

Position paper

COMMENTS TO THE INTERIM REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, FEBRUARY 22, 2006

1) Responding to the New International Economic Order since 1970: legal standards and evolving approaches to transnational corporations	3
a) First wave (mid-1970s): OECD Guidelines & ILO Tripartite Declaration	4
b) Second wave (mid-1990s): Globalization, domestic litigation, and the Global Compact	5
2) Standardizing the Standards of Corporate Conduct: The Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises; & the Work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises	6
3) The state of international law as applicable to companies	7
Critique 1: Restatement of State-centric law or advancement of a new regime?	7
Critique 2: Which responsibilities fall on businesses as opposed to States?	8
4) Moving Forward	9
The special challenge of sphere of influence and complicity	9
5) Conclusion	11

This position paper seeks to contribute to the mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Mr. John Ruggie.

The International Federation for Human Rights (FIDH) welcomes the Special Representative's interim report of February 22, 2006, which it sees as a first step towards the fulfilment of the mandate as defined in Resolution 2005/69 of the United Nations Commission on Human Rights.

The interim report offers an excellent diagnosis of the challenges facing transnational corporations in a globalized world, and recognized the need for an improved accountability of these actors, commensurate with the influence they exercise.

The report explores existing responses to these challenges. The FIDH shares the view that voluntary initiatives however valuable have limited applicability, as they apply to certain sectors and certain actors only, and refer to different standards. The FIDH agrees with the SRSR that the challenge for the human rights community is to make the promotion and protection of human rights a more standard and uniform corporate practice. The FIDH believes that this will be achieved through the adoption of universal standards applicable to all companies.

In the view of the FIDH, corporate self-regulation and voluntary initiatives inadequately ensure the achievement of human rights in areas of business activity. As powerful actors on the world stage, transnational corporations and other businesses must be held accountable for their decisions, which deeply affect the human rights of individuals and communities. It is to be noted that support to such an approach has been shared by major actors of the business community as well as trade unions. Such promising stands should be strengthened rather than set aside.

In the evolution of international instruments dedicated to corporations and human rights, therefore, the Norms represent a promising step toward identifying the substance of respectively States and businesses' human rights responsibilities and suggesting modes of direct accountability. To this end, the FIDH advocates building on this process rather than rejecting it in order to fully comprehend the influence of and eventually impose direct obligations on transnational corporations.

In the following, the FIDH: 1) provides historical background on the call for corporate accountability for human rights violations; 2) describes the genesis of the Norms and the mandate of the Special Representative; 3) identifies and analyzes critically the main points of the Special Representative's interim report; and 4) makes recommendations as to the future of the work of the Special Representative.

1) Responding to the New International Economic Order since 1970: legal standards and evolving approaches to transnational corporations

The question of the human rights responsibilities of companies is hardly new. The current debate over the Norms should be understood in the context of demands for improved control of the activities of transnational corporations-part of the effort to vindicate the 'new international economic order' established in the early 1970s,¹ which the recently decolonized States pushed forward during that period. In fact, the Norms themselves trace back to a failed Draft Code of Conduct on Transnational Corporations prepared until 1992 within the UN Commission on Transnational Corporations.²

Two background developments are relevant to understand the Norms and the work of the Special Representative. First, in

1. See the resolution adopted by the General Assembly of the United Nations on 1 May 1974, calling for a New International Economic Order (UN doc. A/Res/3201 (S-VI)). This resolution was followed upon, in particular, by GA Res. 3281(XXIX) of 15 January 1975, UN GAOR Supp. (No. 31), UN Doc. A/9631 (1975), The Charter of Economic Rights and Duties of States, reproduced in 14 ILM (1975) 251-265.

2. UN doc. E/1990/94, 12 June 1990. This was established as a follow-up to a report prepared at the request of the Economic and Social Council. See Ecosoc Res. 1974/1721 of 24 May 1974 ; The Impact of Multinational Corporations on the Development Process and on International Relations, Report of the Group of Eminent Persons to Study the Role of Multinational Corporations in Development and in International Relations, UN doc. E/5500/Rev.1/Add 1 (1974). The Draft Code failed to be adopted, however, because of major disagreements between industrialized and developing countries, particularly with respect to international law and the inclusion of standards of treatment for TNCs. See the Report by the Secretary General, *The impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter*, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/Sub.2/1996/12, 2 July 1996, para. 61-62. See also on this attempt S.K.B. Assante, 'United Nations: International Regulation of Transnational Corporations', 13 J. World Trade Law (1979), p. 55; W. Spröte, 'Negotiations on a United Nations Code of Conduct on Transnational Corporations', 33 *German Yearbook of International Law* 331 (1990); P. Muchlinski, 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague, 2000, pp. 97-117; N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability*, Intersentia, Antwerpen-Oxford-New York, 2002, pp. 119-124. See also P. Muchlinski, 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD', at p. 100 (referring to Ecosoc Res. 1980/60 of 24 July 1980).

1976, the developed States of the Organization for Economic Cooperation and Development (OECD) adopted the Guidelines for Multinational Enterprises. Almost simultaneously, the International Labor Organisation adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Third, since the mid-1990s, stakeholders have spectacularly revived the question of the human rights responsibilities of transnational corporations.

a) First wave (mid-1970s): OECD Guidelines & ILO Tripartite Declaration

The OECD Guidelines were born of the fear of developed States that certain abuses or political interferences by transnational corporations might provoke hostile reactions in developing States and possibly lead to the imposition of restrictions on the rights of foreign investors. While they only address the 30 Member States of the OECD and the handful of non-member countries who voluntarily adhere to them, the Guidelines still constitute the most widely used instrument in defining the obligations of multinational enterprises.³ Purposed to open up of foreign economies to foreign direct investment, the Guidelines sought to ensure that all States parties would ensure, via national contact points and cooperation with the OECD Investment Committee,⁴ a certain level of control (if only supervisory) over multinational enterprises incorporated within their respective jurisdictions. Revised most recently in 2000, the Guidelines include a general obligation on multinational enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."⁵

Almost simultaneously, the International Labor Organisation adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, based on the finding that "the advances made by multinational enterprises in organizing their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives and with the interest of the workers."⁶ The aim of the Tripartite Declaration of Principles is to "encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the United Nations resolutions advocating the Establishment of a New International Economic Order."⁷ Apart from specific references to fundamental workers' rights as provided for by ILO conventions and recommendations, the Tripartite Declaration contains a general provision (Paragraph 8 of the chapter on General Policies) relating to the obligation to respect human rights. Although the Tripartite Declaration insists that all parties "respect the sovereign rights of States," and pursue activities "in harmony with the development priorities and social aims and structure of the country in which they operate,"⁸ the standards on social policy developed under ILO Conventions and Recommendations are to be complied with, even where the host country either would not be bound by certain of those instruments, or where, even though bound, the host government would be acting in violation of those international obligations.⁹ In this respect, the ILO Tripartite Declaration goes even beyond the provision of the OECD Guidelines.

3. The Guidelines are addressed to the governments of the 30 States parties of the Organisation, but have also been adopted by those of Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia. These governments 'recommend to multinational enterprises operating in or from their territories the observance of the Guidelines' (Declaration on international investment and multinational enterprises, 27 June 2000, I.). There is therefore no territorial limitation to the application of the Guidelines. As most multinational enterprises are domiciled in industrialized countries members of the OECD, the Guidelines are practically of almost universal applicability to transnational business enterprises.

4. Previously called the Committee on International Investment and Multinational Enterprises (CIME).

5. See para. 2 of the Chapter on 'General Policies'. On the context in which the OECD launched the revitalization of the Guidelines for Multinational Enterprises, see J. Murray, 'A new phase in the regulation of multinational enterprises: the role of the OECD', 30 *Industrial Law Journal* 255 (2001); Jan Huner, 'The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, supra note 4, at 197-205.

6. Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Organisation at its 204th Session (November 1977), and revised at the 279th Session (November 2000).

7. Para. 2.

8. Para. 10.

9. See, in particular, para. 9 of the Tripartite Declaration : 'Governments which have not yet ratified Conventions Nos. 87 [concerning Freedom of Association and Protection of the Right to Organise], 98 [concerning the Application of the Principles of the Right to Organise and to Bargain Collectively], 111 [concerning Discrimination in Respect of Employment and Occupation], 122 [concerning Employment Policy], 138 [concerning Minimum Age for Admission to Employment] and 182 [concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour] are urged to do so and in any event to apply, to the greatest extent possible, through their national policies, the principles embodied therein and in Recommendations Nos. 111 [concerning Discrimination in Respect of Employment and Occupation], 119 [concerning Termination of Employment at the Initiative of the Employer], 122 [concerning Employment Policy], 146 [concerning Minimum Age for Admission to Employment] and 190 [concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour]. Without prejudice to the obligation of governments to ensure compliance with Conventions they have ratified, in countries in which the Conventions and Recommendations cited in this paragraph are not complied with, all parties should refer to them for guidance in their social policy'.

Nonetheless, neither the 1976 OECD Guidelines for Multinational Enterprises, nor the 1977 ILO Tripartite Declaration may be described as effective instruments for imposing human rights obligations on transnational enterprises.¹⁰ Both are explicitly presented as non-binding instruments with respect to the multinational enterprises whose practices they ultimately seek to address. The statements adopted by the NCPs at the close of procedures initiated under the revised OECD Guidelines for Multinational Enterprises are generally weak, and the procedure itself before the NCPs is mostly considered as unsatisfactory by the non-governmental organisations which, across some 45 'specific instances' presented to the NCPs by NGOs since 2000, have relied on this mechanism. Under the OECD Guidelines, the only incentive for companies to comply resides in the adverse publicity they will be subjected to if they refuse to cooperate to identifying a solution to the 'specific instance' presented to a national contact point.¹¹ The ILO Tripartite Declaration lacks even this level of incentive.

b) Second wave (mid-1990s): Globalization, domestic litigation, and the Global Compact

After the initial establishment of initiatives like the OECD Guidelines and the ILO Declaration, the field of corporate responsibility became somewhat static. Then, beginning in the mid-1990s, a revived consciousness developed. For instance, the OECD Guidelines were dramatically improved in 2000, especially with respect to the treatment of complaints by the NCPs established by each adhering government. This revival may be seen as part of a more general critique of the

path taken by economic globalization. It also has more immediate causes.

On the domestic front, certain highly visible legal suits have been filed before United States and European Courts against parent companies whose subsidiaries or affiliates were accused of directly committing human rights violations, or more frequently of being complicit in human rights violations committed by the States in which they operated. In the United States, litigants have relied on the class action mechanism,¹² of the Alien Tort Claims Act 1789 (ATCA). Part of the First Judiciary Act of 1789, the ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹³ The United States federal courts have agreed to read this provision as implying that they have jurisdiction over enterprises either incorporated in the United States or having a continuous business relationship with the United States, where foreigners, victims of violations of international law¹⁴ wherever such violations have taken place, seek damages from enterprises which have committed those violations or are complicit in such violations as they may have been committed by State agents.¹⁵ Although its practical consequences remain to be seen, and although the procedural hurdles in using the ATCA should not be underestimated, the litigation following the revival of the Alien Tort Claims Act has served to shed light on the risks involved in the activities of transnational corporations operating in States where human rights may be violated on a routine basis.¹⁶

10. For a comparison of these tools, see Bob Hepple, *Labour Laws and Global Trade*, Hart Publishing, Oxford and Portland, Oregon, 2005, at 78-85.

11. Under the terms of the 'Procedural Guidance' given to the national contact points (NCPs) by the Decision of the OECD Council of 27 June 2000 (OECD doc. DAFFE/IME/WPG (2000)9), 'If the parties involved do not reach agreement on the issues raised, [the NCP may] issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines'. Moreover, 'after consultation with the parties involved, [the NCP may] make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines'. Finally, 'At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues', although 'information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure'.

12. See more generally, on the specific procedural advantages which potential plaintiffs in such cases are recognized under the Federal Rules of Civil Procedure, which imply that the usefulness of the Alien Tort Claims Act may be limited as a model to be followed by other jurisdictions, Beth Stephens, 'Translitigating Filartiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations', 27 *Yale J. Int'l L.* 1 (2002).

13. 28 U.S.C. §1350.

14. The United States Supreme Court considers that, when confronted with such suits, the U.S. federal courts should 'require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [violation of safe conducts, infringement of the rights of ambassadors, and piracy]' which Congress had in mind when adopting the First Judiciary Act 1789 (*Sosa v. Alvarez-Machain*, No. 03-339, slip op. at 30-31 (US Sup Ct 2004)).

15. See in particular *John Doe I v. Unocal Corp.*, 395 F.3d 932, 945-946 (9th Cir., 2002) (complicity of Unocal with human rights abuses committed by the Burmese military); and *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, *2 (S.D.N.Y., 2002) (complicity of Shell Nigeria and its parent companies Shell UK and Royal Dutch in the human rights abuses committed by the Nigerian police).

16. For a synthesis of the litigation against companies based on the Alien Tort Claims Act, see chaps. 2, 3 and 4 of Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, Oxford and Portland-Oregon, 2004. In the other chapters of the book, the author also seeks to provide an overview of the litigation against companies for human rights abuses under other jurisdictions.

Internationally, at the 1999 Davos World Economic Forum, UN Secretary General Kofi Annan proposed to the world of business a Global Compact based on shared values in the areas of human rights, labour, and the environment (anti-corruption was added in 2004). The ten principles of the Global Compact derive from the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption. The process is voluntary, based on the idea that good practices should be rewarded by being publicized, and that they should be shared in order to promote mutual learning among businesses.¹⁷ The companies acceding to the Global Compact are to 'embrace, support and enact, within their sphere of influence', the ten (initially nine) principles on which it is based, and they are to report annually on the initiatives they have taken to make those principles part of their operations. The first two principles relate to human rights: under Principle 1, "Businesses should support and respect the protection of internationally proclaimed human rights;" under Principle 2, they should "make sure that they are not complicit in human rights abuses."

2) Standardizing the Standards of Corporate Conduct: The Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises; & the Work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

As the foregoing shows, corporate accountability mechanisms have suffered from the lack of enforceability and the absence of definitive human rights standards vis-à-vis corporations. The Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises, while unable to alleviate these deficiencies entirely, were formulated to address them at least in part. On August 14, 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights adopted the Norms, after

consulting widely with all relevant stakeholders, including the business community.¹⁸ Essentially, the Norms restate the human rights obligations imposed on companies by existing international law; they are based on the idea that "even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights."

Therefore, "transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments."¹⁹ Principle 1 of the Norms reflects their overall approach to the scope of the human rights obligations of companies:

States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective *spheres of activity and influence*, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups [emphasis added].

In April 2005, the UN Commission on Human Rights requested that the UN Secretary General appoint a Special Representative to identify ways through which the accountability of transnational corporations for human rights violations may be improved.²⁰ On July 28, 2005, professor John Ruggie was appointed Special Representative of the UN Secretary General. As defined by Resolution 2005/69 of the UN Human Rights Commission, the task of the Special Representative of the UN Secretary General is:

(a) To identify and clarify standards of corporate

17. As stated on the website of the Global Compact : 'The Global Compact is a purely voluntary initiative. It does not police or enforce the behavior or actions of companies. Rather, it is designed to stimulate change and to promote good corporate citizenship and encourage innovative solutions and partnerships'.

18. UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); and for the Commentary, which the Preamble of the draft Norms states is 'a useful interpretation and elaboration of the standards contained in the Norms', UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003). On the drafting process of these draft Norms and a comparison with previous attempts of a similar nature, see David Weissbrodt & Muria Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *American Journal of International Law* 901 (2003) ; David Weissbrodt & Muria Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors', in Ph. Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, 2005, pp. 315-350.

19. Preamble, 3d and 4th Recital.

20. UN Commission on Human Rights Res. 2005/69, 'Human rights and transnational corporations and other business enterprises', adopted on 20 April 2005 by a recorded vote of 49 votes to 3, with 1 abstention (chap. XVII, E/CN.4/2005/L.10/Add.17).

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.

It is against this background that the interim report of the Special Representative should be replaced. The description of the mandate of the Special Representative was the result of a compromise within the UN Commission on Human Rights, in which the creation of the mandate itself was obtained only against the absence of any explicit reference to the draft Norms of the UN Sub-Commission for the Promotion and Protection of Human Rights. The FIDH nevertheless considers that, while they could be further improved, and without prejudging the monitoring mechanisms they could lead to of the existing monitoring mechanisms they could contribute to feeding, the Norms usefully demonstrate the potential of international law in responding to the need for an improved accountability of transnational corporations towards human rights.

3) The state of international law as applicable to companies

As the mandate of the Special Representative is broader than the Norms themselves, the interim report speaks generally to corporate accountability and human rights as well as to the specific substance of the Norms. The Special Representative's comments on the Norms reiterate the critiques made by corporate and government actors while the Norms were being drafted.²¹ These criticisms take two main forms: first, that the

Norms are internally incoherent because they purport to merely restate existing legal principles-which critics assert apply only to States-while simultaneously intimating binding legal obligations for corporations; and second, that the Norms confuse the allocation of responsibilities between States and businesses. Yet, as will be demonstrated in the following, it is possible to acknowledge their weaknesses without rejecting the Norms wholesale.

Critique 1: Restatement of Stato-centric law or advancement of a new regime?

The interim report questions the legitimacy of the Norms for "tak[ing] existing State-based human rights instruments and simply assert[ing] that many of their provisions now are binding on corporations as well."²² Mr. Ruggie's implicit argument, that international human rights law imposes obligations only on States, fails to recognize the precedents in international criminal law of imposing human rights obligations on *individuals*. Thus, while it is reasonable to view the Norms as innovative, they do not move into entirely uncharted or unorthodox territory. Moreover, it is important to remember that the move toward a binding framework has grown out of the gross failure of voluntary mechanisms. The interim report gives a descriptive account of some of these efforts-including the ILO Declaration, the OECD Guidelines, and industry-specific initiatives²³-without fully appreciating their inadequacies.

It is true that, in the early 20th century, the legal positivists believed that "the law of nations is based on the common consent of individual States, and not of individual human beings."²⁴ This view however created artificial obstacles to the recognition of 'non-State' entities as subjects of international law.²⁵ It is now dismissed as obsolete. Contemporary authors acknowledge that international legal personality results from the capacity of the subject to hold rights or to be imposed duties under international law, and to exercise those rights or be held accountable to such duties in the international legal process.²⁶ Thus, the recognition of an international legal

21. See 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, 15 February 2005, UN doc. E/CN.4/2005/91, para. 20.

22. Para. 60.

23. Paras. 31-53.

24. L. Oppenheim, *International Law. A Treatise*, 2nd ed., 1912, vol. I, p. 19.

25. See Philip Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', in Ph. Alston (ed.), *Non-State Actors and Human Rights*, Series of the Collected Courses of the Academy of European Law, Oxford Univ. Press, 2005, p. 3.

26. The International Court of Justice ruled in the *Reparations for Injuries Suffered in the Service of the United Nations* case that the United Nations is a 'subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims'. Its based its conclusion that the United Nations have an international legal personality on the finding that 'the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane' (ICJ Rep. 1949, 179).

personality to transnational corporations should not be seen as a prerequisite to the imposition of obligations on such entities, just like it has not been considered a prerequisite for the recognition of rights to these actors, for instance, under free trade agreements or investment liberalization agreements guaranteeing the rights of investors and ensuring that they have access to a procedure for a determination of their claims under such instruments.²⁷

This is not to say of course that the rights or duties of transnational corporations should be seen as identical to those of the States: the International Court of Justice has observed that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."²⁸ But to restrict a definition of international legal personality to the capacity to act in the international legal order just as States may act—for example by the conclusion of treaties or by sending and receiving diplomatic missions—would be tautological: it would deny the international legal personality of entities other than States based on the belief that only States have the capacity to act as States.²⁹

Two additional points bear mentioning. First, although the imposition of direct obligations on companies under international law is one possible outcome of the draft Norms, this is neither a necessary outcome, nor the only outcome which can be imagined. One approach suggested by the Norms is to encourage UN human rights treaty bodies to better monitor the obligations of the States parties, which already have the responsibility to control private actors whose behavior could lead to human rights violations.³⁰ Thus, the Norms could, if adopted, reach corporate actors through States by clarifying the extent of States' obligation to protect.

Second—and this argument follows directly from the first—the Special Representative's assertion that corporate accountability finds "little authoritative basis in international law"³¹ demonstrates an inappropriate collapsing of the *content* of international law and its *tools*. Although international law relies on State responsibility as its mechanism of enforcement, the material object of the international norms is to impose obligations on private actors. Indeed, the direct application of international law by national courts and legislatures illustrates how even the law established by international treaties can be contextualized and applied to private parties.

Critique 2: Which responsibilities fall on businesses as opposed to States?

The report of the Special Representative states that "corporations do not have a general role in relation to human rights as do States" and critiques the Norms for "imposing higher obligations on corporations than on States by including as standards binding on corporations instruments that not all States have ratified or have ratified conditionally and even for which States have adopted no international instrument at all."³² It is certainly true "that corporations are not democratic public interest institutions,"³³ and that the State is in a more appropriate position to make decisions concerning human rights. However, contrary to the interpretation of the Special Representative, the Norms place primary responsibility for the fulfillment of human rights on the States and do not demand businesses to be "co-equal duty bearers."³⁴

As part of this critique, the interim report deconstructs the concept of *sphere of influence* as used in the Norms, arguing that the phrase has "no legal pedigree" and cannot serve as

27. On this question, see in particular D. Kokkini-Iatridou and P. de Waart, 'Foreign Investments in Developing Countries - Legal Personality of Multinationals in International Law', 14 *Neth. Yearbook of International Law* 87 (1983); P. Malanczuk, 'Multinational Enterprises and Treaty-Making - A Contribution to the Discussion on Non-State Actors and the 'Subjects' of International Law', in Vera Gowlland-Debaas (ed.), *Multilateral Treaty-Making. The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, Proceedings of the American Society of International Law/Graduate Institute of International Studies, Forum Geneva, May 16, 1998, Martinus Nijhoff Publ., 2000, p. 35; Jonathan Charney, 'Transnational Corporations and Developing Public International Law', 1983 *Duke L.J.* 748, esp. at 774-776; and the excellent discussion in Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability*, supra n. 4, at pp. 19-35.

28. *Reparations for Injuries Suffered in the Service of the United Nations* case, ICJ Rep. 1949, 178.

29. See Philip Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', supra n. , at 20, and his critique of B. Cheng, 'Introduction to Subjects of International Law', in M. Bedjaoui (ed.), *International Law. Achievements and Prospects*, Paris, Unesco, 1991, 23.

30. Although Principle 16 of the Norms states, perhaps imprudently, that "Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms", the corresponding Commentary refers (in (b)) to the mechanisms which, at United Nations level, already exist in order to monitor compliance by States with their human rights obligations, and which could seek inspiration from the Norms.

31. Para. 60.

32. Para. 66.

33. Para. 68.

34. Para. 68.

"a suitable basis for establishing binding obligations."³⁵ Clarification of this term is, however, an explicit mandate of the Special Representative; that *sphere of influence* has not yet been fleshed out properly in this context is no reason to abandon the draft Norms. To the contrary, it demonstrates the need for further action in order for the draft Norms to have an impact. Moreover, it is precisely because the commitments of States under international human rights law are variable that there is a need to define a set of standards applicable to the business community, both in order to ensure that companies will not invoke the bad human rights record of the host government in order to escape their liability for complicity in certain abuses, and in order to prevent any temptation by a government to seek out potential foreign investors at the expense of human rights under their jurisdiction.

4) Moving Forward

The FIDH recommends that the Special Representative take into consideration the foregoing comments and expand his consultation with relevant stakeholders before submitting his final report in 2007. Human rights advocates and NGOs, including the FIDH, are aware of the shortcomings of the draft Norms but nonetheless support the move toward heightened accountability of transnational corporations. The FIDH calls on the Special Representative to pay particular attention to clarifying the legal concepts of *sphere of influence* and *complicity*, the elucidation of which is critical for the success of any vehicle of corporate accountability for human rights. Indeed, of the tasks of the Special Representative, the most urgent is to create a typology of situations in which a corporation may be said to be complicit in human rights violations committed by its business partners or by the host government in the country where it operates. Neither the draft Norms nor, indeed, any other mechanism for improving the accountability of multinational corporations for human rights obligations, will be workable unless these notions are adequately clarified.³⁶

The special challenge of sphere of influence and complicity

The notion of sphere of influence has proven to be one of the most challenging and significant elements in defining corporate responsibility. Prefigured vaguely in the Global

Compact, sphere of influence is best understood as a compromise between two ideas: on the one hand, companies are not to be equated to their host States, which have primary responsibility for the provision of public services, such as health and education, and for the maintenance of law and order; on the other hand, the more powerful a company is—that is, the closer it comes to possessing the influence traditionally held by States—the more reasonable it would seem to impose compliance with internationally recognized human rights. How then can this tension be resolved in order to make the notion of sphere of influence operational?

In principle, sphere of influence should answer the question of how far the positive obligations of businesses should reach. It functions to help us identify regions of influence, i.e., categories of situations and persons or communities affected (directly or more remotely) by the activities of the corporation and toward whom the corporation has more or less wide-ranging obligations. However, rather than focusing on the boundaries of this influence, it may be more fruitful to identify a set of procedural obligations imposed on corporations which would ensure that they take into account their human rights obligations in planning and executing their activities, including in the selection of their business partners. In that sense, while useful in the hands of the rule-maker or for the company seeking to understand the community standards of responsibility toward human rights, the notion of sphere of influence may be too vague if left completely in the hands of the adjudicator. To serve as an adequate guideline, it may require further implementation before it can be fully applicable, for example, in the context of civil litigation over corporate human rights violations.

Equally important is the related notion of corporate *complicity* in human rights abuses. Complicity is a criminal law concept that describes situations in which a party is at least indirectly responsible for the commission of a violation. It serves to identify the responsibility of companies where another entity, business partners (their suppliers or sub-contractors), or the host government commits criminal human rights abuses. However, complicity has been generalized to apply in civil law settings as well, as recently explained by the U.S. Court of Appeals for the Ninth Circuit in an ATCA case: "what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the

35. Para. 67.

36. Useful attempts are, e.g., Andrew Clapham, 'State responsibility, corporate responsibility, and complicity in human rights violations', in Lene Bomann-Larsen & Oddny Wiggen (eds), *Responsibility in World Business. Managing Harmful Side-effects of Corporate Activity*, United Nations University Press, Tokyo-New York-Paris, 2004, pp. 50-81; Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* (2001), available at <http://www.business-humanrights.org/Clapham-Jerbi-paper.htm>.

standards of international human rights law.³⁷ Insofar as it appears in the Global Compact and in the draft Norms, complicity is used even more broadly.

Like sphere of influence, complicity has been criticized for its vagueness.³⁸ However, it can be generally understood in terms of both the relationship between the concerned company and its business partners, and between that company and the country in which it operates. Although these two situations may be fused in practice, such as when a company forms a partnership or joint venture with its host government, the inter-corporate and corporate-governmental relations are nevertheless analytically distinct and should thus be considered separately.

Complicity intersects significantly with sphere of influence, even though the two concepts are analytically and functionally distinct. In order to evaluate corporate complicity for a violation, we must first ask whether the enterprise aided or abetted the commission of the violation. Under the case-law of the international criminal tribunals, for instance, which in turn inspired U.S. application of ATCA, a party is complicit where its actions had a substantial effect on the commission of the abuse,³⁹ and where it knew or should have known that it would have such an effect, whether or not the accomplice

shares the mens rea of the direct perpetrator.⁴⁰

Other forms of complicity have been put forward, however.⁴¹ Where a company is in a joint venture with the host government or with another private actor and has knowledge of, or should have known of, human rights violations committed by that partner to fulfill the agreement, the company should be considered complicit in the violation for not having put an end to the business relationship. We may also ask, for instance, whether the company benefited from the abuse, for example in instances where the state security forces repress peaceful protest against business activities. Finally, when in the face of systematic or continuous human rights violations in its host country, the company remains silent and refuses to denounce abuses that it was aware of or should have been aware of, the company is a silent accomplice. Increasingly, we have seen a "growing acceptance within companies that there is something culpable about failing to exercise influence in such circumstances."⁴²

This four-tiered approach to complicity has been invoked to elaborate on the Global Compact. Similarly, the Office of the High Commissioner for Human Rights stated in 2005:

37. *John Doe I v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002).

38. See, eg, Gregory Wallace, 'Fallout from Slave-Labor Case is Troubling', 150 N.J.L.J. 896 (1997).

39. Under the Alien Tort Claims Act, it has been authoritatively held that the standard for aiding and abetting is 'knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime': *John Doe I v. Unocal Corp.*, 395 F.3d 932, 945-946 (9th Cir., 2002) (judgment filed Sept 18, 2002). This standard is borrowed from the approach of international criminal tribunals. See, e.g., *Prosecutor v. Furundzija*, IT-95-17/1-T (Dec. 10, 1998), reprinted in 38 I.L.M. 317 (1999), where the International Tribunal for the former Yugoslavia held that 'the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime' (at § 235). As emphasized by the Unocal judgment delivered on 18 September 2002 by the United States Court of Appeals for the 9th Circuit, the ICTY considered that in order to qualify, 'assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal' (*Furundzija* at § 209; see also *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, § 391 (Feb. 22, 2001), <http://www.un.org/icty/foca/trialc2/judgement/index.htm> ('The act of assistance need not have caused the act of the principal')) : it suffices that the acts of the accomplice 'make a significant difference to the commission of the criminal act by the principal' (*Furundzija* at § 233). Under the criterion used by the ICTY, which borrows from the precedents set by the American and British military courts and tribunals dealing with the Nazi war crimes in the aftermath of the Second World War, the acts of the accomplice will have the required '[substantial] effect on the commission of the crime' where 'the criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed.' *Prosecutor v. Tadic*, ICTY-94-1, § 688 (May 7, 1997), <http://www.un.org/icty/tadic/trials2/judgement/index.htm>. The International Criminal Tribunal for Rwanda also considers that the actus reus for aiding and abetting consists in any act of assistance, whether physical or moral, which substantially contributes to the commission of the crime : *Prosecutor v. Musema*, ICTR-96-13-T (Jan. 27, 2000), <http://www.ictcr.org/>.

40. Again, this is the understanding of the *mens rea* required for the existence of direct complicity under the Alien Tort Claims Act. Quoting from § 245 the *Furundzija* case of the ICTY and from § 180 of the *Musema* case of the ICTR, the United States Court of Appeals for the 9th Circuit noted that 'it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime' and that, 'in fact, it is not even necessary that the aider and abettor knows the precise crime that the principal intends to commit' ; '[r]ather, if the accused 'is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor'".

41. See the *Report of the United Nations High Commissioner for Human Rights to the 56th session of the General Assembly*, UN Doc. A/56/36 (2001) (distinguishing direct, beneficial and silent complicity); or the OHCHR Briefing paper, 'The Global Compact and Human Rights : Understanding Sphere of Influence and Complicity', available from the website of the UN Global Compact (http://www.unglobalcompact.com/Issues/human_rights/index.html), at p. 18.

42. *Report of the United Nations High Commissioner for Human Rights to the 56th session of the General Assembly*, supra n. 43, para. 111.

Four situations illustrate where an allegation of complicity might arise against a company. First, when the company actively assists, directly or indirectly, in human rights violations committed by others; second, when the company is in a partnership with a Government and could reasonably foresee, or subsequently obtains knowledge, that the Government is likely to commit abuses in carrying out the agreement;⁴³ third, when the company benefits from human rights violations even if it does not positively assist or cause them; and fourth, when the company is silent or inactive in the face of violations.⁴⁴

5) Conclusion

The FIDH sees the mandate of the Special Representative as one step in a process. This mandate should build on the preexisting efforts to develop tools and instruments to improve human rights accountability of transnational corporations. This includes taking into account the work of the UN Sub-Commission for the Promotion and Protection of Human Rights, which resulted in the 'Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises,' adopted unanimously in Resolution 2003/16 of August 14, 2003. The challenge is not now to undo what has achieved after wide-ranging consultations and a careful drafting exercise. It is to build on what has already been achieved, a) by clarifying further certain notions, such as those of 'sphere of influence' and 'complicity', which the Norms rely on ; and b) by examining the different avenues which could be explored in order to ensure that the restatement of the international law obligations of transnational corporations under the Norms may be equipped with a monitoring mechanism.

The FIDH emphasizes in this respect that the Norms do not prejudice the nature of the monitoring mechanism which they could be complemented by. The implementation of the Norms could be ensured - on the basis of the already existing mechanisms, including treaty-based mechanism, for the monitoring of the human rights obligations of States - by affirming the obligation of States to protect their populations

from certain consequences attached to the activities of transnational corporations (host States) or to control the transnational corporations domiciled under their jurisdiction in order to ensure that they do not violate human rights in their activities abroad (home States). In this regard, the FIDH welcomes the proposal made by the SRSG to explore through a brainstorming session of legal experts the possible extension in the extra-territorial application of home countries' jurisdiction for human rights abuses committed by their firms abroad.

It could also be ensured by developing a new monitoring mechanism directly addressing transnational corporations, without relying on the international responsibility of States under the international law of human rights.

The FIDH shall within the next few weeks make a concrete proposal in this regard, in order to contribute, in a constructive spirit, to the mandate of the Special Representative.

43. Although, in the description of this category of complicity, reference is made only to the business partner of a company which is a government, the same reasoning should hold for the situation where the business partner is a private understanding. This is confirmed by the OHCHR Briefing paper, 'The Global Compact and Human Rights : Understanding *Sphere of Influence* and *Complicity*' referred to above, supra n. 43, which describes as 'complicity in case of joint venture' as the situation where 'the company has a common design or purpose with its contractual partner to fulfil the joint venture. It knew or should have known of the abuses committed by the partner'.

44. *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*, 15 February 2005, UN doc. E/CN.4/2005/91, para. 34 (citing International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*, (Geneva, February 2002), pp. 125-136).

FIDH represents 141 Human Rights organisations

141 organisations

- Albania**-Albanian Human Rights Group
Algeria-Ligue algérienne de défense des droits de l'Homme
Algeria-Ligue algérienne des droits de l'Homme
Argentina-Centro de Estudios Legales y Sociales
Argentina-Comite de Accion Juridica
Argentina-Liga Argentina por los Derechos del Hombre
Austria-Österreichische Liga für Menschenrechte
Azerbaijan-Human Rights Center of Azerbaijan
Bahrain-Bahrain Human Rights Society
Bangladesh-Odnikar
Belarus-Human Rights Center Viasna
Belgium-Liga Voor Menschenrechten
Belgium-Ligue des droits de l'Homme
Benin-Ligue pour la défense des droits de l'Homme au Bénin
Bhutan-People's Forum for Human Rights in Bhutan (Nepal)
Bolivia-Asamblea Permanente de los Derechos Humanos de Bolivia
Brazil-Centro de Justicia Global
Brazil-Movimento Nacional de Direitos Humanos
Burkina Faso-Mouvement burkinabé des droits de l'Homme & des peuples
Burundi-Ligue burundaise des droits de l'Homme
Cambodia-Cambodian Human Rights and Development Association
Cambodia-Ligue cambodienne de défense des droits de l'Homme
Cameroon-Maison des droits de l'Homme
Cameroon-Ligue camerounaise des droits de l'Homme (France)
Canada-Ligue des droits et des libertés du Québec
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Chad-Association tchadienne pour la promotion et la défense des droits de l'Homme
Chad-Ligue tchadienne des droits de l'Homme
Chile-Corporación de Promoción y Defensa de los Derechos del Pueblo
China-Human Rights in China (USA, HK)
Colombia-Comite Permanente por la Defensa de los Derechos Humanos
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Democratic Republic of Congo-Groupe Lotus
Djibouti-Ligue djiboutienne des droits humains
Ecuador-Centro de Derechos Economicos y Sociales
Ecuador-Comisión Ecuemenica de Derechos Humanos
Ecuador-Fundación Regional de Asesoría en Derechos Humanos
Egypt-Egyptian Organization for Human Rights
Egypt-Human Rights Association for the Assistance of Prisoners
El Salvador-Comisión de Derechos Humanos de El Salvador
Ethiopia-Ethiopian Human Rights Council
European Union-FIDH AE
Finland-Finnish League for Human Rights
France-Ligue des droits de l'Homme et du citoyen
French Polynesia-Ligue polynésienne des droits humains
Georgia-Human Rights Information and Documentation Center
Germany-Internationale Liga für Menschenrechte
Greece-Ligue hellénique des droits de l'Homme
Guatemala-Centro Para la Accion Legal en Derechos Humanos
Guatemala-Comisión de Derechos Humanos de Guatemala
Guinea-Organisation guinéenne pour la défense des droits de l'Homme
Guinea Bissau-Liga Guineense dos Direitos do Homem
Iran-Centre des défenseurs des droits de l'Homme en Iran
Iran (France)-Ligue de défense des droits de l'Homme en Iran
Iraq-Iraqi Network for Human Rights Culture and Development (United Kingdom)
Ireland-Irish Council for Civil Liberties
Israel-Adalah
Israel-Association for Civil Rights in Israel
Israel-B'tselem
Israel-Public Committee Against Torture in Israel
Italy-Liga Italiana Dei Diritti Dell'uomo
Italy-Unione Forense Per la Tutela Dei Diritti Dell'uomo
Ivory Coast-Ligue ivoirienne des droits de l'Homme
Ivory Coast-Mouvement ivoirien des droits de l'Homme
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Jordanie-Jordan Society for Human Rights
Kenya-Kenya Human Rights Commission
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Lebanon-Foundation for Human and Humanitarian Rights in Lebanon
Lebanon-Palestinian Human Rights Organization
Liberia-Liberia Watch for Human Rights
Libya-Libyan League for Human Rights (Switzerland)
Lithuania-Lithuanian Human Rights Association
Malaysia-Suaram
Mali-Association malienne des droits de l'Homme
Malta-Malta Association of Human Rights
Mauritania-Association mauritanienne des droits de l'Homme
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Mexico-Comisión Mexicana de Defensa y Promoción de los Derechos Humanos
Moldova-League for the Defence of Human Rights
Morocco-Association marocaine des droits humains
Morocco-Organisation marocaine des droits humains
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Serbia and Montenegro-Center for Antirwar Action - Council for Human Rights
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Tunisia-Conseil national pour les libertés en Tunisie
Tunisia-Ligue tunisienne des droits de l'Homme
Turkey-Human Rights Foundation of Turkey
Turkey-Insan Haklari Dernegi / Ankara
Turkey-Insan Haklari Dernegi / Diyarbakir
Uganda-Foundation for Human Rights Initiative
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La Lettre

is published by the Fédération internationale des ligues des droits de l'Homme (FIDH), founded by Pierre Dupuy. It is sent to subscribers, to member organisations of the FIDH, to international organisations, to State representatives and the media.

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SUBSCRIPTION PRICES FIDH PUBLICATIONS	La Lettre de la FIDH 6 Nos/year	Mission Reports 12 Nos/year	La Lettre and Reports
France	25 Euros	45 Euros	60 Euros
European Union	25 Euros	50 Euros	65 Euros
Outside EU	30 Euros	55 Euros	75 Euros
Library/Student	20 Euros	30 Euros	45 Euros

Director of the publication: Sidiki Kaba
 Editor: Antoine Bernard
 Authors of this report: Olivier De Schutter and Tammy Kim
 Assistant of publication: Céline Ballereau-Tetu
 Printing by the FIDH - Dépôt légal March 2006 - ISSN en cours - N° 442/2
 Commission paritaire N° 0904P11341
 Fichier informatique conforme à la loi du 6 janvier 1978 (Déclaration N° 330 675)

price: 4 Euros