relevant to defining the rights for which business has responsibilities. At the global level, international human rights law provides the primary source. Importantly, the Universal Declaration of Human Rights has become a point of reference for many initiatives and standards on business and human rights. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the other main human rights treaties provide a further source. While human rights coverage is not equal across nations due to varying levels of ratification, it is important to note that all States have ratified at least one human rights treaty. Significantly, the Convention on the Rights of the Child, which recognizes all civil, cultural, economic, political and social rights in relation to children, has achieved almost universal acceptance with 191 ratifying States. Similarly, some human rights have become norms of customary international law and can therefore be considered to have universal application.¹⁴

41. The international instruments give little guidance as to which human rights are relevant to the activities of business.¹⁵ In principle, the responsibility to “respect” human rights could apply to all recognized rights; business entities should therefore refrain from interfering with the enjoyment of any rights. However, to the extent that business entities have positive responsibilities to “support” human rights, the rights applicable to business are necessarily narrower than those applicable to States, given the very different nature of business and the role it plays in society. Importantly, rights that require sensitive balancing decisions in the public interest or intervention by a public authority would be outside the scope of business responsibilities. For example, some rights such as the rights relating to criminal trials, the right to asylum and political rights are wholly within the public functions of the State and therefore less directly relevant to business.

42. A non-exhaustive list of human rights more relevant to business could include: the prohibition of discrimination, the right to life, liberty and security of the person, freedom from torture, the right to privacy, freedom of opinion and expression, the right to seek, receive and impart information, freedom of association, the right to organize, the prohibition of bonded or forced labour, the prohibition of forms of child labour, the right to health, the right to an adequate standard of living and the right to education. Similarly, the rights of certain groups of people particularly affected by the activities of business are relevant - such as the rights of women, children, employees, indigenous peoples and migrant workers and their families.¹⁶

How can the responsibilities of business with regard to human rights be guaranteed?

43. Ensuring that business respects human rights is first a matter of State action at the domestic level. States have undertaken international obligations to respect the rights of individuals and groups of individuals and to protect those rights against the actions of third parties; those third parties include business entities. Many countries have introduced human rights implementing legislation that regulates business entities in areas such as discrimination and workers’ human rights. Courts and quasi-judicial tribunals enforce these laws.

44. Companies also have an important role to play in ensuring that they protect human rights standards in their own operations. Voluntary initiatives on business and human rights can help to promote a culture of respect for human rights from within the company and can give human rights standards practical meaning while motivating positive change in support of human rights. Companies can also promote human rights in their relationships with business partners through the inclusion of contractual terms stipulating respect for human rights as part of a business deal. Similarly, markets mechanisms have a role to play in ensuring respect for human rights through the use of environmental and social indices and public reporting on social responsibility which rates the performance of business entities, which in turn can affect market confidence and motivate better performance.

45. Nonetheless, company and market initiatives have their limits and are not necessarily comprehensive in their coverage nor a substitute for legislative action. Importantly, while voluntary business action in relation to human rights works for the well-intentioned and could effectively raise the standard of other companies, there remains scepticism amongst sectors of civil society as to their overall effectiveness.

46. There is also a question of how to ensure respect for human rights in situations where effective governance or accountability are absent because the State is unwilling or unable to protect human rights - for example due to a lack of control over its territories, weak judiciary, lack of political will or corruption. A lack of appropriate regulation and enforcement by the State could fail to check human rights abuses adequately while also encourage a climate of impunity. A particularly complex issue involves the regulation of companies headquartered in one country, operating in a second and having assets in a third. There is concern that business entities might evade the jurisdictional power of States in some situations, which could lead to negative consequences for the enjoyment of human rights.

47. Increasing attention is being given to whether and to what extent parent companies should be subject to the law and jurisdiction of their home countries in relation to their operations abroad. The United States Alien Tort Claims Act provides one example of a home country measure which gives courts power to hear civil claims by foreign citizens for injuries caused by actions in violation of the law of nations or a treaty of the United States although other examples also exist. Subjecting parent companies to their home jurisdiction for alleged human rights abuses against claimants of the host country raises questions of respect for the national sovereignty of the host country while also highlighting several complex legal questions which require further examination.¹⁷ Nonetheless, home country regulation could provide an effective means of protecting human rights in situations where accountability gaps exist.

48. The Commission might wish to study and analyse in greater depth the protection of human rights in situations where a host State is unwilling or unable to protect human rights, including studying the opportunities offered by home country regulation.

Is there a need for a United Nations statement of universal standards setting out the responsibilities of business entities with regard to human rights?

49. The Commission has charged itself with identifying options for the strengthening of standards on business and human rights. In this context, there appears to be a growing interest in discussing further the development of a United Nations statement of universal standards on business and human rights. Issues the Commission might wish to examine in this regard include:

(a) Whether such a statement could help to clarify the current gap in understanding of human rights responsibilities of business and could provide a means to build upon the two human rights principles contained in the United Nations Global Compact - in particular, by giving greater clarity to the positive steps business could take to “support” human rights;

(b) Whether the international nature of a United Nations statement could assist business in creating a level playing field by identifying the standards that all business should respect;

(c) Whether a United Nations statement could assist business, States and civil society to navigate the human rights dimensions of the corporate social responsibility framework;

(d) Whether a United Nations statement might also be helpful in the development of tools to assist business to promote human rights, by providing an authoritative text to explain human rights responsibilities and to develop indicators, human rights assessment methodologies and other materials;

(e) Whether a United Nations statement might assist national Governments in developing or strengthening national standards for business conduct as it affects human rights;

(f) Whether a United Nations statement could assist treaty bodies in the process of constructive dialogue with States parties to human rights treaties by identifying with clarity the requirements on States to protect human rights from the actions of third parties.

What would the legal nature of those responsibilities be?

50. International human rights law generally imposes obligations on States, although some exceptions do exist, for example, in relation to armed groups.¹⁸ States parties to human rights treaties have the obligation to protect individuals and groups of individuals from the actions of third parties, including business entities. The process of elaborating a statement of universal standards on business and human rights would raise the question of the legal status of that text and whether it would impose direct legal obligations on business with regard to human rights. The Commission might wish to consider further the effect of imposing direct legal obligations on business entities under international human rights law and how such obligations might be monitored.

What tools are needed to promote respect for human rights within the activities of business?

51. In its decision 2004/116, the Commission also envisages further work on the question of implementation of standards. The consultation process identified a number of areas where further work was needed. These included the development of human rights impact assessment methodologies to assist businesses to assess the real and potential impact of operations on the enjoyment of human rights; the elaboration of training materials to assist business entities in supporting human rights within operations; compilations of best business and State practices in the field of business and human rights; the introduction and strengthening of technical assistance to States in the area of business and human rights, including judicial training, assistance in establishing national regulatory authorities and help in drafting legislation and other regulations.

CONCLUSIONS AND RECOMMENDATIONS

52. **The consultative process undertaken in the preparation of this report has marked a further step in a continuing dialogue between States and different stakeholders on the question of business and human rights. In light of this process, the High Commissioner formulates the following conclusions and recommendations to help progress this dialogue and assist the Commission “to identify options for the strengthening of standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation”. In doing so, the High Commissioner underlines not only the importance of this issue to the Commission’s agenda but also the need for the Commission to act expeditiously to build upon the**

significant momentum that currently exists to define and clarify the human rights responsibilities of business entities. Defining and clarifying these responsibilities will provide a significant basis to promote dialogue and to resolve the many challenges that stakeholders face in the area of business and human rights.

(a) On the basis of the review of existing initiatives and standards, there are gaps in understanding the human rights responsibilities of business with regard to human rights.

(b) There is a growing interest in discussing further the possibility of establishing a United Nations statement of universal human rights standards applicable to business.

(c) The present consultation process should be seen as a beginning and there is a need, through the Commission, for continued dialogue and consultation among all stakeholders on the question of business and human rights. In this context, there is a particular need to consider ways to include more effectively the views and opinions of States and stakeholders from developing countries.

(d) Much of the consultation process focused on the draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”. In spite of opinions on the draft still being divided, there is merit in identifying more closely the “useful elements” of the draft Norms noted by the Commission in its decision 2004/116. In particular, the “road-testing” of the draft Norms by the Business Leaders’ Initiative on Human Rights could provide greater insight into the practical nature of the human rights responsibilities of business. Such an initiative deserves encouragement. The High Commissioner therefore recommends to the Commission to maintain the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration.

(e) Many of the issues identified in the present report require separate study. The principal issues that would benefit from further clarification and research include the concepts of “sphere of influence” and “complicity”; the nature of positive responsibilities on business to “support” human rights; the human rights responsibilities of business in relation to their subsidiaries and supply chain; questions relating to jurisdiction and protection of human rights in situations where a State is unwilling or unable to protect human rights; sector specific studies identifying the different challenges faced by business from sector to sector; and situation specific studies, including the protection of human rights in conflict zones.

(f) There is a significant need to develop “tools” to assist businesses in implementing their responsibilities, in particular through the development of training materials and of methodologies for undertaking human rights impact assessments of current and future business activities.

Notes

¹ <http://www.ohchr.org/english/issues/globalization/business/reportbusiness.htm>.

² <http://www.unglobalcompact.org/Portal/Default.asp>.

³ For a complete review of existing initiatives and standards on business and human rights see R. Mares, (ed), *Business and Human Rights: A compilation of documents*, The Raoul Wallenberg Institute Human Rights Library, vol. 13 (Martinus Nijhoff Publishers, Leiden, 2004).

⁴ The eight countries are: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia.

⁵ For example, see the preamble which proclaims the Declaration “as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, 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, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”.

⁶ The constitutions of some countries stipulate direct responsibility for legal persons to respect human rights. For example, the Constitution of South Africa (1996) provides in section 8 (2) that: “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.

⁷ The Secretary-General has noted that “individuals and companies take advantage of, maintain and have even initiated armed conflicts in order to plunder destabilized countries to enrich themselves, with devastating consequences for civilian populations” (S/2002/1300, para. 58).

⁸ Anthony Ewing, suggests the following examples of responsibilities to “support” human rights: (1) not to interfere with or oppose government efforts to protect human rights; (2) to initiate stakeholder dialogues and communicate openly with human rights organizations; (3) to become human rights advocates; (4) to educate employees and other stakeholders in human rights; and, (5) to build capacity of governments and others effectively to respect, ensure and promote human rights. “Understanding the Global Compact Human Rights Principles” in *Embedding Human Rights in Business Practice*, joint publication of the United Nations Global Compact and the Office of the United Nations High Commissioner for Human Rights, 2004, at p. 38.

⁹ “The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity: OHCHR Briefing Paper”, in UN Global Compact/OHCHR, *ibid*, p. 19.

¹⁰ International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*, (Geneva, February 2002), pp. 125-136.

¹¹ Under international criminal law, three elements must be met to show complicity: first, a crime must have been committed; second, the accomplice must contribute in a direct and substantial way to the crime; and, third, the accomplice must have had intent or knowledge or was reckless with regard to the commission of the crime. See International Peace Academy and Fafo AIS, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law*, September 2004, p. 23 (<http://www.fafo.no/liabilities/index.htm>).

¹² International Council on Human Rights Policy, op. cit., p. 136.

¹³ For example, a claim against a parent company for acts allegedly committed by a subsidiary or agent raises complex legal questions of the extent to which a parent company can be held liable for the action of its subsidiaries - particularly where the subsidiary is not subject to the laws of the home country. Legal systems generally protect parent companies - as well as company directors and individual shareholders - from liability resulting from the acts or omissions of subsidiaries. The establishment of liability of the parent company requires "piercing the corporate veil" by demonstrating a sufficiently substantial connection between the parent company and its subsidiary. This generally requires some degree of regular control by the parent company and knowledge of events and decisions of the subsidiary. See International Peace Academy and Fafo AIS, op. cit., p. 26. See also D. Kinley, and Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law", *Virginia Journal of International Law*, Vol. 44, No. 4, p. 962, which notes that it would appear that at least a substantial degree of operational or day-to-day control would be necessary for a business entity to attract liability for the acts of one its subsidiaries, agents, buyers or suppliers.

¹⁴ For example, the International Law Commission has recognized the prohibition of discrimination on the basis of race as part of customary international law. See the report of the International Law Commission on its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, p. 208. General comments No. 24 (1994) and No. 29 (2001) of the Human Rights Committee also provide some guidance on identifying customary norms.

¹⁵ International human rights instruments recognize some specific rights over which non-state actors do have some secondary and indirect responsibility. For example, the Convention on the Elimination of All Forms of Discrimination against Women requires States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise (art. 2). Similarly, the Convention on the Rights of the Child requires the best interest of the child to be a primary consideration in all actions concerning children, including by private welfare institutions (art 3, para. 1).

¹⁶ See e.g., D. Kinley, and Tadaki, op. cit., pp. 966-993. See also International Council on Human Rights Policy, op. cit., pp. 21-43.

¹⁷ For example, a tribunal must establish that it has the jurisdiction to hear the case. The court must satisfy that there are grounds for hearing the case - for example, the alleged abuse occurred in the country, the courts have the authority to hear claims concerning the actions of their nationals abroad, questions of national security are at stake and so on. Similarly, the court must decide that it is the appropriate forum to hear the case. The principle of *forum non conveniens* gives courts discretion to refuse to hear a case where the court holds the opinion that, in the interests of all the parties and of justice, it may be more appropriately heard in another forum. The court might decide that the case should be tried in the courts of the country where the alleged abuse occurred. See e.g., International Peace Academy and Fafo AIS, *op. cit.*, p. 27.

¹⁸ For example, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts recognizes that “Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years” (art. 4, para. 1).

Annex I

OUTLINE OF THE CONSULTATION PROCESS IN RESPONSE TO COMMISSION DECISION 2004/116

STATES AND STAKEHOLDERS CONTACTED FOR INPUT INTO THE REPORT

States

All members and observer States of the Commission.

Transnational corporations

ABB, Agricola Chapi, Alcan, Ashanti Goldfields, BASF, British Petroleum, Eskom, Felipe Rodriguez, Gap, Hewlett Packard, Junyao Group, Li & Fung, Oil and Natural Gas Corporation, Newmont Mining, Nexen, Nissan, Novartis, Novo Nordisk, Novozymes, Petrobras, Pfizer, Ricoh, Rio Tinto, Sasol, Shell, Sonofon, Suez, Tata Iron & Steel, Telefonica, Talal Abu-Ghazaleh Organization, Titan Cement, Unilever, Westpac.

Employer associations

The International Chamber of Commerce, the International Organization of Employers, the United States Council for International Business, the World Business Council for Sustainable Development.

Employee associations

International Confederation of Free Trade Unions, World Confederation of Labour.

Intergovernmental organizations and United Nations organizations and bodies

The Global Compact Office, International Committee of the Red Cross, International Finance Corporation, International Labour Office, International Monetary Fund, Organization for Economic Cooperation and Development, United Nations Conference on Trade and Development, United Nations Development Programme, United Nations Environment Programme, United Nations Industrial Development Organization, United Nations Research Institute for Social Development, World Bank.

Non-governmental organizations

Action Aid, American Association of Jurists, Amnesty International, Business and Human Rights Resource Centre, Business for Social Responsibility, Christian Aid, Center for Economic and Social Rights, Centre for Housing Rights and Evictions, Centre for Research on Multinational Corporations (SOMO), CSR Europe, Ethical Globalization Initiative, Danish Institute for Human Rights, Europe-Third World Centre, FIAN International, Friedrich Ebert Stiftung, Global Reporting Initiative, Henri Dunant Centre for Humanitarian Dialogue, Human Rights Advocates, Human Rights Watch, International Baby Food Action Network, International

Restructuring and Education Network Europe, Organisation Mondiale Contre la Torture, Oxfam, Peoples' Movement for Human Rights Education, The Prince of Wales Business Leaders' Forum, Save the Children, Transparency International, World Economic Forum.

Treaty bodies

The Committee against Torture, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, the Human Rights Committee.

STATES AND STAKEHOLDERS PROVIDING INPUTS INTO THE REPORT

States

Australia, Austria, Belgium, Canada, Croatia, Cuba, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Mauritius, Netherlands, Norway, Philippines, Poland, Portugal, Sweden, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America.

Transnational corporations

BASF, British Petroleum, Business Leaders' Initiative on Human Rights (ABB Ltd, Barclays plc, Hewlett-Packard Company, National Grid Transco plc, Novartis Foundation for Sustainable Development, Novo Nordisk A/S, MTV Networks Europe, Statoil and the Body Shop International plc), Gap, Newmont, Nexen, Pfizer, Rio Tinto, Sasol, Shell, Sonofon, Storebrand, Telefonica.

Employer associations

Bundesverband der Deutschen Industrie, Business and Industry Advisory Committee to the OECD, Confederation of British Industry, Confederation of Danish Industry, International Chamber of Commerce, International Organization of Employers, Netherland's Industry, United States Council for International Business.

Employee associations

World Confederation of Labour.

Intergovernmental organizations and United Nations organizations and bodies

The Global Compact Office, International Labour Office, International Monetary Fund, Organization for Economic Cooperation and Development, United Nations Environment Programme, United Nations Research Institute for Social Development.

Treaty bodies

The Committee on the Rights of the Child, The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families.

Non-governmental organizations

Action Aid, Amnesty International, Australian Human Rights Centre, Berne Declaration, Business and Human Rights Resource Centre, CAFOD, Castan Centre, CEDHA, Christian Aid, Dutch Round Table on Business and Human Rights, ESCR-net (joint submission), Europe Third World Centre (joint submission), FIDH, Geneva Social Observatory, German Clean Clothes Campaign, Greenpeace, Human Rights First, Human Rights Watch, Humanistish Overleg Mensenrechten, Infact, Interfaith Center on Corporate Responsibility, International Baby Food Action Network, International Commission of Jurists, International Peace Academy/FAFO, Misereor (joint submission), Mineral Policy Institute (joint submission), Oxfam.

Other stakeholders

Business for Social Responsibility, Caux Round Table, Sir Geoffrey Chandler, Columbia University Law School Human Rights Clinic, Danish Institute for Human Rights, Ms. Surya Deva, Ethical Funds, François-Xavier Bagnoud Center for Health and Human Rights (Harvard School of Public Health), Mr. Francis House, International Business Leaders' Forum, Mr. Menno Kamminga, King Zollinger, Lawhouse, Mr. John O'Reilly, SustainAbility, TwentyFifty.

STAKEHOLDERS ATTENDING THE OHCHR/GLOBAL COMPACT CONSULTATION ON 22 OCTOBER 2004

Experts

Mr. Aron Cramer, Mr. Andrew Clapham, Mr. Klaus Leisinger.

Transnational corporations

ABB, ABN Amro, Alcan, BASF, Credit Suisse, Eni, Norsk Hydro, Novo Nordisk, Pfizer, Rio Tinto, Novartis Foundation for Sustainable Development.

Employer associations

International Organization of Employers, Confederation of British Industry.

Employee associations

International Confederation of Free Trade Unions, International Federation of Chemical Energy, Mine and General Workers.

Intergovernmental organizations and United Nations organizations and bodies

Global Compact Office, International Committee of the Red Cross, United Nations Conference on Trade and Development, United Nations Children's Fund, United Nations Research Institute for Social Development, United Nations System Staff College.

National human rights institution

Danish Institute for Human Rights.

Non-governmental organizations, consultancies and other organizations

Amnesty International, Berne Declaration, Business and Human Rights Resource Centre, Earth Justice, Europe Third World Centre, Franciscans International, Geneva Social Observatory, Global Reporting Initiative, Greenpeace, Human Rights Watch, INFACT, International Bar Association, International Business Leaders' Forum, International Commission of Jurists, International Council on Human Rights Policy, International Service for Human Rights, KLD Research and Analytics, Kroc Institute, Lawhouse, Norwegian Forum for Development, Respect Europe, Rights and Accountability in Development, SustainAbility Ltd, 3D-Trade-Human Rights-Equitable Economy, Misereor.

Independent

Mr. Bjorn Kümmel, Mr. Chip Pitts, Ms. Dorothee Baumann (University of Zurich), Mr. John O'Reilly.

Annex II

DESCRIPTION OF A SELECTION OF EXISTING INITIATIVES AND STANDARDS ON BUSINESS AND HUMAN RIGHTS

Of the many existing initiatives and standards on business and human rights, the following list identifies those mentioned most prominently in the consultations.

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The Tripartite Declaration, adopted in 1977 by Governments, employer associations and employee associations, provides guidance to multinational enterprises as well as to domestic business, Governments and workers' organizations in areas such as employment, training, conditions of work and industrial relations. The interdependent aims of the Tripartite Declaration are, on the one hand, to encourage the positive contribution that investment by multinational enterprises can make to economic and social progress, and on the other hand, to minimize and resolve the difficulties to which such investment may give rise.

The Global Compact. The Global Compact is the voluntary corporate citizenship initiative of the United Nations Secretary-General that brings together companies, labour, United Nations agencies and civil society to support ten principles derived from key international instruments including the Universal Declaration of Human Rights. The first two principles of the 10 Global Compact Principles concern human rights. The Global Compact is a multi-stakeholder network with over 1,700 formal participants. The Global Compact was conceived as a way to help bring about a more sustainable and inclusive global economy, by underpinning it with universal values that Governments have defined through international agreements.

The OECD Guidelines for Multinational Enterprises. The Guidelines are a government-backed set of voluntary guidelines for international business covering a broad range of issues ranging from human rights, core labour standards, fighting corruption, consumer protection and environmental protection to compliance with local laws and regulations, abstaining from anti-competitive practices and meeting host country tax liabilities. While observance of the Guidelines is voluntary for business, adhering Governments are committed to promoting them among multinational enterprises operating in or from their territories. 38 Governments - the 30 members of the OECD and eight non-members (Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia) - have adhered to them. The Guidelines were last revised in 2000.

The draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights". The draft Norms are a set of human rights, environmental and consumer protection responsibilities of business approved by the Sub-Commission on the Promotion and Protection of Human Rights in 2003. The draft includes provisions on the right to equal opportunity and non-discrimination, the right to security of persons, the rights of workers and respect for national sovereignty and human rights and seeks to hold business directly accountable in relation to human rights standards.

Business Leaders' Initiative for Human Rights (BLIHR). BLIHR brings together ten companies (ABB, Barclays plc, Gap, Hewlett-Packard Company, National Grid Transco plc, Novartis, Novo Nordisk, MTV Networks Europe, Statoil and the Body Shop International plc) for a three-year period beginning in May 2003 to explore the ways that human rights standards and principles can inform issues of corporate responsibility and corporate governance. During the first year of the initiative, BLIHR worked together in collaboration with leading human rights and corporate responsibility experts and organizations to examine a range of relevant standards and initiatives, with a particular focus on the draft Norms described above.

The ILO Declaration on Fundamental Principles and Rights at Work. Adopted in 1998, the ILO Declaration is addressed to all ILO member States, irrespective of whether they have ratified the core ILO conventions. Its four principle areas of application are freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. Although addressed to States, the ILO Declaration has implications for the activities of business.

Voluntary Principles on Security and Human Rights for the Extractive and Energy Sectors. The Governments of the United States and the United Kingdom, companies in the extractive and energy sectors and non-governmental organizations developed a set of voluntary principles to provide practical guidance to strengthen human rights safeguards in company security arrangements in the extractive sector. The Voluntary Principles are the basis of a global standard for the extractive sector and address three areas of mutual concern to both companies and civil society, namely: engagement with private security; engagement with public security; and risk assessment supporting security arrangements consistent with human rights. While the Voluntary Principles are essentially voluntary, they have also been annexed to contracts and can therefore also potentially become legally enforceable.

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Adopted in 1997, the OECD Convention on Combating Bribery seeks to combat the "widespread phenomenon" of bribery in international business transactions. The Convention requires each State party to establish measures making the bribery of a foreign official in international business transactions a criminal offence and requires the imposition of sanctions on natural and legal persons in the case of bribery. The Convention envisages prosecution of nationals of States parties for acts of bribery committed abroad where this is possible under national law. The Convention however does not specifically refer to human rights.

The United Nations Convention against Corruption. Adopted in 2003, the Convention seeks amongst other objectives to promote and strengthen measures to prevent and combat corruption more efficiently and effectively and includes requirements that States, consistent with its legal principles, establish liability of legal persons. The Convention does not specifically refer to human rights.

Worldwide Responsible Apparel Production (WRAP). WRAP is a certification programme, requiring manufacturers to comply with 12 universally accepted principles including principles, relating to compliance with laws and workplace relations; the prohibition of forced labour; prohibition of harassment and abuse; compensation and benefits; hours of work; prohibition of discrimination; health and safety; freedom of association and collective bargaining; environment; customs' compliance and security. The programme's objective is to monitor independently and certify compliance with these socially responsible global standards for manufacturing and ensure that sewn products are produced under lawful, humane and ethical conditions. Participating companies voluntarily agree that their production and that of their contractors will be certified by the WRAP certification programme as complying with these standards. 19 worldwide apparel associations participate in the scheme, which they promote among their members.

SA8000. Social Accountability International, a non-profit organization based in the United States, established the SA8000 certification scheme in 1999 as a way for retailers, brand companies, suppliers and other organizations to maintain just and decent working conditions throughout the supply chain. SA8000 is based on international workplace norms derived from ILO Conventions, the Universal Declaration of Human Rights and the Convention on the Rights of the Child, and includes standards on child labour, forced labour, workplace health and safety, freedom of association and collective bargaining, non-discrimination, discipline, working hours, compensation, and management systems. Companies focused on production can seek certification under SA8000 while companies involved in selling goods or a combination of production and selling can join the SAI corporate involvement programme that helps companies implement the standards and report on adherence.

Kimberley Process Certification Scheme. In 2002, 36 States and the European Union, representing countries that mine, trade and cut rough diamonds, formally adopted the Kimberley Process Certification Scheme with the ultimate aim of putting an end to trade in conflict diamonds. A declaration outlines all the steps that Governments should take to ensure certification of diamonds under the scheme. Steps include the creation of systems of internal control - including penalties for violations - to prevent conflict diamonds entering shipments of rough cut diamonds. The signatory Governments have also undertaken to monitor effectively diamond trade in order to detect and prevent trade in conflict diamonds. The Kimberley Process is ongoing and participating Governments rotate the chairpersonship of the process on an annual basis.

The Global Sullivan Principles. The Global Sullivan Principles were developed as a voluntary code of conduct for companies doing business in apartheid - South Africa. The Principles aim to have companies and organizations of all sizes, in widely disparate industries and cultures, working toward the common goals of human rights, social justice and economic opportunity. Each endorser of the Principles makes a commitment to work towards the goals of the Principles, including through the implementation of internal policies, procedures, training and reporting structures. Endorsing companies and organizations are asked to take part in an annual reporting process to document and share their experiences in relation to implementation of the Principles.

Global Reporting Initiative (GRI). GRI started in 1997 as a multi-stakeholder process and independent institution to develop and disseminate a globally applicable framework for reporting an organization's sustainability performance. The framework presents reporting principles and specific content indicators to guide the preparation of organization-level sustainability reports. The framework of principles and guidelines is for voluntary use by organizations for reporting on the economic, environmental, and social dimensions of their activities, products, and services. GRI is an official collaborating centre of UNEP and works in cooperation with the Global Compact.

Fair Labor Association. The Fair Labor Association (FLA) is a non-profit organization combining the efforts of industry and civil society to promote adherence to international labour standards and to improve working conditions worldwide. FLA endorses an industry-wide code of conduct based on ILO labour standards and holds participating companies accountable for the conditions under which their products are produced through an independent monitoring system. There are currently 12 leading brand name companies participating in FLA.

The Extractive Industry Transparency Initiative. In 2002, the United Kingdom Government announced the Extractive Industries Transparency Initiative at the World Summit on Sustainable Development in Johannesburg. The initiative aims to increase transparency over payments by companies to governments and Government-linked entities, as well as transparency over revenues by those host country Governments through voluntary reporting submitted to an independent third party. The initiative is multi-stakeholder and seeks the involvement of small, medium and multinational businesses, industry groups, intergovernmental and non-governmental organizations as well as host and home country Governments.

Caux Round Table Principles for Business. Designed in 1994 by a network of business leaders, the Caux Round Table Principles aim to express a standard to measure business behaviour through the identification of shared values and the reconciliation of differing values. The Principles set out responsibilities of business in relation to a range of issues including respect for the environment, avoidance of illicit operations and respect for customers, employees, investors, suppliers, competitors and communities. The Principles identify the responsibility of business to respect human rights and democratic institutions and promote them wherever possible. The Caux Round Table promotes the Principles through a range of networks that includes employer associations, civil society and the Global Compact Office.

International Peace Operations Code of Conduct. The International Peace Operations Association (IPOA) is a non-profit organization of private sector service companies, non-governmental organizations and individuals engaged in international peace operations around the world that aims to help international peace operations succeed by utilizing the capabilities of the private sector. IPOA approved its revised Code of Conduct in 2004. Through the Code of Conduct, IPOA members pledge to adhere to principles of human rights, transparency, accountability and ethical conduct at levels that go beyond strict legal requirements.

The Danish Institute for Human Rights (DIHR) Human Rights and Business Project. Since 1999, the Human Rights and Business Project of DIHR, in joint sponsorship with the Confederation of Danish Industries and the Industrial Fund for Developing Countries, has focused on clarifying the responsibility of business in relation to human rights through the development of concrete tools which can be used by companies to evaluate their human rights performance. DIHR has focused in particular on the development of the Human Rights Compliance Assessment tool - a diagnostic test, consisting of individual indicators which companies run to ensure that their practices remain compliant with human rights.

FTSE4Good Index. FTSE Group, an independent company whose sole business is the creation and management of indices and associated data services, has developed the FTSE4Good index series to measure the performance of companies that meet globally recognized corporate responsibility standards and to facilitate investment in those companies. For inclusion in the company assessment process, a company must meet criteria requirements in three areas: working towards environmental sustainability; developing positive relationships with stakeholders; and upholding and supporting universal human rights.

Goldman Sachs Energy Environmental and Social Index. Goldman Sachs, a global investment banking, securities and investment management firm, has developed an environmental and social index for the oil and gas industry to identify specific environmental and social issues likely to be material for company competitiveness and reputation. The index relies on 30 criteria over 8 categories, namely: climate change; pollution; human rights; management diversity and incentives; investment in the future; workforce; safety; and transparency and vision. Goldman Sachs published its first index in 2004.

The United States Alien Torts Claims Act. This Act empowers United States courts to hear civil claims of foreign citizens for injuries by actions in violation of the law of nations or a treaty to which the United States is party.

Individual corporate codes of conduct, statements, principles and policies. Some businesses establish their own principles and standards on human rights and related issues to which they adhere voluntarily. The following companies provided information in the consultation process on such initiatives: BASF, BP, GAP, Nexen, Prizer, Rio Tinto, Shell General Business Principles, SONOFON, Storebrand and Telefonica.

Annex III

COMPARISON OF THE SCOPE AND LEGAL STATUS OF EXISTING INITIATIVES AND STANDARDS LISTED IN ANNEX II

	Description	Objectives	Source	Human rights coverage	Territorial coverage	Company coverage	Implementation/ monitoring	Legal status
ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy	International instrument directed at States and business	Promotion and protection	ILO member States and associated employer and employee associations	Workers' human rights recognized in ILO instruments	International	Multinational enterprises	Conventions listed are subject to ILO supervisory mechanisms	Non-binding (Conventions included are binding on States parties)
Global Compact	Voluntary initiative	Promotion	United Nations Secretary-General	General reference to human rights	Not defined	1,700 participants to date - mostly business enterprises	None	Non-binding
OECD Guidelines for Multinational Enterprises	International instrument directed at States and business	Promotion and protection	OECD member States and 8 adhering States	General references plus specific workers' rights	OECD member States and the 8 adhering States	Multinational enterprises headquarter in OECD countries	National contact points to resolve specific instances	Non-binding but commitment by adhering States to promote
Draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights"	Draft international instrument directed at States and business	Promotion and protection	Sub-Commission on the Promotion and Protection of Human Rights	General and specific references to a wide range of rights	International coverage envisaged	Transnational corporations and other business enterprises	National and international monitoring, verification and enforcement	As a draft proposal, they have no legal standing
Business Leaders' Initiative for Human Rights	Tools	Promotion	10 companies and civil society	General/ specific references drawn from the draft Norms	Not defined	10 companies	Results of project expected in 2006	Non-binding

Annex III (continued)

	Description	Objectives	Source	Human rights coverage	Territorial coverage	Company coverage	Implementation/ monitoring	Legal status
ILO Declaration on Fundamental Principles and Rights at Work	International instrument directed at States of relevance to business	Promotion and protection	ILO member States	Freedom of association, the elimination of forced labour and child labour and discrimination in the workplace	International	Indirect coverage of potentially wide pool of business	Rights referred to are subject to ILO supervisory mechanisms as well as Global Report	Non-binding
Voluntary Principles on Security and HR for the Extractive and Energy Sectors	Voluntary initiative	Promotion	UK and US Governments plus companies in extractive and energy sectors and NGOs	General references to human rights	Not defined	Extractive and energy sectors	Encourages risk assessment and investigation by companies	Non-binding
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	International instrument directed at States of relevance to business	Promotion and protection	OECD member States	No references to human rights	OECD Member States	Bribery by legal persons envisaged as an offence	Monitoring in framework of the OECD working group on bribery in international business transactions	Binding on States parties
Convention against Corruption	International instrument directed at States of relevance to business	Promotion and protection	United Nations member States	No references to human rights	International	Corruption in the private sector	National enforcement	Binding on States parties
Worldwide Responsible Apparel Production (WRAP)	Certification scheme	Promotion and protection	Independent	Workers' human rights	Undefined (focus on countries with apparel production)	Apparel sector	Certification scheme	Non-binding
SA 8000	Certification scheme	Promotion and protection	Independent	Workers' human rights, children's human rights	Undefined	Retailers, brand companies, suppliers and others	Certification scheme	Non-binding

Annex III (continued)

	Description	Objectives	Source	Human rights coverage	Territorial coverage	Company coverage	Implementation/ monitoring	Legal status
Kimberley Process Certification Scheme	Certification scheme/ instrument directed at States, relevant to business	Promotion and protection	36 States and the European Union	General references to human rights	Countries that mine, trade and cut rough diamonds	Diamond sector	Certification scheme and monitoring by States parties	Non-binding but commitment by States to respect and promote
The Global Sullivan Principles	Voluntary initiative	Promotion and protection	Independent	General references to human rights	Undefined	Approx. 100 companies	Annual reporting process to share experience	Non-binding
The Global Reporting Initiative	Voluntary initiative	Promotion and protection	Independent (but in collaboration with the United Nations)	General references to human rights	Undefined	Over 600 organizations using the Guidelines	Sustainability reports	Non-binding
Fair Labor Association	Voluntary initiative	Promotion and protection	Independent coalition of businesses and civil society	Workers' human rights	Undefined	12 leading brand name companies	Independent monitoring mechanism and public reporting	Non-binding
The Extractive Industry Transparency Initiative	Voluntary initiative	Promotion and protection	Governments, donors, companies, investors, civil society organizations and IFIs	No reference to human rights	Undefined	Companies in the extractive sector	Publishes guidelines on reporting	Non-binding
Caux Round Table Principles	Voluntary initiative	Promotion	Independent	General references to human rights	Undefined	International business leaders	None	Non-binding
International Peace Operations Code of Conduct	Voluntary initiative	Promotion	Independent	General references to human rights	Undefined	Service companies engaged in international peace operations	Engages in dialogue with stakeholders and publishes an industry newsletter	Non-binding

Annex III (continued)

	Description	Objectives	Source	Human rights coverage	Territorial coverage	Company coverage	Implementation/ monitoring	Legal status
The Danish Institute for Human Rights: Human Rights and Business Project	Tools	Promotion	Independent, with support of government and participation of private sector and not-for-profit actors	General and specific reference to a wide range of rights	International	Pharma, steel, agriculture, logging, lumber, paper and cardboard, apparel and textile industries	Enters into active dialogue with companies during the research and development phase; delivers training programmes; makes tools available for the assessment of compliance, develops codes	Non-binding
FTSE4Good Index	Mainstream financial indices	Promotion and protection	Independent	General to human rights	International	Wide	Reviews information provided by business and independent sources to assess companies	Non-binding
Goldman Sachs Energy Environmental and Social Index	Mainstream financial indices	Promotion and protection	Independent	General references to human rights	International	Oil and gas industry	Companies evaluated on thirty criteria in eight categories and ranked accordingly	Non-binding

Annex III (continued)

	Description	Objectives	Source	Human rights coverage	Territorial coverage	Company coverage	Implementation/ monitoring	Legal status
Alien Tort Claims Act	National legislation	Promotion and protection	US Government	No specific references, although read to encompass some human rights obligations	International	Wide	Allows United States District Courts to take jurisdiction in matters involving injuries connected with the violation of the law of nations or a treaty to which the United States is a party	Binding on companies
Individual corporate initiatives	Voluntary initiatives	Promotion	Individual companies	Both general and specific references depending on the initiative	Depends on the operations of the business entity	Individual companies	Self-monitoring	Non-binding