Corporate Responsibility to Respect Human Rights

Geneva, Dec. 4-5, 2007

The Special Representative of the UN Secretary-General on business and human rights (SRSG) held a series of multi-stakeholder consultations in the fall of 2007, which were intended to inform his 2008 report to the Human Rights Council. These consultations were broadly framed in terms of three baskets of issues: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need to create more effective remedies to address corporate-related human rights disputes.

The consultation on the corporate responsibility to respect human rights—what it means and implies for companies, both in conceptual and operational terms—took place in Geneva on December 4-5, December 2007. It was convened in cooperation with *Realizing Rights: the Ethical Globalization Initiative;* co-chaired by Mrs. Mary Robinson and Sir Mark Moody Stuart; and hosted by the Office of the United Nations High Commissioner for Human Rights. The SRSG is grateful for this assistance, and for the contributions made by all participants.

Participants at the consultation included representatives from corporations and civil society as well as academics, legal practitioners and international organizations. A list of participants and their affiliations is appended below.

In order to encourage full and frank discussion, the consultation was held under non-attribution rules. Accordingly, the following is a general summary of the discussion.

Introduction and objectives

Society expects companies to respect human rights, and companies generally believe they do. However, most companies cannot make that claim with high degrees of confidence because they lack the systems to ensure it. The consultation's aim was to explore what steps companies need to take in practice to satisfy themselves and their stakeholders that their practices indeed do respect human rights.

The corporate responsibility to respect human rights in essence means "non-infringement" on the enjoyment of rights—or put simply, "doing no harm." Doing no harm may require companies to take positive steps. For example, a company that wishes to respect the right to non-discrimination in the workplace will need to adopt appropriate hiring policies and engage in employee training to be sure that the right is honored.

Furthermore, companies may have additional responsibilities in particular situations—for example, if they perform governmental functions. Or they may take on additional obligations with regard to human rights voluntarily.

The consultation stressed that companies cannot "buy offsets" to counterbalance harm to human rights for which they are responsible, through philanthropic acts or by fulfilling rights in other areas. The responsibility to respect is a universal requirement, applicable in all situations.

Understanding When and How Corporations May Harm Rights

In order to contextualize the discussion of the corporate responsibility to respect human rights, two recent studies of alleged corporate human rights abuses were presented. The first was conducted by the International Council on Mining and Metals (ICMM). It examined 38 allegations against mining companies in 25 countries. The most common allegations include adverse impacts of company operations on health and environment, indigenous peoples, security, and conflicts. Of the "underlying issues" that may have helped drive the allegations, economic effects were the most frequently cited, either because company activity negatively impacted the local community's economic situation or because the local economy failed to benefit. Lack of consultation also was frequently mentioned. In up to 70% of the cases, both the company and another entity, usually the state, were alleged to be responsible for the abuse, raising the issue of corporate complicity—that is, when a company is held responsible for the actions of another entity with which it has relations because it contributed to and had some knowledge of those actions.

The second study is being carried out by the Office of the UN High Commissioner for Human Rights in support of the SRSG's mandate. It analyzes a sample of more than 300 allegations of corporate human rights abuses from all sectors, collected by the Business and Human Rights Resource Center. Initial findings indicate that companies have been accused of having negative impacts on the full range of human rights. Most of the cases allege direct violations by a company, although some claim that the company contributed to or benefited from violations by states, the supply chain, or other third parties.

The two studies show that companies can and do impact the full spectrum of human rights. Therefore, the *ex ante* specification of rights for which companies might bear some responsibility is an inherently fruitless exercise; in principle, all rights can be affected. Efforts by companies to ensure respect for rights should reflect this fact.

Due Diligence

The consultation then addressed the need for an overarching analytical framework that can guide corporate policies and management practices in respecting human rights and ensuring that their business operations "do no harm." The concept of "due diligence" was proposed and was found to be a useful starting point for companies as they seek to integrate respect for human rights into their practices.

One speaker described due diligence as understood in the United States as the steps taken by directors to discharge fiduciary duties of care and loyalty, which can include

overseeing the operations of a company to ensure it is acting both legally and ethically.[1] This requires proactive conduct on the part of the company. The corporate duty of care and loyalty in the United States is one of oversight, requiring directors to take reasonable steps to identify and address risks. The corporate fiduciary duty of care also is defined by the United States Sentencing Guidelines as due diligence to ensure that companies are in compliance with both legal and ethical guidelines, which the speaker believed could include international human rights standards.

Another speaker indicated that in Canadian employment law due diligence means taking all reasonable steps and precautions to avoid harm. They include having written policies and procedures concerning health and safety systems, for example; instruction and training in the use of such procedures; ongoing communication; consultation regarding problems and follow-up concerning results; and effective monitoring and enforcement.

The concept of due diligence was also explored in the context of international investment law. One speaker noted that while bilateral investment treaties do not specify duties for the investor, international investment tribunals nevertheless have started to consider whether foreign investors have assessed risks adequately through due diligence and refrained from "unconscionable conduct." Investment tribunals have noted the relevance of human rights in a few water-related cases, which may indicate that companies will be expected to take into account the human rights situation of the country in which they invest as part of their due diligence.

Clearly more research is needed to establish greater clarity. But as a first cut, participants felt that the concept of due diligence offers a good starting point for companies seeking to establish that they respect rights.

Policy Formulation

The next step would be for companies to adopt human rights policies or integrate human rights into existing policies. The consultation explored the lessons learned and the challenges of incorporating human rights standards into company policy areas.

General aspirational statements about respect for the principles of the Universal Declaration of Human Rights (UDHR), for example, need to be supplemented by specific guidance for managers with limited understanding of international human rights standards. Some participants argued for the need to articulate human rights standards in business friendly language that applies to specific areas of company policy and practice.

Participants had different views about whether a stand-alone human rights policy was necessary. Most agreed that human rights must be integrated into existing company policies and management practices and should not be kept in a silo. Some thought it would be sufficient for companies to check their existing policies and procedures against international human rights instruments to make sure the key elements were in place.

---

[1] The International Bar Association is conducting research for the SRSG that examines how concepts of due diligence and fiduciary duties are understood in various jurisdictions.

Participants also commented on the need to train employees regarding the policies to ensure they are implemented.

Speakers mentioned two tools that provide detailed policy guidance. The Business Leaders' Initiative for Human Rights matrix looks to the UDHR and articulates its relevance for business by policy area. And the Danish Institute for Human Right's Compliance Assessment tool allows companies to assess their policies and practices in different operational areas for compliance with human rights.

Human Rights Impact and Compliance Assessments

There is a growing realization that the assessment of human rights impacts and compliance before operations begin are a critical part of due diligence to ensure respect for human rights. Participants noted increased investor pressure on companies to use human rights impact assessments, and the ability of governments, commercial banks, and multilateral lenders to encourage uptake in their use. The consultation considered when such assessments should be carried out and what form they should assume.

Participants agreed that impact assessments should be conducted as early as possible, ideally before the decision to invest has been made, so that companies can alter their decisions about location, timing, design, and costing, and thus the investment's overall viability, based on the impact assessment. Participants indicated that this sort of "pre-check," usually comprising desk research and some expert consultation, should be done in any business sector.

These desk-based impact assessments were differentiated from assessments that include consultation with the potentially impacted individuals and communities. Some participants indicated that whether such "on-the-ground" activity was necessary would depend on sector, type of activity, or scale of the investment. Participants diverged on the practicability of disclosing the results of the impact assessment to the public, although they agreed this was in principle desirable.

Participants also differed on whether human rights impact assessments should be free-standing or could be integrated into existing risk management processes. It was suggested that, if they were to be integrated, it was essential to maintain a human rights perspective.

It was noted that several tools for human rights impact assessments are now available, including the Human Rights Compliance Assessment tool, produced by the Danish Institute for Human Rights; the Guide to Human Rights Impact Assessments (road-testing draft from June 2007), produced by the International Finance Corporation, the International Business Leaders Forum and the UN Global Compact; and Human Rights Impact Assessments for Foreign Investment Projects, produced by Rights & Democracy (for use by affected communities).

Accountability through Monitoring, Auditing, and Assurance

This session considered the role of monitoring and auditing of corporate human rights policies and practices as a means of ensuring respect for rights.

It was agreed that monitoring and auditing are needed to raise awareness within the company about human rights issues and to help address issues of non-compliance. Auditing results can also help focus training efforts. However, some participants indicated that there is a significant difference in the quality of auditing depending on the degree of independence of the auditors.

It was agreed that monitoring and auditing have improved health and safety standards in the workplace, but they have not always successfully addressed issues such as freedom of association, collective bargaining, and non-discrimination. One participant suggested that the latter issues could be addressed if auditing systems were designed to enhance accountability, build worker and community capacity, and bring about structural change in how the company operates. Participants noted that these processes can be expensive, especially for mid-sized companies, but others noted that they are a necessary component of business excellence and sustainability. The particular role that unions can play on behalf of workers was highlighted.

The buying practices of global brands were also raised, with participants noting that they place undue pressures on factories that were at the same time held to very strict cost-constraints. Some multi-stakeholder initiatives are trying to take into account the human rights impacts caused by purchasing practices in their audits. It was suggested that this topic merited further attention.

Accountability through Grievance Mechanisms and Remediation

When corporations adversely affect the enjoyment of human rights of individuals and communities, mechanisms need to be in place to provide remedies for grievances or harms. However, there has been little analysis of what such mechanisms should look like, particularly at the operational level in companies. This session explored what constitutes effective and credible grievance mechanisms to help ensure corporate respect for human rights.

One speaker suggested that grievance mechanisms can be divided in three categories. The first includes those created by the company at the level of a specific site or operation, such as a mine or factory. The second comprises mechanisms that are outside of companies but not part of the formal legal system, such as the ombudsman function of the International Finance Corporation, the OECD National Contact Points, or complaint mechanisms of multi-stakeholder initiatives such as the Fair Labor Association. The third category consists of judicial institutions at the national and international level. All three categories are needed to ensure effective remediation.

The conversation mainly focused on company grievance mechanisms. The point was made that such mechanisms could be particularly effective because they were located in the physical and cultural context in which the issues arose and could enable solutions to

be found more quickly. Participants agreed that operational level grievance mechanisms should most appropriately use mediation or negotiation rather than an adjudication process.

Several participants noted the potential for operational level grievance mechanisms to be empowering if they involved workers or communities in the process in a meaningful way, giving them information and support. Other participants expressed concern about the fairness and independence of such a process, in terms of funding and access to information. Participants agreed that safeguards and some solution to the funding conundrum were necessary so that, for example, any mediator could be seen as neutral. Participants believed that a mechanism specifically for "human rights" grievances would not be feasible or necessary, so grievance mechanisms should be able to consider complaints related to environmental problems and other harms to communities or employees.

Concerning the second category of grievance mechanisms, it was suggested that non-judicial mechanisms external to companies should support dialogue and mediated solutions. They could also encompass adjudication, without having the legally binding effect of a court ruling. One speaker noted the need to avoid undermining government investigation and complaint mechanisms, such as National Human Rights Institutions. Some of these institutions already address corporate related human rights issues, and this capacity could be strengthened and extended.

Finally, redress through the legal system for corporate infringements of human rights was discussed. One speaker expressed concern regarding the slowness and inaccessibility of the court system. It was agreed that courts were always needed as a backstop to other types of mechanisms, and for some types of grievances, such as those raising issues of criminal liability, they were indispensable.

Beyond "Sphere of Influence"?

This session addressed the question of *when* the corporate responsibility to respect human rights applies, and *how* a company delineates the sphere within which it will be expected to take steps to do no harm. Since the launch of the UN Global Compact, the concept of "sphere of influence" has been commonly accepted as an analytical tool to delineate the scope of company responsibilities, though the practical application of the concept still gives rise to confusion and disagreement.

Sphere of influence is not about what *rights* companies must respect, but rather about *when* and *where* companies must take steps to ensure that they respect human rights. While the concept of sphere of influence has been compared to a state's jurisdiction, within which its human rights obligations apply, a corporate sphere of influence cannot be similarly defined by geographic boundaries.

Two members of the SRSG's team recently published an article in *Ethical Corporation* magazine that sought to clarify the concept of corporate sphere of influence. The article

argued that the concept as previously articulated lumped together too many disparate concepts, such as control, causation, physical proximity, benefit, and political influence, and thus was unable to provide crisp policy guidance to companies and stakeholders.[2]

Some participants suggested that just because a company may have influence or power over an entity that affects human rights does not necessarily mean that it has a *responsibility* for those human rights impacts. Participants generally agreed that factors such as control, causation, and benefit need to be part of the formula for assigning responsibility. But more uncertainty surrounded the relevance of geographic proximity and political influence.

If a company causes harm, or if it controls an entity causing harm, most participants agreed that the harm would fall within the company's sphere responsibility to respect human rights. Control of another entity might exist when the company has a direct contractual relationship with the entity causing the impact, or perhaps if it buys a high percentage of a supplier's output. Similarly, where a company's product is directly causing harm, and such an outcome was foreseeable, the harm may be the responsibility of the company. Some participants also found it reasonable that companies benefiting directly from the human rights violations by others might have some responsibility for the harm. However, it was unclear how direct that benefit needs to be and whether the violation would need to be supported by the company.

Most participants agreed that when a company has political influence over a third party that is harming rights, but the harm is neither conducted on the company's behalf nor otherwise linked to the company's activities, the company may not be responsible for that harm, although it may well face reputational risks by remaining silent.

Participants indicated that several additional concepts may be relevant to delineating the scope of a company's responsibility to respect human rights, including knowledge, duration, and severity of the human rights impact.

It was suggested that the SRSG continue exploring the concept of sphere of influence and how it may become a more useful tool for companies from different sectors, including those without major physical footprints.

Corporate Complicity

Many of the charges made against corporations for failing to respect human rights allege corporate complicity in human rights violations committed by others. The SRSG's mandate requests him to clarify the implications of the concept of complicity in the corporate context. The session aimed to explore both the legal and non-legal dimensions of the concept.

---

[2] Lehr, Amy and Beth Jenkins, Business and human rights – beyond corporate spheres of influence, Ethical Corporation,.available at http://www.ethicalcorp.com/content.asp?ContentID=5504.

The discussion focused primarily on international criminal law definitions of complicity, which have been employed by international tribunals and domestic legal systems. The International Commission of Jurists (ICJ) presented preliminary findings from an expert panel that was established in 2005 to clarify the legal standard for corporate complicity in violations of human rights. The expert said that the preliminary findings of the panel suggest that three elements could or should qualify an act or omission as complicity: conduct that enables a violation to occur where the violation could not have occurred without that contribution; that exacerbates the violation's impact; and or that facilitates the violation. Being a silent onlooker would almost never by itself lead to a legal ruling of complicity, though in a very small number of situations where companies carry great influence over the perpetrator, such silence could be construed as a sign of approval and thus constitute support.

In relation to the required knowledge to establish complicity, the expert panel found that a company need not have desired that the violation occur for it to be found complicit. Rather, it simply must have had knowledge that its conduct was likely to contribute to a human rights violation—such a result must be reasonably foreseeable, although it is not clear whether the standard is actual knowledge or that the company "should have known." Participants expressed concern that the requirement of actual knowledge could lead to companies seeking to "know less" in order to avoid being found complicit. The SRSG is currently reviewing the draft report of the expert panel.

Participants also discussed steps a company can take to avoid allegations of complicity. Companies may be accused of complicity even where there is little chance they would be found legally liable. Therefore, many companies view the issue as part of a reputational rather than legal risk analysis. It was suggested that as part of their due diligence companies incorporate human rights clauses into their business contracts.

One participant suggested that when companies operate in conflict zones, stakeholders may expect the company to show that they are part of the solution by promoting and fulfilling rights to avoid being seen as complicit. Several participants responded that while companies may undertake additional responsibilities in particular cases, the corporate responsibility to respect human rights encompasses a responsibility to ensure that corporations are not complicit in acts that harm rights, and that this standard applies irrespective of any additional commitments made by a company.

When Standards Conflict

As multinational companies try to meet their responsibility to respect human rights, they may encounter situations where international human rights standards conflict with local law, or where local law to protect human rights is not enforced. The session focused on approaches that companies should consider when operating in such situations to ensure themselves and others that they are not violating rights.

Participants agreed that companies must take steps to ensure that they are not violating rights. Reference was made to a recent paper by the International Organisation of

Employers, the International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, which states that companies "are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent."[3]

When a company faces not the absence of legal standards or their enforcement, but an outright conflict between national and international standards, it was suggested that the company should articulate guiding principles in support of human rights; outline the steps it is taking to deal with the conflicting standards; engage third parties for assurance and evaluation of its actions; and disclose as much of the human rights related information about the situation as possible.

The company also could adopt a standardized process that includes expert consultation when considering entering a new market; create a company-wide clearinghouse of policies and approaches to dealing with human rights dilemmas, and engage with home and host governments, alone or with other companies and stakeholders. Participants noted that when governments do take steps to enforce their human rights obligations, companies should be supportive.

Concluding remarks

The consultation focused on the question of how companies can ensure that they respect human rights. Further discussion and elaboration is needed concerning some of the difficult conceptual and operational issues the consultation addressed. Nevertheless, there was broad acceptance of the underlying premise of the consultation, that companies have a responsibility to respect human rights, and of due diligence as a useful overarching concept enabling companies to operationalize the responsibility to respect. This marks an important contribution to the work of the SRSG as he moves forward in developing a new framework for the business and human rights discourse along the lines outlined in the introduction: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need to create more effective remedies to address corporate related human rights disputes.

---

[3] IOE, ICC, BIAC, Business and Human Rights: The Role of Government in Weak Governance Zones, Dec 2006, para. 15, available at http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf.

LIST OF PARTICIPANTS

Ms. Nathalie Bernasconi, Managing Attorney,
Center for International Environmental Law

Mr. Lorenz Berzau, Staff Director,
Business Social Compliance Initiative

Mr. Brian Burkett, Partner,
Heenan Blaikie LLP

Mr. Bruno Colombani,
Manager Social Ethics, EMC Distribution

Mr. Manoj Chakvarti,
Advisor Corporate Social Responsibility, Titan Industries

Prof. Andrew Clapham,
Director, Geneva Academy of International Humanitarian Law and Human Rights

Mr. Aidan Davy, Program Director,
International Council of Minerals and Mining

Mr. Christophe De Courten,
Legal Counsel, UBS

Mr. Olivier De Schutter, Secretary-General,
International Federation of Human Rights

Ms. Kathryn Dovey, Directrice, Entreprises pour
les Droits de l'homme

Ms. Tricia Feeney, Director, Rights and
Accountability in Development

Mr. Dan Feldman, Attorney, Foley Hoag

Mr. Ravi Fernando, Director Corporate Branding
and CSR, MAS Holdings

Mr. Peter Frankental, Strategy Adviser Economic
Relations, Amnesty International

Mr. Christian Frutiger, Public affairs manager,
Nestle

Mr. Jan Furstenborg, Head, UNI Commerce

Ms. Audrey Gaughran, Head of economic

relations, Amnesty International

Ms. Raquel Gonzalez, Ass. Director, GVA office, International Trade Union Confederation

Mr. Adam Greene, VP, Int'l Labor Standards &
CSR, US Council of International Business/International Organization of Employers

Ms. Susan Hayter, Senior Policy Advisor,
International Labour Organization

Ms. Leah Hoctor, Programme Officer,
International Commission of Jurists

Mr. Hans Hofmeijer, Director, International
Labour Organization

Ms. Beth Jenkins, Director of Policy Studies, CSR
Initiative, Kennedy School of Government,
Harvard

Mr. Scott Jerbi, Senior Adviser, Realizing Rights:
The Ethical Globalisation Initiatve

Mr. Chris Jochnick, Director of Private Sector
Engagement, OxfamAmerica

Ms. Seema Joshi, Legal Advisor, Global Witness

Ms. Margaret Jungk, Director Human Rights and
Business, Danish Institute for Human Rights

Mr. Julian Kassum, Policy manager, International
Chamber of Commerce

Ms. Türkan Karakurt, Director, Friedrich Ebert
Stiftung

Mr. Yann Kermode, Risk Controler, UBS

Mr. Jung-Hae Kho, Head of Global Communications, SK Holdings

Mr. Jeong Shik Kwak, General Manager,
Responsible for corporate ethics, POSCO Steel

Ms. Melissa Lane, Senior Lecturer, Kings College,
Cambridge

Ms. Amy Lehr, Research Fellow, CSR Initiative,
Kennedy School of Government, Harvard

Mr. Klaus Leisinger, President and Executive
Director, Novartis Foundation

Ms. Ray Lindsay, Partner
Clifford Chance LLP

Mr. Gareth Llwellyn, Global Corporate
Responsibility Director, National Grid

Mr. Reg Manhas, Senior Manager, Talisman

Mr. Allan Miller, Director, McGrigors Rights

Mr. Anthony Miller, Economic Affairs Officer,
UNCTAD

Sir Mark Moody-Stuart, Chairman of the Board,
AngloAmerican

Mr. John Morrison, Director, Business Leaders
Initiative on Human Rights

Mr. Tam Nguyen, Policy Advisor for Corporate
Responsibility and Global Issues, Chevron

Mr. Oluwole Olaleye, Policy Researcher,
ActionAid South Africa

Mr. Gerald Pachoud, Special Advisor to the
SRSG

Ms. Jeehye Park, Manager, SK Telecom

Ms. Angeles Pereira, Global Governance
Program Director, Center for Human Rights and
Environment

Mr. Chip Pitts
Independent Expert, Stanford University Law School

Ms. Susie Pontarolli, CSR Coordinator, Copel

Mr. Mike Posner, President, Human Rights First

Mr. Ed Potter, Director, Global Workplace
Rights, The Coca Cola Company

Ms. Soroya Ramoul, CSR Coordinator, Novo
Nordisk

Ms. Caroline Rees, Research Fellow, Kennedy

School of Government; Harvard

Ms. Aisling Reidy, Senior Legal Advisor, Human Rights Watch

Ms. Kate Rigge, Corporate Responsibility Director, STMicroelectronics

Ms. Mary Robinson, President, Realizing Rights: The Ethical Globalization Initiative

Mr. John Ruggie, SRSG

Mr. Michael Samway, VP, Deputy General Counsel, Yahoo!

Mr. David Schilling, Program Director, Interfaith Center of Corporate Responsibility

Ms. Andrea Shemberg, Consultant

Mr. John Sherman, Deputy General Counsel, National Grid

Mr. Mark Taylor, Deputy Managing Director, FAFO

Ms. Alice Tepper Marlin, President & CEO, Social Accountability International

Mr. Salil Triparthi, Senior Policy Adviser, International Alert

Ms. Stefania Tripodi, Associate Human Rights Officer, Office of the High Commissioner for Human Rights

Ms. Auret Van Herden, President & CEO, Fair Labour Association

Mr. David Vermijs, Research Fellow
Kennedy School of Government, Harvard

Ms. Claude Voillat, Deputy Head, Private Sector Relations, International Committee of the Red Cross

Ms. Lene Wendland, Adviser on business and human rights, Office of the High Commissioner for Human Rights
Mr. Mike Wilkinson, VP Sustainable Development, Shell

Mr. Michael Wright, Consultant, Office of the
High Commissioner for Human Rights

Ms. Ursula Wynhoven, Special Assistant to the Executive Head of the Global Compact Office