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**A United Nations Proposal Defining
Corporate Social Responsibility For Human Rights**

The social responsibility of corporations has been a growing issue over the past 50 years. The United Nations has emerged as a central forum in this debate and has focused attention on the scope of businesses' responsibilities concerning human rights. Leading this effort, a Special Representative to the Secretary-General recently completed a report with broad implications for global business and particularly for companies that operate on a global basis, in emerging markets, in underdeveloped countries, or in countries that lack a democratic system.

The Special Representative's Report, which will be considered in a June session of the United Nations Human Rights Council, proposes that corporations bear the "responsibility to respect human rights," that the State has a "duty to protect" against human rights abuses by companies, and that both the State and businesses must provide more effective access to remedies for human rights violations. Despite the assurance that corporations' duty to respect human rights "essentially means not to infringe on the rights of others – put simply, to do no harm," the framework recommended to the United Nations could impose on businesses an array of expansive obligations that require close attention by corporate management and boards. To discharge their responsibility to respect human rights, corporations would be required to conduct a broad due diligence process "to become aware of, prevent and address adverse human rights impacts," purportedly in the same way as corporations already must "assess and manage financial and related risks."

The effect of this proposal would be to impose on corporations the obligation to compensate for the political, civil, economic, social, or other deficiencies of the countries in which they conduct business. Further, corporate boards of directors may even be expected to monitor and ensure the vindication of broad-textured principles enshrined in various international human rights instruments. The following sets forth the core principles which the U.N. Human Rights Council may endorse to guide corporate responsibilities for human rights and additionally considers their implications for directors. Corporations and their boards should carefully weigh the consequences of this development in the corporate social responsibility debate.

I. PROTECT, RESPECT AND REMEDY

Under the Special Representative's proposal to the U.N. Human Rights Council, the corporate responsibility to respect human rights would require a process of due diligence that ensures compliance with national laws but also manages the risks of human rights harms in order to avoid them. To meet their due diligence obligation, companies would be expected to: (a) establish a human rights policy, (b) integrate the policy as a key factor in decision-making throughout company management systems, (c) conduct human rights "impact assessments" in order "to understand how existing and proposed activities may affect human rights," and

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(d) track and respond to their performance. Importantly, the responsibility to respect human rights also would require the establishment of effective “means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available.”

The responsibilities involved in a human rights impact assessment warrant particular scrutiny. The Report only briefly addresses the shape of an impact assessment but specifies that it should take place before significant project activity begins and, “[b]ased on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis.” According to a more detailed methodological report which the Special Representative submitted to the U.N. Human Rights Council in 2007, a human rights impact assessment would include the following components:

- i. A description of the proposed business activity;
- ii. A catalogue of the legal, regulatory and administrative frameworks to which the activity is subject, as well as the international human rights frameworks that apply to the area in which the business will operate;
- iii. A description of the human rights conditions in the area surrounding the business activity before significant activity begins;
- iv. A statement of what is likely to change because of the business activity, which may include identifying multiple scenarios or predicting outcomes based on varying levels of intervention. Relevant factors include country-specific human rights challenges as well as the potential human rights impact of the company’s activities and of the relationships associated with those activities;
- v. A prioritization of the human rights challenges for the company;
- vi. A management plan that includes both recommendations to address identified human rights challenges and provisions for the monitoring of baseline indicators.

As standard practice, human rights impact assessments “would always be published in full,” but “reasonable” political, legal, or security risks “must also be considered and may force a partial or summary publication.” Companies would be expected to implement — and respond to — monitoring and auditing processes that provide regular updates on the business activity’s human rights impact.

Finally, the Special Representative’s Report proposes that a business’s evaluation of its human rights impact and performance should be measured, “at a minimum,” according to the substantive “benchmarks” of international human rights instruments like the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

The expansive procedural imperatives and the substantive standard proposed by the Special Representative would impose on corporations sweeping duties to compensate for deficiencies which a State has been unable, or unwilling, to address in the political, civil,

economic, social, or other systems of the areas in which business activities will take place. In particular, officers and directors should consider three specific consequences.

First, the proposal of international rights conventions as the substantive standard for the due diligence process would impose on corporations the State's responsibility — but not its power and legitimacy — to vindicate the broad-textured guarantees of international human rights instruments according to local circumstances.

Second, the measure a corporate activity's human rights impact would be tied inextricably to deficiencies in the political, civil, economic, or social conditions left unaddressed by the State. In fact, one U.N. Discussion Paper proposed that the human rights impact assessment must evaluate "the state of realization of a broad spectrum of rights rather than only those obviously impacted by the proposed business activity."

Third, the burden imposed on companies to predict outcomes and "prioritize" human rights challenges, in ways allegedly comparable to financial and other risk management strategies, would expose businesses to enormous liability. Indeed, this is readily apparent from an earlier report to the U.N. Human Rights Council in which the Special Representative acknowledged that stating a project's likely impact is a "difficult and subjective exercise." The report noted that in predicting outcomes, a human rights impact assessment actually might have to look beyond a project's likely effects to consider as well "community perceptions of what is likely to change; even though a new petrochemicals plant might produce no local pollution, community fears about air or water quality will necessitate action by the company." Whatever the good-faith efforts applied by corporations, these far-reaching process requirements for respecting rights would furnish any number of liability claims, whether based on erroneous predictions of possible human rights outcomes, a board's decision not to follow every recommendation in an impact assessment's management plan, or a company's "prioritization" of human rights challenges and corresponding project designs.

II. THE STATE DUTY TO PROTECT

Directors also should take particular note of the Report's focus on the State duty to protect against human rights abuses by businesses. The Special Representative urges States to improve their protection against corporate human rights abuses by fostering corporate cultures in which respect for rights is an essential part of doing business. The Report suggests that one way to exert market pressures on companies to cultivate such a corporate culture would be to expand fiduciary duties to include the obligation to consider the human rights impact of corporate activities. Lest this dramatic expansion of board monitoring duties appear to be an unlikely development, consider two recent expressions of this reform trend.

Following a process safety accident that occurred in 2005 in BP's Texas City refinery, an independent panel led by former Secretary of State James A. Baker III was established to review the company's corporate safety culture, management systems and oversight, and to make recommendations to improve BP's process safety performance. In a report describing the "evolving" understanding of the role of boards of directors in health and safety matters, the independent panel noted the United Kingdom Health and Safety Commission's recommendation that the board of directors "needs to accept formally and

publicly its collective role in providing health and safety leadership in its organisation.” The panel urged that, in pursuit of best practices, directors’ role in governing the process safety issues in their business “should be supported by formal individual terms of reference, covering as a minimum setting process safety policy and strategy development, setting standards, performance monitoring and internal control.” Such an expansion of the monitoring and oversight obligations of boards would mark a significant change in the distribution of responsibilities in corporations.

Moreover, to demonstrate how States can increase the pressure on companies to respect human rights, the Special Representative’s Report specifically references the binding legal obligations which British law began imposing on directors by “redefining fiduciary duties.” Under Section 172 of the United Kingdom’s Companies Act 2006, for directors to act in good faith to promote the success of their company they must “have regard” to “the impact of the company’s operations on the community and the environment.” In fact, during its consideration by Parliament, an earlier version of the legislation had attributed this new responsibility to directors only “so far as reasonably practicable,” but the Government removed this reasonableness clause before final passage of the law. To the extent the U.K. Companies Act forms one of the bases on which the U.N. Human Rights Council may endorse the State’s duty to protect against human rights abuses, such a new legal standard would mark a dramatic expansion beyond traditional constituency statutes. Further, even if the U.N. Human Rights Council does not specifically address the redefining of fiduciary duties or best practices, the Special Representative’s Report reflects a trend in reform proposals to which corporations and boards may wish to respond.

Instead of fostering a corporate culture in which boards of directors develop the best balance between their monitoring of human rights compliance by the corporation and advising management as to strategy, the Report’s proposed pressures would force directors to navigate a maze of procedural imperatives and “evolving” best practices. An expansion of fiduciary duties would make the work of boards of directors more difficult without yielding a correlative improvement in the targeted corporate focus on human rights. In particular, a challenge which boards must confront is the procedural focus that animates the Special Representative’s definition of respect for human rights. The proposal places a premium on broad process duties — from the due diligence obligation of human rights impact assessments, to the board monitoring of corporate compliance — but these should not form the anchor of corporations’ social responsibility to respect human rights. To be sure, procedural attention to potential human rights harms before they occur, and throughout the lifecycle of a business project, can provide valuable safeguards for human rights, but the Special Representative’s Report goes much further. Consequently, directors must cautiously evaluate the repercussions of the Special Representative’s proposal, for corporate boards and for global business more generally.

III. CONCLUSION

The Report of the Special Representative marks an important development in the global debate over corporate social responsibility. It advances the discussion of how we may better harness globalization’s benefits while redressing and eliminating the gaps that permit the abuse of human rights. It also advances the cause of social responsibility activists who propose

proxy resolutions and take other actions to pressure companies. Experience shows that these proposals resonate most strongly with public pension funds and in the academic community with pressure on endowments to disinvest securities of companies that are not responsive to the activists' proposals.

The Report bears significant, potentially harmful implications for global business and for meaningful accountability in various social actors' duties to fulfill the promises of international human rights instruments. The proposal to the U.N. Human Rights Council thus requires close scrutiny by the business community. The Report will invite immense pressure on corporations and their directors, and boards should work closely with management to address this development through a special committee or a public affairs committee.

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