

**OFFICE OF THE HIGH COMMISSIONER FOR  
HUMAN RIGHTS, IN COOPERATION WITH THE  
GLOBAL COMPACT OFFICE**



**CONSULTATION ON BUSINESS AND  
HUMAN RIGHTS**

**Geneva, 22 October 2004  
United Nations Office Geneva**

**GUIDE TO DISCUSSION FOR PARTICIPANTS**

## INTRODUCTION

The Office of the High Commissioner for Human Rights (OHCHR), in cooperation with the Global Compact Office (GCO), offers this Guide to Discussion to participants in the Consultation on Business and Human Rights, which will take place on 22 October 2004. The Guide builds on the themes set out in the consultation's agenda as a means to encourage more focused discussion.

Each of the themes in the consultation's agenda derives from the issues being considered by the High Commissioner for Human Rights in her report on: "The responsibilities of transnational corporations and related business enterprises with regard to human rights". The High Commissioner will submit this report to the next session of the Commission on Human Rights (March/April 2005) in a response to a request from the Commission in 2004. That request was as follows:

*... to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia, the draft (Norms)... and identifying outstanding issues, to consult with all relevant stakeholders in compiling the report, including States, transnational corporations, employers' and employees' associations, relevant international organizations and agencies, treaty monitoring bodies, and non-governmental organizations, and to submit the report to the Commission at its sixty-first session in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation.*

The discussions in this consultation will assist the High Commissioner in her consideration of the issues raised by the Commission on Human Rights.

The purpose of this Guide is only to assist participants to focus on relevant issues. The Guide does not seek to be exhaustive in its treatment of issues, nor does it seek to restrict discussion to the issues it raises. Further, it is not expected that participants will be able to treat all the questions indicated – more than anything, the questions are a way of helping participants to focus on particular issues even if only some of them might be treated in the limited time available.

Finally, it is important to underline that this guide to discussion does not necessarily reflect the contents of the report that the High Commissioner will submit to the Commission on Human Rights.

## EXISTING INITIATIVES AND STANDARDS WITH REGARD TO BUSINESS AND HUMAN RIGHTS

There are currently many and various initiatives and standards which could be construed as relating to business and human rights. Existing initiatives and standards range from constitutional provisions, national legislation, codes of conduct, norms, certification schemes, ethical frameworks, voluntary guidelines, declarations, directives, strategies, assessment tools, pilot projects, social responsibility indices,

certification schemes, social investment, public-private partnerships, self-reporting, third-party reporting, studies, meetings, consultations and many others.

The diversity of each initiative and standard lies in their: **scope** (coverage of human rights and other areas such as environment); **source** (initiative motivated internally eg by business; or externally eg by a state or states, civil society organizations); **subject** (businesses, states); **level of operation** (national, international); **responsibilities** (negative, positive, mix); **nature** (voluntary, regulatory); **duration** (single event, continuous); amongst other distinguishing criteria.

Some examples of existing initiatives and standards include:

- *The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* – A set of global guidelines agreed by governments, employers and workers for investment-related policy and practice.
- *The Global Compact* – an initiative of the UN Secretary-General to bring together companies, labour, UN agencies, and civil society to support ten principles, two of which refer to human rights.
- *The OECD Guidelines for Multinational Enterprises* – Voluntary guidelines for promoting appropriate business conduct among multinational enterprises.
- *The draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* – a draft set of human rights norms setting out business responsibility in the area of human rights.
- *Business Leaders' Initiative for Human Rights* – a three year programme to explore the ways that human rights standards and principles can inform issues of corporate responsibility and corporate governance, having a particular focus on the draft Norms mentioned above.
- *WRAP* – Worldwide Responsible Apparel Production (WRAP) is a certification programme, requiring manufacturers to comply with 12 universally accepted principles including principles related to workers' rights and workplace health and safety.
- *SA 8000* – includes an advisory board with experts from trade unions, businesses and civil society and provides a way for retailers, brand companies, suppliers and other organizations to maintain just and decent working conditions through the supply chain.
- *Kimberley Process Certification Scheme* – An international diamond certification scheme to ban trade in conflict diamonds, imposing requirements on participants to certify all international shipments of rough diamonds and to adopt internal guidelines.
- *The Sullivan Principles* – developed as a voluntary code of conduct for companies doing business in apartheid South Africa, the Principles aim to support economic, social and political justice by companies where they do business.
- *Voluntary Guidelines on Security and Human Rights for the extractive and energy sectors* – voluntary principles aiming to guide companies to maintain safety and security in their operations so as to ensure respect for human rights.
- *Global Reporting Initiative* - The Global Reporting Initiative (GRI) is a multi-stakeholder process and independent institution whose mission is to develop and disseminate globally applicable Sustainability Reporting Guidelines, working in co-operation with the Global Compact and UNEP.

- *FTSE4Good index* - The FTSE4Good index series has been designed to measure the performance of companies that meet globally recognized corporate responsibility standards, and to facilitate investment in those companies.
- *Goldman Sachs Energy Environmental and Social index* – An index designed for the oil and gas industry to identify specific environmental and social issues likely to be material for company competitiveness and reputation.
- *The US Alien Tort Claims Act* – The Act empowers US district courts to hear civil claims of foreign citizens for injuries caused by actions in violation of the law of nations or a treaty of the United States.
- *Individual corporate codes of conduct, statements and principles* – such as those of GAP, Rio Tinto, Shell General Business Principles, Nexen Code of Ethics and others.
- *Constitutional provisions and national legislation* – Constitutional and legislative provisions establishing the responsibilities of legal and natural persons nationally for human rights.

Many more initiatives and standards exist in relation to business and human rights.

## Questions

The following lists some questions that participants might wish to consider:

- Is it possible to identify a specific list of initiatives and standards of particular relevance to the work of the Commission on Human Rights in relation to business and human rights?
- If yes, what existing initiatives or standards would be relevant?
- On what basis could such a selection be justified?

## SCOPE AND LEGAL STATUS OF EXISTING INITIATIVES AND STANDARDS

Assuming it is possible to identify a set of key existing initiatives and standards, a comparison of these initiatives and standards should indicate any gaps in protection or needs for further initiatives and standards. This raises the question of whether it is possible to identify objective criteria by which to compare the scope and legal status of existing initiatives and standards.

Such criteria could, for example, refer to:

- *Objectives* – are the initiatives or standards oriented towards promotion or human rights or protection or human rights?
- *Explicit references to human rights* - do initiatives or standards refer specifically to human rights or more generally to social or governance dimensions (which might nonetheless carry implicit references to human rights);
- *Human rights coverage* - is the reference to human rights generally or is there an identification of different rights – if so, which rights?
- *Source or origin* – is the initiative or standard created by one or more entities (states, businesses etc)?

- *Business coverage* - how many business entities are included within the scope of the particular initiative or standard - for example, does the initiative relate to a single sector, a single business etc?
- *Territorial coverage* - does the initiative or standard operate in a particular country or region or is it international?
- *Legal status* - is the initiative or standard legally binding? Could it be considered "soft" law? Is it purely voluntary?
- *Monitoring and enforcement* - what monitoring mechanisms does the initiative or standard create or require (if any)?

## Questions

- Are these criteria appropriate or useful for the classification of the scope and legal status of existing initiatives and standards?
- Are there other relevant criteria?

## OUTSTANDING ISSUES

### **What human rights are relevant to the activities of business and what are the responsibilities of business in this regard?**

Determining which human rights are relevant to the activities of business depends in part on a consideration of the nature of human rights. The international human rights system has adopted an instrument-based approach to recognize human rights. Thus, human rights include those rights recognized in the *Universal Declaration on Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* and the other international human rights instruments.

Applying an instrument-based approach to determining which human rights are relevant to the activities of business would rely on the identification of relevant treaty provisions. However, human rights treaties are subject to ratification which leads to inconsistencies in treaty coverage between States. Thus, potential problems could arise under a treaty-based approach in the case of businesses operating in two or more countries with different levels of ratification. In this context it is important to remember that all States have ratified at least one human rights treaty, 192 have ratified the *Convention on the Rights of the Child*, and 178 have ratified the *Convention on the Elimination of All Forms of Discrimination Against Women*. Further, it is also relevant to consider those human rights norms considered to be part of customary international law. The prohibition on discrimination on the basis of race provides one such example.<sup>1</sup> Other norms and standards might also be recognized as particularly relevant to the activities of business.

Existing initiatives and standards identify a range of human rights relevant to business activities which are not always consistent. Discussion continues around such human rights as: the right to life, freedom of association and the right to form trade unions; the principle of non-discrimination; freedom from slavery; freedom from

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<sup>1</sup> See eg report of the International Law Commission on its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, (A/56/10)*, p.208.

torture; the right to an adequate standard of living; the right to health; the right of children to be protected from economic exploitation; and, rights in relation to particular groups such as the human rights of indigenous peoples and so on.

## Questions

- Which human rights are particularly relevant to the activities of business?
- Are there particular activities of business in which the protection of human rights is more relevant?

Identifying the responsibilities of business in relation to human rights requires the consideration of at least four issues. The first concerns the nature of the obligations that businesses might have in relation to human rights. State obligations in relation to human rights are sometimes characterized as negative or positive obligations. A negative obligation requires the State not to do something (eg not to torture) while a positive obligation requires the State to do something in order to ensure the realization of a particular right (eg provide legal aid for criminal cases). Identifying the scope and boundaries of business responsibility with regard to human rights requires the consideration of whether businesses carry both positive as well as negative obligations. For example, in some cases, a business might have significant influence that could affect positively the enjoyment of human rights, but it is not clear whether it should have a responsibility to do so.

A second issue, closely related to the first, concerns the relationship between business responsibilities with regard to human rights and the obligations of States under national and international law to promote and protect human rights. In particular, the norms and standards of international human rights law were established with States in mind as the primary responsibility holder or duty bearer. This has led to concern that recognition of business' responsibilities with regard to human rights might force businesses to assume the responsibility of States or allow States to escape their responsibility. At the same time, in situations where a State is unable to protect human rights, complex issues arise concerning the responsibility of a range of non-state actors, not only business.

The third issue concerns the relationship between different companies operating jointly. The relationship between a business and its suppliers, distributors, sub-contractors, service providers, business partners and others raises complex questions of parent liability for subsidiaries.

A fourth issue relates to the responsibilities of directors, employees and shareholders with regard to human rights. International human rights law recognizes that States have responsibilities to ensure that individuals and enterprises respect human rights law - for example, in relation to discrimination.<sup>2</sup> International criminal and humanitarian law applies to natural persons. Consequently, individuals have responsibilities in relation to genocide, crimes against humanity and war crimes. A consideration of individual responsibility is therefore relevant to defining the boundaries of business responsibility. Questions of liability and causation are also important here.

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<sup>2</sup> For example, the *Convention on the Elimination of Discrimination Against Women*, article 2(e).

## Questions

- What is an appropriate characterization of the responsibilities of business with regard to human rights?
- How can business responsibilities with regard to human rights be mutually reinforcing with the role of the State as primary duty bearer of human rights?
- To what extent can principles of tort or criminal law be effective in understanding the nature and boundaries of business' responsibility with regard to human rights?
- What are the human rights responsibilities of business in situations where the State is unable or unwilling to fulfill its obligations under national or international law?
- What are the respective "supply chain" responsibilities of transnational corporations, suppliers, distributors, sub-contractors, service-providers and others with regard to human rights?

### **What is the most appropriate way to ensure respect for human rights standards by business – and in particular, what might be the value of having a statement of universal human rights responsibilities of business?**

Respect by business of human rights standards can be achieved in several ways and there is probably no one "most appropriate" method. Companies themselves have an important role to play in ensuring that they protect human rights standards in their own operations. Voluntary initiatives are often seen as a means of achieving this by helping to promote a culture of respect for human rights from within the company, as well as helping to give human rights standards practical meaning and motivating positive change in support of human rights. Pilot projects between different businesses are also ways to improve understanding responsibilities which in turn can improve respect for human rights. Similarly, markets also have a role to play in ensuring respect for human rights. Increasingly environmental and social indices and public reporting on social responsibility help to rate business' performance, including in relation to respect for human rights, which in turn can affect market confidence and motivate better performance.

The role of national governments is also important to highlight. National governments have the primary responsibility to promote and protect human rights within their territory. States sign, ratify and implement international conventions on human rights, including through legislation. The effective protection of human rights requires States to respect the rights of individuals and groups of individuals and to protect those rights against the actions of third parties; those third parties include businesses. Consequently, States have undertaken to create effective means, including by adopting legislation, to ensure the protection of human rights by third parties such as business. For example, constitutional provisions of some States recognize responsibilities of non-state actors in relation to human rights.<sup>3</sup>

However, a focus on national government action raises the issue of how effective national governments can - alone – be in protecting human rights in the

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<sup>3</sup> For example, the Constitution of South Africa (1996) provides in section 8(2) that: "A provision of the Bill of Rights binds a natural or juristic person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".

context of business. This is particularly so in the context of national regulation over businesses headquartered in one country, operating in a second country and having assets in a third country. There is concern that businesses might evade the jurisdictional power of States in some situations which could lead to negative consequences for the enjoyment of human rights. A related issue concerns countries, particularly those in situations of conflict, where effective governance and accountability are absent - either because the government is unable or unwilling to meet its human rights obligations. This leaves open the potential for actors, including businesses, to become involved - willingly or not - in activities that could lead to abuses of human rights. If that is the case, the lack of governance and accountability at the national level could lead to a climate of impunity.

Home-country legislation with extra-territorial reach might provide a means of dealing with such jurisdictional and impunity issues. However, legislation with extra-territorial reach could also potentially override state sovereignty. Experience could be drawn from another area of international human rights law, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.<sup>4</sup>

## Questions

- What measures at the international level are needed to assist States in protecting human rights in the context of the activities of business?
- What possibilities exist for businesses to evade jurisdictional powers of States in relation to their responsibilities with regard to human rights?
- Should the home country government subject businesses under their jurisdiction to regulation in relation to alleged human rights elsewhere?
- How can human rights be better protected in areas where governments are unwilling or unable to meet their human rights obligations, particularly in areas of conflict?

A range of views exist in relation to the desirability of and need for a statement of universal human rights responsibilities of business? Some commentators argue that such a statement could provide a level playing field for business so that all businesses operate according to the same rules and standards. The identification of universal standards would not stop individual businesses doing more; however it could indicate the minimum standards expected of all businesses. Other commentators emphasize that different businesses operate in different sectors and countries and therefore have different approaches to their operations; on this basis, they question the applicability of universal standards.

Two key issues are relevant to determining the value of a statement of universal human rights responsibilities of business. First, there is a need for coherence. Given that there are existing initiatives and standards in relation to

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<sup>4</sup> Article 4(2) states that: "Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases: (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory; (b) When the victim is a national of that State."

business and human rights, consideration should be given to how any new statement would interact with these. Second, there is a need to avoid duplication. Avoiding duplication requires an analysis of what gaps currently exist in the promotion and protection of human rights in the context of the activities of business.

### **Questions**

- What are the arguments for or against a statement of universal human rights responsibilities of business?
- Are current human rights initiatives and standards difficult to navigate or do they allow for adaptability?
- Is there a lack of clarity in current standards expected of businesses with regard to human rights? Would a statement of universal standards create greater clarity of what is expected of businesses?
- How can coherence between different actors, sectors and initiatives be best ensured?
- How can duplication between existing initiatives and standards and a statement of universal standards be avoided?

### **What tools do businesses need to meet their human rights responsibilities?**

Businesses have an important role to play in creating the economic growth needed to provide an enabling environment for the enjoyment of human rights, including the right to development, and in meeting the Millennium Development Goals. It is therefore important to consider ways to build on this potential as a means of promoting human rights. Equally important is the need to take action now so as to avoid problems in the future. Violations of human rights are not always willful; they are often the result of lack of knowledge or lack of attention.

Consequently, the development of tools to assist businesses to promote and protect human rights in their operations is a necessary element in the consideration of the responsibilities of businesses with regard to human rights. The development of methodologies for the assessment of human rights impacts of investments and projects are an example of one such tool. Human rights impact assessments provide a means of assessing the potential risks for the enjoyment of human rights before undertaking an investment, granting a loan, or starting a development project. Assessments can also be undertaken after a period of investment or the implementation of a project to ensure continued respect for human rights and to evaluate past practice. The development of indicators is another tool that could help businesses and other actors to clarify standards and to help identify sensitive areas for human rights protection. Other tools include the development of management tools to assist management in the workplace as well as the compilation of best practices drawn from both business practices and state practices.

### **Questions**

- What tools could be relevant to assisting businesses promote human rights in their activities?
- Are there particular tools that are more urgently needed than others?

- Are there issues related to business and human rights in need of further research or study?