Draft Interim Report of the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises

February 2006

Introduction

1. In its resolution 2005/69, the Commission on Human Rights requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years, who shall submit an interim report to the Commission at its sixty-second session and a final report at its sixty-third session, containing views and recommendations for the consideration of the Commission, with the following mandate:

a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";

d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.

2. On 25 July 2005, the Economic and Social Council adopted decision 2006/273 approving the Commission's request. On 28 July 2005, the Secretary-General appointed Professor John Ruggie as his Special Representative.[1]

3. As requested by the Commission, and in light of the complex challenges addressed by the mandate as well as the history that preceded its creation, the SRSG has begun his work by conducting extensive consultations on the substance of the mandate as well as alternative ways to pursue it – with states, non-governmental organizations, international business associations and individual companies, international labor federations, UN and other international agencies,

and legal experts. To date, formal meetings have been held in Geneva, New York, London, Paris, and Washington. Subject to the availability of voluntary contributions, the SRSG plans to convene regional multi-stakeholder consultations in sub-Saharan Africa, Latin America, and Asia. In addition, he has concluded the first of what he hopes will be a series of unofficial visits to the overseas operations of companies in several sectors, at the invitation of but not financed by the firms. The purpose of these visits, which include independent discussions with groups from affected communities, is to deepen the SRSG's personal understanding of situations on the ground, not to report on either the companies or the countries in which they are located.

4. For additional background information relevant to the mandate, the SRSG is conducting a survey of the Fortune Global 500 companies, [2] asking this set of influential firms whether they have human rights policies and practices in place, and if they do, what standards they reference, whether they conduct human rights impact assessments, and how they conceive of their human rights responsibilities towards various stakeholders. He also proposes to conduct a survey of Governments to obtain information needed in order to prepare an adequate response to subparagraphs (b) and (e) of the mandate.

5. For advice on the strictly legal dimensions of the mandate, the SRSG is drawing on the support of Harvard Law School as well as pro bono research and advice from legal practitioners and scholars in the United States, the United Kingdom, and Australia. He would welcome additional assistance from legal experts, in particular from developing countries.

6. In his final report, the SRSG will respond to each subparagraph of the mandate in as much detail as is possible within the existing time and resource constraints. This interim report is intended merely to frame the overall context encompassing the mandate as the SRSG sees it, to pose the main strategic options, and to summarize his current and planned program of activities.

I. FRAMING THE ISSUES

7. In carrying out his work, the SRSG is guided by the terms of Resolution 2005/69 and its drafting history. Thus, he takes as a premise that the objective of the mandate is to strengthen the promotion and protection of human rights in relation to transnational corporations and other business enterprises, but that governments bear principal responsibility for the vindication of those rights. Moreover, he takes the operative paragraphs of the Resolution to indicate that the mandate is intended to be primarily evidence based, and also to provide conceptual clarification where called for or otherwise required.

8. Three broad contextual factors frame the SRSG's analysis of the rapidly evolving business and human rights relationship: the institutional features of globalization; overall patterns in alleged corporate abuses and their correlates; and the characteristic strengths and weaknesses of existing responses established to deal with human rights challenges.

Globalization

9. The United Nations was created for a state-based international order. In 1945, states were the sole international decision-makers of any significance, they were the subjects of their joint decisions, and they were responsible for enforcing those decisions. The only public interest that had any standing in international governance reflected whatever accommodation states

managed to reach among their respective national interests. Even when the human rights regime was constructed, which seemingly clashed with these principles by creating obligations that transcend statehood and nationality, states were designated as the only duty-bearers who could violate international human rights law, and they alone were held responsible for implementing human rights principles by enforcing treaty-based obligations or customary norms within their domestic jurisdictions.

10. Today we also live in a global world, wherein a variety of actors for which the territorial state is not the cardinal organizing principle have come to play significant public roles. Nowhere is this truer than in the economic realm. In the immediate post-World War II era, the term "international economy" was still an accurate spatial description of the prevailing reality: an economic order consisting of *external* transactions taking place among separate and distinct national markets, conducted at arms length, which governments could buffer effectively at the border by point-of-entry measures like tariffs, non-tariff barriers, exchange rates and capital controls – and which were constrained, as always, by the cost and capabilities of available communication and transportation technologies.

11. Now contrast this picture with the most visible manifestation of globalization today: some 70,000 transnational firms, together with roughly 700,000 subsidiaries and millions of suppliers spanning every corner of the globe.[3] Their's are no longer external arms-length transactions. For example, intra-firm trade, that is, trade among affiliates of the same corporate entity, accounts for a significant share of overall global trade.[4] In this respect then, what once was external trade between national economies increasingly has become *internalized* within firms as global supply chain management, functioning in real time, and directly shaping the daily lives of people around the world.

12. The rights of transnational firms – their ability to operate and expand globally – have increased greatly over the past generation, as a result of trade agreements, bilateral investment treaties, and domestic liberalization. In the 1990s, intellectual property rights were successfully reframed as a trade issue and consequently became more firmly rooted in law than ever before. In some sectors, such as telecommunications, companies participate directly in international standards setting. Moreover, a large fraction of disputes related to foreign investments nowadays is settled by private arbitration, not national courts. And so corporate law firms and accounting firms add yet additional layers to routine transnational rule making.

13. These comments are meant to be descriptive, not judgmental. While its benefits are unevenly shared, globalization has generated numerous positive effects in terms of higher living standards, and in some parts of the developing world it has provided the opportunities for unprecedented rates of poverty reduction. The point is merely to observe that, in light of this transformation in the institutional features of the world economy, it is hardly surprising that the transnational corporate sector – and by extension the entire universe of businesses – has attracted increased attention by other social actors, including civil society and states themselves. Indeed, civil society actors in many ways have become as transnationalized as firms; according to one academic source, more than 30,000 NGOs operate international programs, roughly 1,000 have memberships drawn from three or more countries, and purely national and local NGOs are often supported by international counterpart institutions.[5]

14. At least three distinct drivers are behind the increased attention on transnational corporations. The first is simply the latest expression of one of the oldest axioms of political life: the successful accumulation of power by one type of social actor will induce efforts by others with different interests or aims to organize countervailing power. When large firms in the industrialized countries first became major players on the national scene in the late nineteenth century, countervailing efforts came from labor and faith-based communities, among others, and ultimately from the state. At the global level today, a broad array of civil society actors has been in the lead. And when global firms are widely perceived to abuse their power – as was the case with major pharmaceutical companies over pricing and patents of AIDS treatment drugs in Africa, for example – a social backlash is inevitable.

15. The second driver is that some companies have made themselves and even their entire industries targets by committing serious harm in relation to human rights, labor standards, environmental protection, and other social concerns. This has generated increased demands for greater corporate responsibility and accountability, often supported by companies wishing to avoid similar problems or to turn their own good practices into a competitive advantage. Examples include the push for greater disclosure of non-financial performance by corporations through various means of reporting or certification, and the gradual uptake of such information by the financial and investment sectors; the emergence of voluntary proto-regulatory schemes, sometimes involving governments, intended to ensure better protection of human rights and other social standards; and a greater willingness by national courts to accept jurisdiction in cases alleging the most serious human rights-related abuses involving companies abroad, of which U.S. Alien Tort Claims Act (ATCA) jurisprudence is the major but not sole instance.[6]

16. Yet a third rationale for engaging the transnational corporate sector has emerged in the past few years: the sheer fact that it *has* global reach and capacity, and that it is capable of acting at a pace and scale that neither governments nor international agencies can match. Other social actors increasingly are looking for ways to leverage this platform in order to cope with pressing societal problems – often because governments are unable or unwilling to perform their functions adequately.

17. Thus, in individual issue areas, whether the aim is providing access to medicines in poor countries, meeting the Millennium Development Goals, mitigating climate change, or curbing human rights abuses, civil society actors and policymakers increasingly appreciate the fact that active corporate involvement is an essential ingredient for success.[7]

18. Moreover, at the level of the world political economy as a whole policymakers and pundits of varying persuasions are coming to appreciate a lesson that history taught us long ago: that severe imbalances between the scope of markets and business organizations, on the one hand, and the capacity of societies to protect and promote the core values of social community, on the other, are not sustainable. The Victorian variant of globalization collapsed, as did the attempt to restore a laissez-faire international financial system after World War I, because both made it difficult if not impossible for governments to meet mounting domestic demands for full employment and greater economic equity. Both failures contributed to the emergence of ugly "isms" that were inimical to business, human rights and, in the end, to world peace. In contrast, the post-1945 institutional arrangements for monetary and trade relations balanced commitments to international liberalization with ample scope for domestic safety nets and social investments, and helped build, thereby, domestic political support for the most recent wave of globalization.

Today, the widening gap between global markets and the capacity of societies to manage their consequences may pressure political leaders to turn inward yet again, pulled by economically disadvantaged but politically empowered segments of their publics, as a result of which assertive nationalisms or intolerant fundamentalisms may emerge as the promised means for providing social protection. Embedding global markets in shared values and institutional practices is a far better alternative; contributing to that outcome is the broadest macro objective of this mandate.

19. It stands to reason that human rights should be at the very center of these concerns. Whatever other differences may exist in the world, starting with the 1948 Universal Declaration human rights are the only internationally agreed expression of the entitlements that each and every one of us has simply because we are human beings. Thus, securing respect for human rights must be a central aim of governance at all levels, from the local to the global, and in the private sector no less than the public.

Abuses and Correlates

20. There being no global repository of comprehensive, consistent, and impartial information, we cannot say with certainty whether abuses in relation to the corporate sector are increasing or decreasing over time, only that they are reported more extensively because more actors track them and transparency is greater than in the past. Of course, to victims of abuses this uncertainty matters little. But it does make it more difficult to design and assess the efficacy of alternative policy approaches to deal with these challenges – a bit like searching for ways to prevent and cure cancer without fully knowing its epidemiology.

21. It is generally believed that economic development coupled with the rule of law is the best guarantor for the entire spectrum of human rights: from civil and political, to economic, social, and cultural rights. To the extent that globalization fosters both it enhances prospects for the enjoyment of those rights as well. At the same time, however, there are intuitive grounds for suspecting that the expansion and deepening of globalization, at least initially, has also increased the possible involvement of transnational firms in human rights violations. In part, this is a matter of sheer numbers: there are many more such firms operating in more countries around the world, increasingly in socio-political contexts that pose entirely novel challenges for their leadership, especially with regard to human rights.

22. In addition, the distinctive institutional features of global firms touched upon in the previous section inevitably multiply and amplify these challenges. For many companies, going global has meant adopting network-based operating models involving multiple corporate entities, spread across and within multiple countries. Networks, by their very nature, involve divesting direct control over significant operations, substituting negotiated relationships for hierarchical structures. This form of extended enterprise has enhanced the economic efficiency of firms. But it also has increased the difficulty companies face in managing their global value chains – the full range of activities required to bring a product or service from its conception to end use. As the number of connections in value chains increases so, too, do the vulnerabilities for the global enterprise as a whole posed by each link in the chain. At the same time, distributed corporate networks also have increased the available entry points through which civil society actors can seek to leverage a company’s brand and resources in the hope of improving not only the firm’s performance, but the social environment in which it operates as well.

23. Thus, quite apart from bad judgments or acts of malfeasance by corporate officials, these distinctive institutional features of transnational corporations, if left unattended, increase the probability that "the company" in some manifestation or other will run afoul of its own corporate principles or community expectations of responsible corporate behavior. The core challenge of business and human rights, then, lies in devising instruments of corporate and public governance to contain and reduce these tendencies.

24. But what precisely is the situation today? What if any patterns of abuses exist that could and should inform the design of such governance instruments? To provide an illustrative profile of alleged corporate human rights abuses and their correlates, the SRSG surveyed sixty-five instances recently reported by NGOs. It seems reasonable to assume that particularly egregious cases or firms already targeted for a campaign would have been selected as subjects, so these reports are unlikely to be a representative sample of all situations, but of the worst. The patterns and their correlates are striking, though they will surprise few knowledgeable observers.

25. The extractive sector – oil, gas, and mining – utterly dominates this sample of reported abuses, with two-thirds of the total. The foods and beverages industry is a distant second, followed by apparel and footwear, and the information and communication technology sector. The extractive industries also account for most allegations of the worst abuses, up to and including complicity in crimes against humanity, typically for acts committed by public and private security forces protecting company assets and property; large-scale corruption; violations of labor rights; and a broad array of abuses in relation to local communities, especially indigenous people.

26. The foods and beverages industry's chief challenges tend to concern questions of land tenure and water, coupled with labor rights. Abuses of labor rights also constitute the core issue in apparel and footwear. In both sectors, the labor rights issues tend to involve supply chains. In information and communications technology, the emerging concern is infringements on freedom of expression and privacy rights, with possible additional adverse consequences for the right to life, liberty, and security of the person.

27. In what socio-political contexts do these alleged abuses take place? The sixty-five instances occurred in twenty-seven countries. Here, too, the patterns are striking and not entirely unexpected. For example, these are mainly low-income countries, or on the low side of the middle-income category (to be precise: where "one" is low income, "two" middle, and "three" high, the twenty-seven countries score 1.8). Moreover, nearly two-thirds of them either recently emerged from or still are in conflict. Lastly, these countries are characterized by "weak governance." On a "rule of law" index developed by the World Bank, all but two of the twenty-seven fall below the average score for all countries; one of the two exceptions is slightly above the global average, the other right at it.[8] On the Transparency International Corruption Perceptions Index – where "zero" is labelled "highly corrupt" and "ten" is described as "most clean" – their average score is 2.6.[9] And on the Freedom House index of political systems – where "not free" is ranked as one, "partially free" two, and "free" three – their average is 1.9.[10]

28. Needless to say, other types of corporate-related human rights abuses take place in the world, and in other types of countries. But even without being exhaustive, this brief profile suggests two implications for the design of policy responses.

29. First, significant differences exist among various industry sectors in terms of the types and magnitude of human rights challenges. The extractive sector is unique because no other has so enormous and intrusive a social and environmental footprint. At local levels in poor countries no effective public institutions may be in place. This authority vacuum may compel responsible companies, faced with some of the most difficult social challenges imaginable, to perform *de facto* governmental roles for which they are ill equipped, while other firms take advantage of the asymmetry of power they enjoy. In other sectors the spectrum of affected human rights issues is more circumscribed, and each exhibits its own characteristic dilemma situations. Such differences should be reflected in public and private sector policy responses dealing with business and human rights.

30. Second, there is clearly a negative symbiosis between the worst corporate-related human rights abuses and host countries that are characterized by a combination of relatively low national income, current or recent conflict exposure, and weak or corrupt governance. Of course, there is an overlap with the extractive sector here, which operates in such contexts more often than other industries. But weak governance poses a more general challenge to the established international human rights regime and requires special attention from all parties concerned.

Existing Responses

31. Instituting effective policies and practices to deal with human rights challenges has been on the agenda of civil society actors, corporations and governments for some time. Firms have adopted numerous initiatives individually, or in collaboration with business associations, NGOs, and in some cases governments and international organizations. It is beyond the scope of this report to review or assess the large number of such efforts under way. Brief mention is made of some of their characteristic features, strengths, and weaknesses as they relate to the mandate.

32. In order to gain a better sense of what the major global companies are doing in relation to human rights, the SRSG is conducting a survey of the Fortune Global 500, the world's largest corporations. At the time of writing this report, only about eighty responses were in hand, and the early responders may well have been the more enthusiastic and committed. Thus, the results summarized here are tentative, and a full report will be published separately.[11]

33. Nearly eight out of ten companies responding to date report having an explicit set of principles or management practices regarding the human rights dimensions of their operations; by a ratio of two-to-one, human rights are included as part of an overall corporate social responsibility code or principles, rather than being free-standing. Non-discrimination and workplace health and safety issues are included in virtually all cases, followed closely by other core labor rights (eighty-five percent). In contrast, the right to health is cited by fifty-six percent, and the right to an adequate standard of living by forty-three. Other categories of rights cited have particular relevance to individual sectors, but the overall number of respondents is not yet high enough to permit us to explore any meaningful sectoral differentiation.

34. When asked which if any international human rights instruments the company references in its policy, three-fourths say ILO declarations or conventions, sixty-two percent cite the Universal Declaration on Human Rights, and fifty-seven percent the UN Global Compact. The OECD Guidelines for Multinational Enterprises are referenced by four out of ten.

35. Only four out of ten firms indicate that they “routinely” conduct human rights impact assessments of their projects, and a slightly higher number that they do so “occasionally.” In part, this may reflect sectoral variations. But undoubtedly it is also due to the fact that no ready-made human rights impact assessment tools exist yet, even for individual sectors, a gap that is addressed later in this report.

36. When asked which stakeholders the company’s human rights policies encompass, virtually all include employees; nine out of ten include suppliers, contractors, distributors, joint venture partners and others in their value chain; two-thirds include the communities surrounding their operations; and just under sixty percent, the countries in which they operate. Although companies generally do not employ the term “spheres of influence,” this differentiation based on gradually declining direct corporate responsibility outward from employees appears to reflect an emerging consensus view among leading companies.[12]

37. Finally, almost nine out of ten companies say they have systems of internal reporting and compliance in place in connection with their human rights policies, with seven out of ten stating that they engage in periodic external reporting in company publications or websites. Most companies indicate that they work with external stakeholders in developing and implementing their human rights policies; NGOs are ranked the most frequent partner, followed closely by industry associations, then the UN or other international organizations, then labor unions, with governments bringing up the rear.

38. A larger number of responses is required to draw strong conclusions about overall patterns or variations by sector and country. But these preliminary results suggest that many if not most of the world’s major firms are aware they have human rights responsibilities, have adopted some form of human rights policies and practices, think systematically about them, and have instituted at least rudimentary internal and external reporting systems as well. None of this could have been said a decade ago. Ideally, we would have comparable information for purely national firms, small and medium sized enterprises, and state-owned enterprises, but a survey of that magnitude is beyond the time and resource constraints of this mandate.

39. In addition to individual company policies and practices, there is an emerging architecture of collaborative arrangements involving firms and other social actors. No attempt is made here to be exhaustive.[13] But it is worth highlighting a few of their distinctive features, beginning with those intended to promote broad principles of responsible corporate behavior, moving on to labor standards, and concluding with the extractive sector.

40. The UN Global Compact (GC) is by far the world’s largest corporate social responsibility initiative, with more than 2,300 participating companies. Established in 2000, it engages firms in implementing ten universal principles drawn from UN sources in the areas of human rights, labor standards, environmental practices, and anti-corruption. Its human rights principles introduced the concepts of “complicity” and “spheres of influence” into corporate social responsibility discourse, where they have taken on a life of their own. In essence, the GC is a learning network, sharing and disseminating good practices. Its most significant feature is that more than half of the participating companies are from developing countries, as are two-thirds of the national networks through which knowledge sharing takes place. For two-thirds of the companies from developing countries, the GC has been their first encounter with corporate

social responsibility practices.[14] An annual communication on progress in implementing the principles is required.

41. A unique feature of the OECD Guidelines for Multinational Enterprises is the system of National Contact Points (NCPs). These are government offices in the participating countries that, among other functions, take up "specific instances" (complaints, in ordinary language) of company non-compliance with the Guidelines. Any person or organization can raise such complaints, and most have come from organized labor. This mechanism has enormous potential to help resolve business and human rights challenges as it covers issues not only in home but also host countries. But the performance of NCPs is very uneven, especially when it comes to human rights. More uniform practices and greater public accountability would enhance the NCPs' currently modest contribution.

42. The ILO has had responsibility for labor standards since 1919. Its 1998 Declaration on Fundamental Principles and Rights at Work is widely referenced by other initiatives, including the Global Compact, and its Tripartite Declaration of Principles Concerning Multinational Enterprises, most recently revised in 2000, constitutes an important normative statement with formal implementation procedures involving all three social sectors. The ILO is also directly involved in a noteworthy experimental program in the Cambodian garment industry. The initiative – Better Factories Cambodia – includes the government, trade unions, manufacturers and local civil society, with the ILO monitoring labor standards compliance in return for greater access to the U.S. market for the goods produced under the program's auspices. This may serve as a model for other countries of comparable industry scale, and for other export markets.

43. Monitoring performance in supply chains has become a core tool whereby global brands try to avoid becoming implicated in the abuse of social and environmental standards, including human rights. It plays a particularly important role for premium brands in the footwear and the apparel industries. The Fair Labor Association (FLA) is one of several such initiatives in this sector. It is organized as a multi-stakeholder coalition of 18 firms, together with a group of NGOs and nearly two hundred university retail outlets. The companies adopt a program of workplace standards implementation, monitoring, and remediation in order to bring some 4,000 manufacturing sites into compliance with FLA standards, which go beyond the ILO's. The recent FLA experience with monitoring may have wider implications for corporate responsibility and accountability in relation to human rights.

44. The FLA has concluded, in essence, that monitoring by itself is not an effective way of bringing about change in supply chains. The proliferation of different codes and their imposition on the same suppliers is part of the problem; it imposes excessive burdens on suppliers and leads them to game the system. Another issue is the standard practice by the brands to demand ever-shorter delivery schedules coupled with tight quality and cost controls. But the most important factor may be that the remedial efforts taken in response to non-compliance inevitably are inadequate because the required human and institutional capacities in host countries are lacking. Consequently, the FLA is piloting a strategy whereby global brands will contribute to capacity building in developing country factories. In order to ensure sustainability, it may be desirable simultaneously to address related capacity gaps in the public sector, where labor inspectors typically are few and far between, and are often paid even less than the factory workers.

45. Several initiatives have been launched in the extractive sector in recent years. The problems of corruption and the misallocation of public revenues have been endemic. They undermine the rule of law, impede the pursuit of social objectives, and contribute to conflicts that frequently foster human rights abuses. The Extractive Industries Transparency Initiative (EITI) marks a modest advance in establishing revenue transparency. A voluntary initiative for governments, once they join it becomes obligatory for extractives companies operating in those countries. The World Bank aggregates and publishes the taxes, royalties and fees paid by firms. Started in 2003, currently ten countries implement EITI's provisions and another eleven have endorsed them. But many countries that should participate do not, and the initiative does not include the government expenditure side of the ledger.

46. The challenge of collaborative revenue management is even greater than achieving transparency, as witnessed by the possible termination of an innovative World Bank brokered agreement whereby the government of Chad had committed a significant fraction of its revenues from the Chad-Cameroon pipeline to specific development needs.

47. The Kimberley Process Certification Scheme (KPCS) was launched in 2002 to stem the flow of conflict diamonds, the trade in which has fuelled devastating conflicts and human suffering in Africa. A joint initiative composed of forty-four countries plus the European Union, the international diamond industry, and civil society organizations, the KPCS imposes extensive requirements on participants in return for certifying that their shipments of rough diamonds do not include conflict diamonds. Domestic laws must be adopted and implemented, traded rough diamonds must be tamper resistant and certified, records are required, reviews are conducted, and diamond trade is permitted only with other KPCS participants. The industry has adopted similarly strict rules. Implementation by governments is variable, and some key countries do not participate. But knowledgeable NGO sources indicate that the initiative is relatively effective. No doubt this outcome is facilitated by the industry's concentrated market structure and the fact that its chief product is a high-end luxury good. A number of officials, industry sources, and civil society actors have urged creating similar certification schemes for other mining sectors, including gold.

48. The Voluntary Principles on Security and Human Rights (VPs), adopted in 2000, address the critical nexus between the legitimate security needs of companies in the extractive sector and the human rights of people in surrounding communities, which can be and often have been abused by security forces. The VPs provide practical guidance to companies on three sets of issues: risk assessment, including the potential for violence; identification of the potential human rights vulnerabilities firms face as a result of their relationship with public security providers, both military and police, as well as recommendations for how to deal with them; and similar issues associated with private security forces. Perhaps most significant, companies are obliged to check available human rights records of the security forces with which they work and ensure that the type and number of forces deployed in particular situations are "competent, appropriate and proportionate to the threat." In addition, they are required to "record and report any credible allegations of human rights abuses by public security forces in their areas of operation to appropriate host government authorities," and where appropriate urge investigation and that actions be taken to prevent any recurrence.

49. At the time of writing this report (just prior to a VPs plenary), the initiative still comprised only four states,[15] though others engage informally and more are expected to join;

sixteen participating companies; and a number of major NGOs. The plenary was to consider adopting the VPs first annual reporting criteria for participating companies, several of which have taken their obligations very seriously while others have kept a low profile. Explicit criteria for membership and suspension were on the agenda. And the initial practice of permitting companies to join only if their home governments had done so seemed likely to be abandoned, permitting a larger number of companies to participate. To date, therefore, the VPs are notable as much for their potential, including serving as a possible model for initiatives in other sectors, than for actual measurable success on the precise issues they address.

50. An important precedent was established when one company included the VPs text in its Host Government Agreements for a three-country project, and in another instance attached the text to a project contract with its state-owned partner.[16] Accordingly, in both cases these voluntary measures may now be legally enforceable, creating a promising hybrid practice.

51. The VPs demonstrate that innovative action can be started by a small number of actors driven by a particular sense of urgency, and then gradually build on that foundation. This approach may have potential applicability in a variety of sectors, including heavy infrastructure development, or foods and beverages, where companies frequently operate in low-intensity conflict situations; the private security industry itself, which often operates in ambiguous legal environments lacking clear lines of accountability; and beyond the area of security relations, in the information and communication technology industries, where the number of key global players remains relatively limited, but which is encountering novel challenges at a rapid pace.

52. In short, fragments of collaborative governance are emerging in a variety of sectors, specifically tailored for their characteristic dilemma situations. Some initiatives have spillover effects into other areas. Financial institutions and the investment community are becoming an important vehicle for generating such effects, not only socially responsible investment funds but gradually also mainstream institutions concerned about social and environmental risk exposure. The Voluntary Principles again provide an example. The International Finance Corporation (IFC) is adopting new performance standards for its loans to extractive sector firms. Among their provisions is a distillation of several key elements of the VPs, including security-related risk assessments, which will become a requirement for IFC loans above US $50 million. Some of those provisions, in turn, will be included in the project lending policies of commercial banks that cooperate with, or take their cue from, the IFC, as is the case with the thirty-nine banks adhering to the Equator Principles for assessing and managing environmental and social risks.[17]

53. At the same time, there can be little doubt but that these arrangements have weaknesses as well. One is that most choose their own definitions and standards of human rights, influenced by but rarely based directly on internationally agreed standards. Those choices have as much to do with what is politically acceptable within and among the participating entities than with objective human rights needs. Much the same is true of their accountability provisions. Moreover, these initiatives tend not to include determined laggards, who constitute the biggest problem – although laggards, too, may require access to capital markets and in the long run face other external pressures. Finally, even when taken together, these “fragments” leave many areas of human rights uncovered, and human rights in many geographical areas poorly protected. The challenge for the human rights community, then, is to make the promotion and protection of human rights a more standard and uniform corporate practice. That brings us to the question of how best to advance this objective.

II. STRATEGIC DIRECTIONS

54. Having examined the broader context of the mandate the next step is to identify an approach that can move the agenda forward effectively. In some respects, the most challenging part of the mandate concerns the issue of standards. This is so for two reasons. First, insofar as the overall global context itself is in transition, standards in many instances do not simply "exist" out there, waiting to be recorded and implemented, but are in the process of being socially constructed. Indeed, the mandate itself inevitably is a modest intervention in that larger process. One of the main aims of the SRSG's plan to convene a series of regional consultations and make site visits to the operation of major firms in developing countries is to gain a better appreciation of the specific needs and dilemmas that are driving the process in different settings.

55. The second reason why this issue is tricky is that it has proved exceedingly difficult to carry on a serious dialogue about standards without having it become a recapitulation of the earlier debates in and around the Commission on the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"[18] – most recently at the consultations on the extractive industries convened by the Office of the High Commissioner in November 2005. The reason is clear: the Norms claim to represent a definitive and comprehensive set of standards. But those earlier debates ended in stalemate – with most of business opposed, many if not most human rights groups in favor, and governments adopting the SRSG's mandate as a means to move beyond the stalemate. Because those debates continue to shadow the mandate, however, the SRSG thought it necessary to examine the Norms as a possible approach in some depth and develop his own assessment of the exercise.[19]

The Norms

56. A product of the Sub-Commission on the Promotion and Protection of Human Rights, the Norms comprise 23 articles, drafted in treaty-like language, which set out human rights principles for companies in areas ranging from international criminal and humanitarian law; civil, political, economic, social, and cultural rights; as well as consumer protection and environmental practices. The Sub-Commission approved the Norms in Resolution 2003/16 of August 13, 2003. The Commission, in Resolution 2004/116 of 20 April 2004, expressed the view that, while the Norms contained "useful elements and ideas" for its consideration, as a draft the proposal had no legal standing.

57. Like the Commission, the SRSG believes that the Norms contain useful elements: the summary of rights that may be affected by business, positively and negatively, and the collation of source documents from international human rights instruments as well as voluntary initiatives have considerable utility. Any fair-minded discussion of standards inevitably will cover some of the same grounds.

58. Had the Norms exercise confined itself to compiling such an inventory, coupled with a set of benchmarks of what practices business must or should avoid, and what it could help to achieve, the subsequent debate might have focused on substantive issues: What belongs on the list, what doesn't, and why? What are the different categories of business responsibilities, ranging from the mandatory to the desirable? How can broad principles best be translated into management practices and tools? In short, the relevant stakeholders might well have focused on the sorts of operational issues that have been taken up by a group of ten companies known as the

Business Leaders for International Human Rights (BLIHR), which are engaged in a constructive effort to explore whether and how some of the concrete provisions of the Norms can be turned into company policies, processes and procedures.[20]

59. Instead, the Norms exercise became engulfed by its own doctrinal excesses. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers. Two aspects are particularly problematic in the context of this mandate. One concerns the legal authority advanced for the Norms, and the other the principle by which they propose to allocate human rights responsibilities between states and firms.

60. The Norms are said merely to "reflect" and "restate" international legal principles applicable to business with regard to human rights. At the same time, they are also said to be the first such initiative at the international level that is "non-voluntary" in nature, and thus in some sense directly binding on corporations. But taken literally, the two claims cannot both be correct. If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones. What the Norms have done, in fact, is to take existing state-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law – hard, soft, or otherwise.

61. All existing instruments specifically aimed at holding corporations to international human rights standards, such as those discussed in the previous section, are of a voluntary nature. Relevant instruments that do have international legal force, including some ILO labor standards, the Convention on the Elimination of All Forms of Discrimination Against Women, and the OECD and UN anti-bribery Conventions, impose obligations on states, not companies, including the obligation that states prevent private actors from violating human rights. Under customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture and some crimes against humanity.

62. Much of the relevant jurisprudence to date has come from U.S. Alien Tort Claims Act cases, which in turn has drawn on evolving international standards of individual criminal liability for such offenses. It is worth noting, therefore, that of the thirty-six ATCA cases to date involving companies, twenty have been dismissed, three settled, and none decided in favor of the plaintiffs; the rest are ongoing. In its only ATCA decision, the U.S. Supreme Court, while reaffirming the standing of customary international law norms in principle, stipulated demanding tests for proving their existence: they must be "specific," "obligatory," and "universal."[21] Moreover, the majority opinion advised lower courts to exercise restraint in "applying internationally generated norms" and leave the decision to create novel forms of liability "to legislative judgment in the great majority of cases."[22] Thus, ATCA's influence has been mainly existential: the mere fact of providing the possibility of a remedy has made a difference. But it

remains a limited tool, even more so after the Supreme Court ruling; it is difficult and expensive to use, especially for plaintiffs; and it is unique.

63. There are reasons to believe that the potential for greater corporate liability under domestic criminal law for grave human rights violations committed abroad also may be evolving. For example, the Norwegian Institute of Applied Social Science (Fafo) is conducting surveys of countries that have integrated the provisions of the International Criminal Court statute into their domestic legal systems. The research to date suggests, as a working hypothesis, that these countries may have opened jurisdictional doors, thereby, for prosecuting firms domiciled in them for such crimes committed abroad**.**[23] In a small number of national jurisdictions, tort law, too, appears to be moving in a similar direction, though less linked to international standards.

64. In sum, there is fluidity in the applicability of international legal principles to acts by companies. But most of it involves quite narrow, albeit highly important, areas of international criminal law, with some indication of a possible future expansion in the extraterritorial application of home country jurisdiction over transnational corporations. None of these changes, however, support the claim on which the Norms rest: that international law has transformed to the point where it can be said that the broad array of international human rights attach direct legal obligations to corporations, a claim that has generated the most doubt and contestation.

65. There are legitimate arguments in support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended. Moreover, there are no inherent conceptual barriers to states deciding to hold corporations directly responsible, either by extraterritorial application of domestic law to the operations of their own firms, or by establishing some form of international jurisdiction. But these are not propositions about established law; they are normative commitments and policy preferences about what the law should become that require state action for them to take effect.

66. A second problematic feature of the Norms concerns their imprecision in allocating human rights responsibilities to states and corporations. While it may be useful to think of corporations as “organs of society,” in the preambular language of the Universal Declaration, they are specialized organs, performing specialized functions. They are not a microcosm of the entire social body. By their very nature, therefore, corporations do not have a general role in relation to human rights like states, but a specialized one. The Norms do allow that some civil and political rights may not pertain to companies. But they articulate no actual principle for differentiating human rights responsibilities based on the respective social roles performed by states and corporations. Indeed, in several instances, and with no justification, the Norms end up imposing higher obligations on corporations than states, by including as standards binding on corporations instruments that not all states have ratified or have ratified conditionally, and even some for which states have adopted no international instrument at all.

67. Lacking a principled basis for differentiating responsibilities, the concept of “spheres of influence” is left to carry the burden. But in legal terms, this is a burden it cannot sustain on its own. The concept has productive practical applicability, as we saw in the discussion of company human rights policies, and as the SRSG will elaborate more fully in his final report. But it has no

legal pedigree; it derives from geopolitics. Neither the text of the Norms nor the Commentary offers a definition, nor is it clear what one would look like that could pass legal liability tests. Case law searches to date have found no explicit references to it, and nothing that corresponds to it beyond fairly direct agency-like relationships. So the strictly legal meaning of the concept remains elusive, hardly a suitable basis for establishing binding obligations.

68. In addition, without a principled differentiation, in actual practice the allocation of responsibilities under the Norms could come to hinge entirely on the respective capacities of states and corporations in particular situations – so that where states are unable or unwilling to act, the job would be transferred to corporations. While this may be desirable in special circumstances and in relation to certain rights and obligations, as a general proposition it is deeply troubling. The issue is not simply one of fairness to companies, or of inviting endless strategic gaming by states and companies alike. Far more profound is the fact that corporations are not democratic public interest institutions and that making them, in effect, co-equal duty bearers for the broad spectrum of human rights – and for "the obligation to promote, secure the fulfilment of, respect, ensure respect and protect" those rights, as the General Obligations of the Norms put it – may undermine efforts to build indigenous social capacity and to make governments more responsible to their own citizenry.

69. Nothing that has been said here should be taken to imply that innovative solutions to the challenges of business and human rights are not necessary, or that the further evolution of international and domestic legal principles in relation to corporations will not form part of those solutions. Likewise, normative undertakings and advocacy are essential ingredients for the continued development of the human rights regime, in relation to business no less than other domains. But it is to conclude that the flaws of the Norms make that effort a distraction from rather than a basis for moving the SRSG's mandate forward. Indeed, in the SRSG's view the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments, and international institutions with respect to human rights.

Principled Pragmatism

70. The preceding discussion makes it clear how complex and difficult the task ahead is, but it also sheds light on what some of the specific elements of that task are. It is essential to achieve greater conceptual clarity with regard to the respective responsibilities of states and corporations, for the reasons discussed above. In doing so, we should bear in mind that companies are constrained not only by legal standards, but also by social norms and moral considerations – in the terminology of the BLIHR group, distinguishing what companies must do, what their internal and external stakeholders expect of them, and what is desirable. Each involves standards. But each has a very different basis in the fabric of society, exhibits distinct operating modes, and is responsive to different incentive and disincentive mechanisms. A mapping of corporate responsibilities using such distinctions as its coordinates would have considerable practical utility for companies, governments, and civil society alike. Whatever progress is made in this direction will be included in the SRSG's 2007 report.

71. In the meantime, one critical area of legal standards that merits close attention is the possible extension in the extraterritorial application of some home countries' jurisdiction for the worst human rights abuses committed by their firms abroad. If such jurisdictional doors were to

open, however slightly, it could create a situation in which companies are held to different national standards, as they once were in the areas of money laundering and of bribery and corruption. There seems interest all around in having a brainstorming session of legal experts examine this set of issues as well as possible responses to it. On the assumption that voluntary funding becomes available, the SRSG would be pleased to host such an effort.

72. With regard to emerging legal standards for establishing corporate complicity in human rights abuses, the SRSG will follow with interest the work of the expert panel convened by the International Commission of Jurists. Additionally, he is working with legal teams in several countries to examine case law in different jurisdictions. It seems that the most explicit judicial definition of complicity thus far was provided by the U.S. Court of the Appeals for the 9th Circuit in the Unocal case, brought under the Alien Torts Claims Act.[24] The ruling stipulated three criteria: giving practical assistance to the actual perpetrator of a crime; the requirement that this assistance had a substantial effect on the commission of the criminal act; and the fact that the company knew or should have known that its acts would result in a possible crime even if it did not intend for that crime to take place. These criteria conform closely to what is widely thought to be the current state of international law on this subject.[25]

73. There can be little mystery about core labor standards; the ILO has actively addressed issues concerning work and related human rights for a very long time. Moreover, all employers, including business enterprises, by direct implication are among the addressees of its labor standards, and the private as well as public sectors, along with organized labor, are represented in the ILO tripartite decisionmaking structure through which standards are negotiated. Finally, the ILO has eliminated uncertainty about what it considers to be its most fundamental human rights by limiting that category to eight conventions grouped under four headings: freedom of association and collective bargaining; the elimination of forced and compulsory labor; the elimination of discrimination in respect of employment and occupation; and the abolition of child labor – though none has been absolutely universally ratified.[26]

74. The individual company policies and voluntary initiatives discussed in an earlier section are a reflection of how social expectations influence corporate behavior. The SRSG will continue his ongoing research in this area, concluding the analysis of the Fortune Global 500 firms, aiming to identify best practices based on that survey as well as other sources, and focusing in particular on how to strengthen transparency and accountability mechanisms. In addition, he will keep in close contact with relevant stakeholders exploring new initiatives that link these concerns to capacity building needs in developing countries.

75. The role of social norms and expectations can be particularly important where the capacity or willingness to enforce legal standards is lacking or absent altogether. Thus, the SRSG has asked the International Organization of Employers (IOE) to undertake work in the first half of 2006 indicating effective ways for companies to deal with dilemma situations encountered in “weak governance zones.” The IOE has agreed to do so, and will liase with its members and other business organizations, including the OECD Business and Industry Advisory Committee, the International Chamber of Commerce, and the Union des Industries de la Communauté européenne, in order to determine the best way to establish the scope of this work. The SRSG is grateful to the IOE for undertaking this project and looks forward to its results.

76. The ability of companies fully to meet their human rights obligations depends in considerable measure on the availability of effective impact assessment tools, at national and project levels. No standard tool is currently available; all past efforts have employed ad hoc approaches. Subparagraph (d) of the mandate asks the SRSG to develop materials and methodologies for undertaking human rights impact assessments. Upon initial exploration, the dimensions of this task unfortunately turn out to be beyond the resource and time constraints of the mandate, but the SRSG will closely monitor two ongoing efforts.

77. The first is a human rights compliance assessment tool developed by the Danish Institute for Human Rights over a period of six years. As the name suggests, it identifies a company's compliance with human rights instruments – a total of 1,000 indicators, derived from the Universal Declaration, the two Covenants, more than 80 other human rights instruments, and ILO conventions. The Institute provides corresponding data on particular countries as well. By cross-referencing the two, a company can assess its likely or potential areas of risk. But the tool does not actually relate the impact of the company's existing or proposed activities to the human rights situation on the ground, or vice-versa.

78. The International Finance Corporation is funding an effort intended to fill this gap by developing an actual impact assessment guide. According to its authors, the guide will review the entire spectrum of human rights, focusing on the areas where the responsibilities of companies are clearest, but reminding companies that they should review all areas of rights relevant to their operations. Human rights issues will be addressed at both country and project levels. The country assessment will focus on what impacts human rights challenges can have on projects, and vice-versa. At the project level, the guide will take companies through a methodology that includes outlining each step of a typical impact assessment, identifying what human rights considerations should be taken into account in each step, and explaining what the implications of a human rights approach means for the impact assessment process. A fuller report on these and any other such efforts will be included in the SRSG's 2007 report.

79. The role of states in relation to human rights is not only primary, but also critical. The debate about business and human rights would be far less pressing if all governments faithfully executed their own laws and fulfilled their international obligations. Moreover, the repertoire of policy instruments available to states to improve the human rights performance of firms is far greater than most states currently employ. This includes home countries providing investment guarantees and export credits often without adequate regard for the human rights practices of the companies receiving the benefits. The SRSG will attempt to compile a compendium of best practices of states, as requested by the mandate, through a survey of governments and other research.

80. Finally, ways must be found to engage state-owned enterprises in addressing human rights challenges in their spheres of operation. They are becoming increasingly important players in some of the most troubling industry sectors, yet appear to operate beyond many of the external sources of scrutiny to which commercial firms are subject.

81. As indicated at the outset, the SRSG takes his mandate to be primarily evidence based. But insofar as it involves assessing difficult situations that are themselves in flux, it inevitably will also entail making normative judgments. In the SRSG's case, the basis for those judgments might best be described as a principled form of pragmatism: an unflinching commitment to the

principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.

Notes

[1] Kirkpatrick Professor of International Affairs and Director, Mossavar-Rahmani Center for Business and Government, John F. Kennedy School of Government, Harvard University; affiliated faculty member, Harvard Law School; former Assistant Secretary-General and senior advisor for strategic planning to Secretary-General Kofi Annan.

[2] This is a ranking of the world's 500 largest companies by revenue, compiled by Fortune Magazine. See www.pathfinder.com/fortune/global500/.

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[3] See http://www.unctad.org/Templates/webflyer.asp?docid=6087&intItemID=3489&lang=1&mode=toc.

[4] For example, intra-firm trade amounts to some 40 percent of U.S. total trade, and that does not fully reflect the related party transactions of branded marketers or retailers who do not actually manufacture anything themselves. Kimberly A. Clausing, "The Behavior of Intrafirm Trade Prices in U.S. International Price Data," U.S. Department of Labor, Bureau of Labor Statistics, *BLS Working Paper* 333 (January 2001).

[5] Sanjeev Khagram, James V. Riker, and Kathryn Sikkink, eds., *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis: University of Minnesota Press, 2002).

[6] This 1789 statute allows foreign plaintiffs (referred to as "aliens") to sue for torts that also constitute violations of the "law of nations" (customary international law). Its origins remain obscure, though it is assumed to have been adopted for such purposes as protecting ambassadors and combating piracy.

[7] See, for example, the "Conclusions and Recommendations of the 7th Session of the Working Group on the Right to Development," Commission on Human Rights, 9-13 January 2006.

[8] The index measures the extent to which people have confidence in and abide by the rules in their societies. See http://www.worldbank.org/wbi/governance/govdata/.

[9] The index ranks more than 150 countries in terms of perceived levels of corruption, as determined by expert assessments and opinion surveys. See http://www.transparency.org/policy_and_research/surveys_indices/cpi.

[10] See http://www.freedomhouse.org/template.cfm?page=15&year=2005.

[11] The survey is being conducted in cooperation with the International Business Leaders Forum, Business for Social Responsibility, the International Chamber of Commerce, the International Organization of Employers, and the UN Global Compact Office, and with the financial assistance of the Friedrich Ebert Stiftung of Germany. The results will be published on the

SRSG's home page provided by the Business and Human Rights Resource Centre, at http://209.238.219.111/UN-Special-Representative-public-materials.htm.

[12] This is the formulation proposed by the Business Leaders Initiative on Human Rights, in the report of a joint project with the UN Global Compact entitled "A Guide for Integrating Human Rights into Business Management" (available at htpp://www.blihr.org**),** and is also used by several major companies known to the SRSG.

[13] Most of these are described in **"**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," E/CN.4/2005/91; and "Report of the United Nations High Commissioner on Human Rights on the sectoral consultations entitled "Human rights and the extractive industry," 10-11 November 2005," E/CN.4/2006/92.

[14] Based on an independent impact assessment of the GC conducted by McKinsey and Co., the consultancy, available at http://www.unglobalcompact.org/HowToParticipate/guidance_documents/index.html.

[15] United States, United Kingdom, Netherlands, and Norway.

[16] In the former, a consortium led by BP signed a legally binding "Joint Statement" in May 2003 with the three host governments of the Baku-Tbilisi-Ceyhan pipeline project, stating that all pipeline security operations be conducted in accordance with the Voluntary Principles. The latter case involves the Security Guidelines Agreement between Chief of the Papua Police (POLDA Papua) and BP Berau Ltd (BP), as operator of the Tangguh LNG Project, signed in April 2004.

[17] See http://www.equator-principles.com/.

[18] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[19] The following discussion is based on the text of the Norms and Commentary, available at http://www1.umn.edu/humanrts/links/businessresponsibilitycomm-2002.html, and the interpretive essay by David Weissbrodt (their principal drafter) and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *American Journal of International Law*, 97 (October 2003), pp. 901-922.

[20] See http://www.blihr.org/ for an overview of the BLIHR initiative and a list of participating companies.

[21] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

[22] Id. at 726.

[23]"Business and International Crimes – Assessing the Liability Of Business Entities for Grave Violations of International Law", a joint project by the International Peace Academy and Fafo, 2004, available on http://www.fafo.no/liabilities/index.htm.

[24] Burmese plaintiffs sued Unocal for allegedly working with the Myanmar military to conscript forced labor, kill, abuse, and rape citizens while working on the Yadana gas pipeline project. *John Roe X, v Unocal Corp; Union Oil Rswl Co of California*, U.S. Court of Appeals for the Ninth Circuit, filed 18 September 2002, at 14210.

[25] The 9th Circuit Court ruling was vacated when the parties settled the case. Therefore, as of now the principles have no legal status as precedents in relation to business.

[26] For the record of ratifications, see http://www.ilo.org/ilolex/english/docs/declworld.htm.