Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative's Report Entitled "Protect, Respect and Remedy: a Framework for Business and Human Rights"

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With the growing complexity of business in an ever-changing global marketplace, corporations face increasing pressures to satisfy not only legal obligations, but also evolving societal expectations about what it means to be a responsible corporate citizen. To respond effectively to these pressures while satisfying the interests of shareholders, consumers, creditors, suppliers and employees, many U.S. corporations have increased their level of attention to corporate social responsibility issues, including human rights, in analyzing the risks that they face with respect to existing and future operations and strategies.

The discussion of corporate social responsibility and human rights will be prominent at the United Nations in coming months as the Secretary-General's Special Representative presents his report "Protect, Respect and Remedy: a Framework for Business and Human Rights." In 2005, the Secretary-General appointed Harvard Professor John G. Ruggie to be his Special Representative on business and human rights. Professor Ruggie has a mandate that includes elaborating on "the role of States in effectively regulating and adjudicating the role of transnational corporations" with regard to human rights and identifying "standards of corporate responsibility and accountability for transnational corporations" with respect to human rights matters.[i] The ensuing report, which will be presented to the UN's Human Rights Council in June of 2008, posits three "core principles": (1) the State duty to protect human rights, (2) the corporate social responsibility to respect human rights, and (3) the need for access to appropriate remedies for human rights abuses.

We believe the basic concepts embodied in the Report are sound and should be supported by the business community in the United States for the reasons elaborated in this memorandum. Those reasons can be summarized as follows:

- In the first instance, the United States and foreign governments have the primary responsibility for defining what human rights obligations will be binding legal duties and how those duties will be enforced.

- If the Report is taken seriously by foreign governments and foreign companies, it will benefit U.S. corporations by leveling the playing field in placing on foreign boards and management the responsibilities to adhere to many of the same fiduciary and binding legal obligations presently applicable to U.S. companies.

- U.S. companies will find no new legal obligations advocated by the Report.

- The fiduciary and reporting responsibilities of U.S. boards and managers today require that they be aware of, manage and properly disclose risks material to the company. This is an existing responsibility.

- ➢ Violations of human rights may constitute material risks for many U.S. corporations, not only in the United States, but also in foreign jurisdictions where they conduct business.
- ➢ While the Report does not limit the scope of internationally-recognized human rights, each U.S. company must presently determine for itself, what human rights risks may be material to its business.
- ➢ Additionally, and beyond the obligation to manage risks, and comply with law, there is a substantial business case in favor of safeguarding human rights wherever the company does business.

I. THE REPORT DOES NOT CREATE ANY NEW LEGAL OBLIGATIONS

A fundamental premise of the Report is that domestic governments bear the primary obligation for protecting human rights by creating an appropriate body of law and enforcing such laws. The basic framework contained in the Report aims to draw a distinction between the State "duty" to protect human rights and the corporate "responsibility" to respect human rights. Unfortunately, in outlining the role of corporations with respect to human rights, the Report uses language that, while apparently well understood in diplomatic circles, is undefined, imprecise and subject to varied interpretations.

Notably, the Report's use of the term "responsibility" in discussing the evolving societal expectations of corporations for "internationally recognized rights" demonstrates the imprecise language that has caused concern for some U.S. corporations and their counsel. We note that the vernacular used by corporate attorneys and human rights professionals can differ dramatically. For example, we have been assured by the Special Representative himself that the distinction between duties/obligations on the one hand, and responsibilities based on expectations on the other, is generally accepted U.N. terminology; and that his use of the term "responsibility" in the Report refers to moral obligations and social expectations—not binding law. In fact, the Report specifically states that domestic governments, and certainly not this Report, "define the scope of legal compliance" within the human rights framework. A thorough reading of the Report supports this position, but greater clarity on the intended meaning of terms in the Report—many of which have legal connotations in the United States—may be appropriate.

Criticism that the Report imposes new and expansive legal obligations on corporations and directors is therefore misplaced. The Special Representative's mandate does not, and could not under existing law, include the ability to impose new binding legal obligations on corporations. In time, as evolving voluntary human rights responses become firm societal expectations, the law of States may develop as it has in the past. This is the natural path of our common-law tradition. In civil-law jurisdictions, the State may interpose new binding human rights obligations over time. Both processes will be evolutionary, and will be wholly dependent on the development of societies' more specific expectations regarding corporate responsibilities for human rights. The Report highlights the existence of this evolutionary process, and provides an important catalyst for change. It does not, however, impose in today's boardroom new legal obligations for corporate directors.

II. RISK-CONSCIOUS U.S. COMPANIES ALREADY COMPLY WITH PRINCIPLES DESCRIBED IN THE REPORT

(a) The U.S. Legal Environment

Under existing law, U.S. corporations are subject to a variety of state and federal legal requirements with respect to risk-creating activity—including the potential for liability for human rights violations. Although grounded in various areas of the U.S. legal system, these requirements compel risk-conscious U.S. corporations to act in a socially responsible manner and with integrity, both in the United States and abroad. This baseline of behavior established by U.S. law—which we suggest is much higher than that in most legal systems around the globe—results in many of the very practices advocated by the Special Representative's Report already being undertaken by U.S. corporations. The following state and federal regulatory schemes set the framework for the existing culture of compliance in the United States:

(i) ***Fiduciary Duties***: In the United States, corporate directors are generally required to exercise ordinary care and prudence in the conduct of corporate affairs (the "duty of care") and act in good faith in the best interests of the corporation and its shareholders (the "duty of loyalty"). Under Delaware law, which governs the internal affairs of many Fortune 500 corporations, the fiduciary duty encompasses a duty to implement appropriate information, reporting and internal control systems at the company, and requires that directors use these systems to monitor and oversee the company's operations.[ii] Directors also are responsible for assessing the risks that are significant to their organizations (including, as appropriate, actions that may infringe human rights) and for ensuring that management is taking the steps necessary to identify, measure, monitor and control these risks. The Report proposes that "to discharge the responsibility to respect requires due diligence," which is the process describing "the steps a company must take to become aware of, prevent and address human rights impacts." Insofar as certain human rights violations impose a meaningful risk to the corporation, boards of U.S. corporations are well-advised by existing case law to become aware of, and then implement appropriate mechanisms to control for such risks.

(ii) ***Alien Tort Claims Act***: U.S. corporations operating abroad may face criminal and civil liability in their host countries if they are responsible for human rights abuses that violate the law in these foreign jurisdictions. In the United States, corporations also may be held civilly liable for human rights violations abroad pursuant to the Alien Tort Claims Act ("ATCA"), which permits foreign citizens to bring claims in U.S. courts for human rights abuses abroad. Although the courts continue to shape and define the limits of liability under the ATCA, the past fifteen years have evidenced an increasing number of claims against U.S. and foreign corporations under the ATCA. For example, in 2004, the Unocal Corporation settled an ATCA lawsuit that alleged its complicity in certain human rights abuses of the Myanmar government. More recently, an ATCA lawsuit seeking damages from companies that did business in South Africa during Apartheid was permitted to proceed by the Second Circuit Court of Appeals.[iii] Undoubtedly, the potential liability under the ATCA for human rights abuses has become an element of the risk analysis performed by U.S. corporations.

(iii) ***U.S. Federal Sentencing Guidelines***: The recently amended U.S. Federal Sentencing Guidelines provide that the fine payable by a corporation found guilty of a federal crime will be substantially reduced if the corporation has an appropriate compliance program in place prior to the crime. The Guidelines therefore serve as a powerful incentive for corporations to implement and monitor effective compliance programs.

(iv) ***Foreign Corrupt Practices Act***: U.S. corporations doing business abroad are intimately familiar with the U.S. Foreign Corrupt Practices Act ("FCPA"), which prohibits bribery of foreign governmental officials, candidates for office, and officials of political parties for the purpose of obtaining or maintaining business. Under the FCPA, U.S. companies that bribe foreign officials face criminal and civil enforcement actions. U.S. companies doing business abroad typically perform due diligence investigations to evaluate potential sources of liability under the FCPA and, where violations or potential violations are uncovered, implement preventive measures. This type of focus and diligence by U.S. corporations into the foreign markets where they do business impacts human rights issues that the Special Representative's Report highlights.

(v) ***Federal Securities Laws***: The existing U.S. securities regulations impose a vigorous disclosure regime on corporations that are publicly traded on U.S. exchanges with the goal of protecting investors and furthering efficiency through a market-based monitoring of companies. Federal and state securities laws prescribe various civil and criminal penalties for disclosure violations, authorize enforcement actions by regulators, and, in certain cases, permit private citizens to bring lawsuits for alleged violations. Under existing U.S. securities laws, material foreseeable risks faced by public corporations are required to be disclosed in public filings and securities offering documents.[iv] Thus, public companies already are required to disclose operations and activities affecting human rights—in the United States and abroad—that create material risks to business.[v] Indeed, even the most rudimentary search of SEC annual report filings would unearth a number of examples of U.S. corporations (with multinational operations) that disclose human rights challenges in their public filings.[vi] In our view, the existing disclosure regime in the United States already provides significant "market pressures on companies to respect rights," which is one of the stated objectives of the Report.

(b) Corporate Social Responsibility and Best Practices

Separate and apart from potential legal liabilities and concerns, the vast majority of companies in the U.S. business community has already reached the consensus that publicity surrounding human rights abuses can harm their reputations, brand images and, in turn, their bottom lines. Our experience is that many U.S. corporations and their boards are concerned with human rights issues for ethical reasons as well. For the purpose of discussing the Report and the objections made to it, we confine ourselves, however, to the issue of maximizing shareholder value.

Apart from legal liability, it is widely recognized that damaging revelations about human rights abuses abroad can severely impact the financial position of a U.S. corporation by damaging its reputation. Many companies rely heavily on their credibility with consumers, wholesalers and industry leaders to move their business forward. Indeed, brand image and reputation are carefully constructed over years and protected by teams of lawyers and marketing experts. With the exponential growth of both global business and mass communication, corporations face greater risks than ever before from negative revelations. Corporate business practices abroad may be uploaded onto the internet and disseminated to the major media outlets in real time.

In addition, aware of the growth of shareholder-driven social activism, risk-conscious corporations may also benefit from a proactive approach to human rights issues. As suggested in the Report, this may blunt potential shareholder resolutions or campaigns. The Special Representative's Report encourages robust risk assessment that is not only required by the existing U.S. regulatory and judicial scheme, but also is highly advisable from a business perspective in today's highly visible and transparent environment. Put simply, there is a "business case" for social responsibility and concern for human rights.

This notion is not novel in boardrooms across the United States. In his forthcoming book "High Performance with High Integrity", former General Electric General Counsel Ben Heineman describes how GE went about fusing performance and integrity in its business.[vii] GE advocates a broad view of corporate citizenship that is founded on performance, law and ethics. GE has institutionalized its approach to citizenship throughout various layers of the company, and periodically reviews its progress under the policy. In addition, GE publishes an annual Citizenship Report that includes a lengthy section on its human rights practices and policies.[viii] GE's procedures and policies will not fit every business, nor are they designed to. The point remains that risk-conscious U.S. companies are already looking at human rights issues carefully in terms of the company's impact on stakeholders: employees, customers, suppliers, shareholders, creditors and communities. While the Report does not limit the scope of internationally recognized human rights with which corporations should be concerned, it is natural that corporations will focus their diligence and compliance efforts on those rights that are most impacted by their specific business operations.

III. CONCLUSION

The Special Representative's Report is not specifically addressed to U.S. corporations, but to a diverse international community with widely varied demographics, legal and regulatory frameworks and experiences in adjudicating corporate governance issues. A main objective of the Report is to promote "corporate cultures in which respecting rights is an integral part of doing business." Due to both an imposing regulatory and enforcement system and the influence of the "court of public opinion," the U.S. legal and business environment is further along the path of fostering such respect than many other jurisdictions around the world. As a result, many of the recommendations set forth in the Special Representative's Report are not news to U.S. corporations, but are already mandated by U.S. law or voluntarily adopted by U.S. companies focused on improving performance and reducing risk through high integrity in the human rights arena.

In the past, the enactment of domestic legislation aiming at punishing detrimental conduct of U.S. companies abroad without corresponding regulatory efforts by foreign counterparts drew criticism that U.S. corporations were placed at a competitive disadvantage. The passage of the Foreign Corrupt Practices Act and the ensuing efforts by the U.S. government for an international agenda against corruption is a prime example. In promoting the adoption of a regime of corporate respect for human rights on an international scale, the Report would help bring many foreign firms to the level of U.S. companies, thus eliminating the prospect of a competitive advantage arising out of human right abuses. Rather than being alarmed, U.S. corporations should welcome the Special Representative's proposals as a means to facilitate leveling of the international corporate playing field by bringing foreign firms in line with U.S. standards for respect of human rights.

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[i] *See* Commission on Human Rights resolution 2005/69.

[ii] Under Delaware law, director oversight failure claims may be asserted only if directors either (1) "utterly failed to implement any reporting or information system or controls" or (2) "having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *See Stone v. Ritter*, A.2d 362, 370 (Del. 2006). In either case, imposition of director liability requires a showing that the directors knew they were not discharging their fiduciary obligations. *Id.*

[iii] *See Khulumani v. Barclay Nat. Bank Ltd.*, 509 F.3d 148 (2d Cir. 2007). The common facts in these MDL suits involved alleged violations of customary international law by corporations during the South African Apartheid. The importance of this judgment in the Second Circuit was that the panel firmly held that "in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATCA." By staunchly clarifying and substantiating this theory of liability under the ATCA, the Second Circuit makes clear that corporations may be held liable for complicit actions that violate customary international law. In May 2008, the Supreme Court failed to meet a quorum to rule on the Second Circuit's *Khulumani* ruling, and thus that judgment was affirmed.

[iv] *See, e.g.*, Reg. S-K, 17 C.F.R. §§ 229.101, 229.103, 229.303 and 229.503 (2008). According to the U.S. Supreme Court, "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). By way of analogy, while the SEC has not yet provided official guidance with regard to the length, scope or substance of disclosure with respect to issue of global climate change in spite of pressures from environmentalists and institutional investors, public companies have been pressured to disclose their climate change risks, as well as known trends and uncertainties in the Management Disclosure and Analysis section of their annual and quarterly public filings with the SEC.

[v] The enactment of the Sarbanes-Oxley Act in 2002 underscored the importance of compliance processes for publicly-traded companies by creating new or enhanced civil remedies and criminal sanctions designed to deter frauds and other types of securities law violations. The heightened regulatory scrutiny imposed by the Sarbanes-Oxley Act created a "culture of compliance" that may also affect the treatment of human rights violations.

[vi] *See, e.g.*, Am. Eagle Outfitters, Inc., Annual Report (Form 10-K), at 5 (Apr. 2, 2008); [Warnaco Group, Inc., Annual Report (Form 10-K), at 26 (Feb. 27, 2008)]; Reebok, Int'l., Annual Report (Form 10-K), at 16 (Mar. 14, 2003).

[vii] *See* Ben Heineman Jr., High Performance with High Integrity (2008).

[viii] Available at http://www.ge.com/company/citizenship/downloads/pdf/GE_2007_citizen_07rep.pdf. A number of other major U.S. corporations have published similar Sustainability Reports, dealing with any number of human rights issues. *See, e.g.*, Abbott Lab., Generations: 2006 Global Citizenship Report 6, 9 (2007); Coca-Cola Co., The Mark We Make Today Shapes the Future: 2006 Corporate Responsibility Review 14-19 (2007); Starbucks Corp., Corporate Social Responsibility: Fiscal 2006 Annual Report 19-20, 29-33 (2007).