

# INSTILLING CREDIBILITY FOR HUMAN RIGHTS IN TRANSNATIONAL CORPORATIONS

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## INTRODUCTION

In his April 2008 report entitled “Protect, Respect and Remedy: A Framework for Business and Human Rights” (Framework), the Special Representative of the Secretary General on the issue of human rights and transnational corporations (SRSG) concluded the global marketplace as currently structured posed significant risks to society due to the enormous disparity between the marketplace’s power and the reach of the institutions responsible for its regulation. The SRSG characterized this disparity between global economic forces and the capacity of societal institutions to manage such forces through their national governments as “governance gaps.” These gaps were responsible for an increasing number of corporate-related human rights abuses. The inability of many national governments, even those of the largest and most economically dominant states, to manage social impacts associated with globalization left the business and human rights discussion, in the words of the SRSG, without “an authoritative focal point.”<sup>1</sup> As a result, the SRSG concluded that the regulatory framework governing transnational corporations continued to operate in much the same manner as it did at an earlier time.

The Framework was intended in part to bridge these governance gaps and provide a link between transnational business practices, national legal systems and human rights protections. The “messy reality” described by the SRSG and confronting transnational corporations in their foreign investment activities required a different approach than the Framework’s normative predecessor, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Norms).<sup>2</sup> This approach was not mired in lists of rights or imprecise doctrines potentially imposing liability without knowledge, and encouraging active corporate intervention where such was not desirable. The Framework admirably attempts to refocus the dialogue between transnational corporations and human rights through the “protect, respect and remedy” principles.

## THE FRAMEWORK AND THE CREDIBILITY GAP

There is a second and equally important gap that must be bridged in addition to governance gaps. This second gap exists between transnational corporations and the human rights they are entrusted to respect and may be characterized as a “credibility gap.” Specifically, transnational corporations must be convinced of the benefits of the methodology selected by the SRSG to bridge governance gaps. More specifically, transnational corporations must be convinced that the “respect principle” and its attainment through the performance of due diligence are not inconsistent with their dual mission of profit maximization and risk minimization and, in fact, are societal expectations. Corporate codes of conduct, vague pronouncements of commitment to socially responsible values and highly-publicized good deeds aside, transnational corporations must come to realize that respecting human rights and avoiding negative impacts through the performance of due diligence present value opportunities and strategic advantages beneficial to firm performance.

Two primary reasons for this credibility gap are the lack of consensus on the nature of corporations and the absence of a common language. The lack of consensus on the nature of corporations means the inability to achieve a common understanding on corporate personality and associated rights and responsibilities. The preamble of the Universal Declaration of Human Rights states that “every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”<sup>3</sup> Presumably, “organs of society” include transnational corporations.<sup>4</sup> Despite this language, the corporate form of business does not fit neatly into the legal traditions of many states, whose founding documents focus on the regulation of the relationship between individuals and their governments.<sup>5</sup> At the dawn of the Industrial Age, corporate recognition relied on a specific grant of status from the government.<sup>6</sup> Corporations were thus relatively rare creatures.<sup>7</sup> Given the lateness of its recognition, freely incorporable entities were not accounted for at the time of the creation of the legal systems they came to inhabit. This problem was exacerbated when increasing numbers of corporations initiated multinational operations and thus became subject to multi-governmental regulation across widely varying legal regimes. The discussion surrounding the nature of the corporate entity continues unabated today on the

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theoretical plane as addressed in the concession, real entity, and aggregate doctrines<sup>8</sup> and in the public arena in competing outcomes in common law<sup>9</sup> and civil law systems in Asia,<sup>10</sup> Europe,<sup>11</sup> and Latin America.<sup>12</sup>

The absence of a common language means the different vocabularies employed by business and the human rights community. From the perspective of business, it must be noted that international human rights instruments are written by and for states. Thus, their meaning for and application to business is not always well understood.<sup>13</sup> While fluent in economics, transnational corporations do not generally speak the language of human rights.<sup>14</sup> Conversely, the human rights community may not fully appreciate the economic models, financial constraints and corporate governance requirements under which transnational corporations operate. As a result, there is “little that count[s] as shared knowledge across different stakeholder groups in the business and human rights domain.”<sup>15</sup> To his considerable credit, the SRSG attempts to draw the languages of business and human rights closer together by drawing parallels between human rights impact assessment and impact assessments performed by corporations on a routine basis. These include financial, environmental and social impact assessment and a “do no harm” standard familiar to businesses in managing other types of risk.<sup>16</sup>

Only when the credibility gap is bridged will the Framework and the future efforts have a reasonable chance of succeeding where so many past efforts dating back almost forty years have failed. Unfortunately, the report entitled “Guiding Principles on Business and Human Rights: Implementing the United Nations’ “Protect, Respect and Remedy” Framework issued in March 2011 is the SRSG’s final report on this topic.<sup>17</sup> Implementation of the Framework and bridging the governance and credibility gaps will thus largely fall to the SRSG’s successors and the business community. The suggestions and comments set forth in this paper are directed to these successors.

### THE DUE DILIGENCE REQUIREMENT

The SRSG has stated that an ongoing process of due diligence is required for successful integration of human rights into corporate practice.<sup>18</sup> Due diligence expects that firms will make themselves aware of potential human rights issues, prevent these problems from happening, and mitigate adverse impacts that have already arisen.<sup>19</sup> Towards this goal, the SRSG has expressed four core elements of human rights due diligence. First, firms should have an explicit and transparent human rights policy. Second, there should be an assessment of human rights impacts on firm activities. Third, the values underlying human rights should be disseminated and embedded throughout the organization’s culture and systems. Fourth, performance should be tracked and reported.<sup>20</sup>

A significant underdeveloped opportunity of current SRSG reports is the benefits to organizations embedded in implementing human rights due diligence initiatives. Although firm obligations to human rights must not be diluted or become conditional on profitability concerns, there remains a significant opportunity for companies to create and extract value from the implementation of human rights practices.<sup>21</sup> In each of the four steps mentioned above, human rights due diligence can enable firms to improve their performance or tap new sources of revenue.

One preliminary and general benefit bears mention prior to examination of specific value opportunities. This benefit is the distinction drawn in the Framework between the duties of states and the responsibilities of transnational corporations. The Framework reminds us that corporations are “specialized economic organs, not democratic public interest institutions.”<sup>22</sup> As such, the responsibility of transnational corporations to respect human rights cannot mirror the governmental obligation to establish, elucidate, and protect such rights.<sup>23</sup> This distinction correctly recognizes that the state defines human rights duties and the methods by which they are to be enforced whereas transnational corporations lack the power and legitimacy of states to “vindicate the broad-textured guarantees of international human rights instruments.”<sup>24</sup> A contrary conclusion equating transnational corporations and states would inextricably tie human rights impacts associated with corporate activity to political, civil, economic, and social deficiencies existing within host states and left unaddressed by their national governments. Such a conclusion would also impose obligations that do not exist in current international human rights law outside of the baseline norm of respect for human rights set forth in voluntary and soft law instruments.<sup>25</sup> The Framework’s overdue recognition of the distinct roles of states and transnational corporations in the human rights equation overturns previous efforts equating these roles, such as exemplified by the Norms, through recitation of lists of rights to which corporations would be held accountable. The value of this recognition to transnational corporations cannot be overstated. The value to human rights causes is also notable to the extent previous efforts, unworkable as they were in implementation, have been replaced with the more practical and achievable due diligence framework.

However, the SRSG’s final report appears to take a step back from the necessary recognition of the separate duties and responsibilities of states and transnational corporations. While once again reiterating the view that transnational corporations are “organs of society,” the SRSG’s final report does not modify this description as in previous reports to note that such corporations focus on economic activities and do not serve as democratic public interest institutions. Instead, the SRSG’s final report arguably imposes greater responsibility for human rights protections on transnational corporations than on national governments. Specifically, the final report instructs transnational corporations that compliance with national laws which instruct and constrain national governments with respect to their human rights practices is not enough. Rather, the duty to respect “exists over and above compliance with national laws.”<sup>26</sup> The moral minimum for transnational corporations is thus not legal compliance but rather compliance with human rights standards which their home jurisdictions and host states

may not recognize. Transnational corporations are instructed to respect rights contained within the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work that have no or limited legal recognition at home or abroad and thus no or limited ability to constrain national governments. This is a potential source of confusion and conflict in practice and widens the credibility gap between human rights and business by potentially strengthening the misperception that human rights compliance places impossibly vague and uncertain obligations upon businesses that more rightfully belong on national governments.

This potential confusion and conflict is enhanced by language in other parts of the SRSG's final report. The definitive statement requiring transnational corporations to comply with human rights norms despite potential limitations within national law is undercut by later language in the final report stating that businesses need only respect such rights "to the greatest extent possible in the circumstances" where domestic context (including presumably domestic law) renders full compliance impossible.<sup>27</sup> This impossibility excuse is quite broad as many states have not ratified the instruments underlying the SRSG's statement of rights subject to protection and respect and those that have may have implemented such rights in an imperfect or incomplete manner.

Another source of potential confusion is the SRSG's statement that appropriate action by transnational corporations with respect to human rights is, in part, dependent on the extent of leverage possessed by such businesses "to effect change in the wrongful practices of an entity that causes a harm."<sup>28</sup> This statement correctly recognizes that transnational corporations may not always possess the ability to act in a manner that promotes positive change, especially with respect to more remote harms. Furthermore, the statement is correct in its recognition that transnational corporations may have an obligation to minimize harm perpetrated by their subsidiaries, related business enterprises and supply chain to the extent they possess leverage with respect to such entities.

However, a related but unaddressed issue remains regarding the definition of "an entity." The above statements are defensible to the extent "entity" is limited to businesses such as the subsidiaries and supply chain members. They are less defensible to the extent the term "entity" is defined to include national governments including state-owned enterprises. Such an interpretation raises the question of whether transnational corporations are required to exercise their leverage (should it exist) over national governments whose policies result in adverse human rights impacts. Related questions are whether corporations should exercise such leverage given that they are not democratic public interest institutions and the potential conflict between such an obligation and pledges of political non-interference made by many transnational corporations in their codes of conduct and related policies. Unfortunately, there is nothing in the SRSG's final report discouraging such an interpretation, and the matter thus remains an issue open for debate.

#### DEVELOPMENT OF A HUMAN RIGHTS POLICY

The first step of due diligence proposed by the SRSG is the development of a human rights policy.<sup>29</sup> The 2008 report briefly describes the scope of this policy as one that may use "broad aspirational language" to describe human rights but should also offer "more detailed guidance" in areas where it is necessary to give commitments specific meaning.<sup>30</sup> The SRSG's final report elaborates upon the specific requirements of this policy, including approval by the most senior level of management, formulation in consultation with internal and external experts, broad coverage to include personnel, business partners and other parties with direct links to the corporation's operations, public availability and reflection in operational policies and procedures.<sup>31</sup>

Having a human rights policy is certainly an important first step in furthering the goals of human rights protection in a corporate enterprise. An overarching policy is necessary to give the firm some direction in terms of its goals, operationalization of those goals, expression of values, and responsibilities of key internal stakeholders of the organization. In addition, the SRSG rightly notes that there is a tension between having a free-standing human rights policy and one that is integrated within established due diligence processes. The former risks not being integrated into the firm's operations while the latter practice might dilute the unique attributes of human rights protection. The underlying thrust of this concern is expressed in the 2010 report, which wisely instructs that human rights initiatives need to be addressed directly and in a systematic fashion.<sup>32</sup> A policy is the first expression of that initiative.

Future work by the SRSG's successors must account for that, while such policies are important, standing alone they are no panacea for eliminating socially irresponsible behavior. Studies into corporate ethical codes, by analogy, report that the benefits from such expressions of values are far from uniform. While some studies associate ethical codes with reduced unethical conduct,<sup>33</sup> others report no such benefit.<sup>34</sup> Indeed, a 2001 meta-analysis of the effectiveness of codes found that only eight of nineteen studies showed a significant relationship between the corporate code and ethical behavior.<sup>35</sup>

Regrettably, the SRSG's reports also did not discuss the embedded values opportunities in such expressions of corporate policy. These embedded values must not remain deemphasized in future implementation of the Framework. One such value opportunity is the positive impact embedded values may have upon shareholder confidence. Significant individual and institutional investors may also be motivated to invest or increase their stake in firms with a human rights policy. Human rights policies are one indicator of management quality to the extent that they demonstrate risk awareness and mitigation. They may also prove crucial in meeting investor expectations by ensuring corporate access to business opportunities

requiring robust statements of human rights values. Examples in this regard may be found in financial organizations such as the World Bank and the International Finance Corporation, which include statements of human rights values in their governance requirements.<sup>36</sup>

Perhaps more importantly, investors may be dissuaded from divesting as a result of such policies. Although divestment by individual investors may have no appreciable effect, such action by institutional investors could have a significant impact on many corporations. An example in this regard is the California Public Employees Retirement System (CalPERS), the largest public pension fund in the United States with assets in excess of \$200 billion. Although characterizing divestment as an ineffective strategy for achieving social and political goals and expressing a preference for constructive engagement, CalPERS' Statement of Investment Policy issued in February 2009 nevertheless permits divestment where the continuation of the investment is imprudent and inconsistent with fiduciary duties. A comprehensive and implemented human rights policy could dissuade CalPERS and other institutional investors from divestment.<sup>37</sup>

Embedded values will also motivate socially responsible investors to act. Socially responsible investing is a two trillion dollar industry.<sup>38</sup> Indeed, over half of Americans surveyed monitor a firm's social performance, ethics, and environmental behavior.<sup>39</sup> Robust statements of human rights policies by corporations can send strong signals to various constituents that the organization is a worthy recipient of socially responsible investing. The hundreds of socially responsible investment mutual funds may be influenced in investment decision making by the expression of a human rights policy.<sup>40</sup>

Human rights values and practices can also be expressed as a core component of a firm's social marketing campaigns to ethically-sensitive consumers and organizations. As standards for social and environmental corporate reporting coalesce, the opportunity exists for firms to showcase their human rights performance through explicit rankings and measures demonstrating their absolute performance and performance relative to competitors. Furthermore, such policies enhance and safeguard corporate reputation and brand image. Reputation and image are crucial to attract a wide range of stakeholders, including consumers, employees, shareholders, suppliers and business partners. To the extent that human rights violations or the perception thereof harm reputation and image, all of these relationships are negatively impacted. The damage caused to reputation and current and future profitability as a result of this negative impact is often inestimable. Human rights controversies can besmirch corporate reputations overnight, and the resultant damage can linger in the public's conscience for decades.<sup>41</sup> Rehabilitation of reputation and regaining public trust are expensive, time consuming and difficult propositions. Well known global corporations such as Nestlé, Union Carbide, Exxon and possibly BP may remain inextricably linked to their misdeeds despite the passage of time.<sup>42</sup>

Enhancing trust and confidence among stakeholders is particularly crucial. Distrust and a low level of confidence do not provide transnational corporations with significant margins for error with respect to human rights issues. Local stakeholders are much more likely to grant the benefit of the doubt and allow for remedial actions for human rights violations committed by firms with high levels of community trust. Allegations of corporate misdeeds may be addressed and remedied at their root rather than taking on a new life in the media, on the Internet and through non-governmental organizations. While transnational corporations will never perhaps achieve the same level of credibility and trust enjoyed by non-governmental organizations and individuals actively engaged at the grassroots level, that is not the ultimate objective of such policies. Rather, human rights policies present value opportunities to the extent they merely enhance trust and confidence in the communities in which corporations do business.

Human rights policies are also value opportunities to the degree they strengthen corporate legitimacy. It has been noted that "corporate privilege can only be legitimate if the corporation serves the community from which the factors of production of its wealth are derived."<sup>43</sup> This license to operate requires broadly defining the constituencies to which the corporation has some degree of responsibility. Human rights policies address this concern by acknowledging the duty to respect rights beyond traditional shareholder concerns in favor of a much larger pool of stakeholders. A properly drafted and carefully implemented policy draws attention to all stakeholders, thereby increasing collaboration, further enhancing corporate legitimacy and justifying its license to operate within the community.

## ASSESSMENT OF HUMAN RIGHTS IMPACTS

The second prong of due diligence is the assessment of the human rights impacts of company activities.<sup>44</sup> The 2008 SRSG report notes that human rights problems arise for corporations because they fail to assess the human rights implications of decisions before those decisions are undertaken. The emphasis in the report is on proactivity and forward thinking. These assessments can also be linked with other risk-based assessments in the organization such as environmental and social impact assessments.<sup>45</sup>

The SRSG's last report goes further than any previous effort in defining the elements of due diligence.<sup>46</sup> However, despite this admirable attempt, there are several areas that require additional clarification. For example, there are some inconsistencies in the characterization of human rights assessments in the SRSG's reports that merit attention. The SRSG describes human rights assessment with the same language devoted to risk assessment in other fields. Thus, human rights impacts "merit a similar level of due diligence as any other risk."<sup>47</sup> Human rights assessment is described in corporate governance parlance as assessment, management and disclosure of material risks in order to avoid liability.<sup>48</sup> Other risks to be avoided include delays in the planning, construction and operation of foreign investment projects, difficulties in labor

markets, increased costs associated with financing, insurance and security, and reduced returns on investment.<sup>49</sup> The end result is identical to the failure to adequately conduct risk assessment in other fields, specifically, erosion of corporate value and the breach of disclosure requirements and directors' fiduciary duties.<sup>50</sup>

Yet the SRSR sows seeds of confusion to the extent he backs away from this comparison in other portions of his reports. Despite the previously-referenced characterizations, the SRSR has also described due diligence associated with human rights assessment as being broader than traditional notions of due diligence, specifically, "a comprehensive, proactive attempt to uncover . . . risks, actual and potential, over the entire life cycle of a project or business activity."<sup>51</sup> This process must go beyond identification and management of risks to the company and address risks to affected individuals and communities associated with specific activities and relationships.<sup>52</sup> This statement introduces yet another difference between traditional risk management and human rights assessment, that is, the involvement of rights holders. This involvement, according to the SRSR, extends human rights risk assessment beyond merely calculating probabilities.<sup>53</sup> While human rights are undoubtedly indivisible from all aspects of human existence, including, civil, cultural, economic, political and social activities, the SRSR's description of due diligence in this context backs away from prior characterizations closely equating human rights due diligence to other risk assessment frameworks readily understandable to business. What the SRSR appears to offer transnational corporations in some sections of his reports seemingly disappears in other sections.

Additional clarification is also necessary with respect to the consequences of a due diligence process that fails to accurately assess human rights impacts. Transnational corporations that fail to conduct reasonable inquiries or disregard evidence of actual or potential impacts clearly should not receive the protection of the due diligence shield. But due diligence assessments may be thorough and reasonable and nevertheless be tainted by erroneous predictions, a board's well-reasoned decision not to follow every recommendation or a company's prioritization of human rights challenges and corresponding project policies through its organization. The implications of such results must be addressed in future efforts.

There are several key questions that must be addressed in this regard. One example is whether boards and other corporate decision makers must adhere to every recommendation and avoid every risk to human rights no matter how remote or retain a degree of independent business judgment. This is an important consideration as the SRSR has stated that transnational corporations are liable for its own acts and omissions as well as those of companies with which it maintains a "business relationship."<sup>54</sup> The breadth of this potential liability is staggering as it includes acts and omissions by "business partners, entities in the value chain, and any other non-State or State entity directly linked to its business operations, products or services."<sup>55</sup> It may be seriously questioned whether boards and other corporate decision makers even possess sufficient data to make informed decisions let alone whether their imperfect decisions may result in corporate liability. These decisions are crucial as, according to the SRSR, corporate directors, officers and employees may be subjected to personal liability for adverse human rights impacts relating to the acts and omissions of transnational corporations, at least with respect to "gross human rights abuses," a term which remains undefined in the SRSR's reports.<sup>56</sup>

Additionally, the SRSR states that in situations where a transnational corporation lacks "leverage" to prevent or mitigate adverse human rights impacts associated with its activities, it should consider ending the relationship.<sup>57</sup> What amount of "leverage" or lack thereof that constitutes the tipping point remains unclear. Equally unclear is the terminology regarding "ending the relationship." In particular, questions may be raised whether this statement places a requirement upon transnational corporations (or merely a matter for consideration) and whether "ending the relationship" requires divestment. If the relationship is deemed "crucial," the transnational corporation must consider the severity of the abuse and adopt measures designed to mitigate adverse impacts.<sup>58</sup> But if the primary purpose of all transnational corporations is to maximize profits, are not all relationships crucial to maintaining and increasing profitability? A transnational corporation that fails to "end the relationship" under such circumstances should be prepared to "accept any consequences - reputational, financial or legal - of the continuing connection."<sup>59</sup> This statement echoes standards for strict liability - a result which could not possibly have been intended by the SRSR yet arguably seems to fall within such language. At the very least, the SRSR's standard creates intended or unintended openings for future litigants seeking to question board decisions impacting human rights considerations. The SRSR has understandably instructed transnational corporations that his reports and the due diligence framework set forth therein are not intended to serve as a "plug in tool kit."<sup>60</sup> Nevertheless, to be truly effective as undoubtedly intended by the SRSR, the due diligence framework must contain as much clarity and guidance as possible for the transnational corporations sought to be held to its standards.

Finally, there is more that can be developed in the creation and use of impact assessments. A human rights assessment practice generates value capturing opportunities for the organizations that implement them. Most obvious is that such assessments help accurately predict the risks attendant to poor human rights conditions such as kidnapping of employees, sabotage, government expropriation, and corruption.<sup>61</sup> Firms can also assess the potential benefits of human rights practices in their value chain such as local increased productivity, community support, and consumer demand already expressed in Principle One of the United Nations Global Compact.<sup>62</sup>

Future efforts should increase the emphasis that human rights assessments may have positive spillover effects for the functioning of the organization as a whole. The mere act of a company-wide assessment in a novel area such as human rights can improve organizational learning in the practice of self-assessments generally. Assessments can also generate unexpected efficiency opportunities. For example, when the Sarbanes-Oxley Act (SOX) was passed in the United States, it required that each annual report include an assessment of internal controls.<sup>63</sup> While most firms perceived SOX as another cost, a minority

of firms used this assessment requirement to eliminate redundant information systems, stream line financial controls, and consolidate financial processes.<sup>64</sup> Future efforts should emphasize that self-assessments are essential for implementing corporate change, a source of potential value, and embed skills that promote a more nimble organization.

Due diligence also improves risk assessment and management. Human rights due diligence can be integrated into existing management systems to the extent it resembles other forms of risk assessment.<sup>65</sup> This integration broadens and strengthens the information received by business and consequently the risk assessment that emerges from the data collection and analysis processes.<sup>66</sup> The added value associated with human rights due diligence and enhanced risk assessment is also of significant benefit to managers on the ground. Furthermore, as risk assessment is well known to businesses, characterizing due diligence in a similar manner “has the best chance to resonate with company management and be absorbed into site specific practices.”<sup>67</sup>

In addition to these considerations, it should come as no surprise that there is a link between respect for human rights and profitability.<sup>68</sup> Respect for human rights promotes integrity in national fiscal and legal systems.<sup>69</sup> This increased integrity in turn creates a secure investment environment by discouraging arbitrary decisions, protecting intellectual property rights and other business assets and ensuring economic stability, thereby fostering an atmosphere conducive to future growth. Characterizing respect for human rights and due diligence in this manner serves to transform the topic from one posing a potential threat to one of corporate opportunity.

The impact of such certainty cannot be overstated. Similarly due diligence provides greater certainty to transnational corporations themselves. The occurrence of human rights violations and associated possibilities of litigation and harm to corporate image are material risks for transnational corporations. These risks are exacerbated by the fact that human rights instruments are fraught with uncertainty, and the power to define their meaning is fragmented among numerous constituencies.<sup>70</sup> Boards of directors may be unwilling to undertake projects that present such risks, despite the fact that shareholders would otherwise approve of risk-taking in the interest of maximizing profit.<sup>71</sup> Conservative decision-making overly focused on risk avoidance and liability concerns rather than return on investment is a disservice to shareholders who are thus denied the full measure of return on their investment.<sup>72</sup> Due diligence alleviates this risk to the extent it provides greater certainty to boards of directors that their decisions will be less likely to form the basis of litigation and harm to reputation.<sup>73</sup> Boards are thus freer to undertake projects with appropriate risks.<sup>74</sup> This result is most desirable as a degree of risk-taking is a part of every business decision.

Increased certainty and risk minimization will result in more efficient resource allocation. As noted by the SRSR, the primary means by which transnational corporations address human rights abuses are through litigation and countering negative publicity.<sup>75</sup> Litigation costs can be severe even if the claims lack merit. These costs may be direct in the form of legal representation, responding to discovery requests and appearing at judicial proceedings or indirect through the disruption of normal corporate functions, disclosure of sensitive information, and reputational harm.<sup>76</sup> Transnational corporations may also incur transition costs associated with adaptation to constantly changing human rights norms.<sup>77</sup> Further costs may be incurred through the devotion of time and resources to concealing activities that could result in litigation.

Due diligence may reduce these costs. Transnational corporations would incur significantly smaller costs early in the foreign investment decision-making process associated with issues concerning location, timing, design, and personnel.<sup>78</sup> Direct litigation costs could largely disappear to the extent due diligence serves to terminate litigation at an early stage, especially with respect to meritless claims. Indirect litigation costs would also decrease as daily functioning of the business would be subject to less disruption and corporate reputation would be at less risk of suffering harm. Transitional costs could be reduced to the extent that corporations are not required to conform their behavior to a list of ever-evolving substantive rights but rather may use a uniform due diligence process regardless of the nature of the proposed investment activity. Concealment of activities would no longer be an option under the Framework’s reporting and tracking requirements.

The above-listed factors will result in a competitive advantage for those firms that adopt a responsible approach to human rights. Greater certainty strengthens national legal, fiscal and political systems, which in turn encourages foreign investment. This enhanced certainty encourages responsible risk-taking, improves assessment of such risks, streamlines management and resource allocation and reduces negative costs associated with litigation and crisis management. These benefits are in addition to those arising from brand and reputational enhancement and building consumer trust. Such firms are attractive to a wide range of stakeholders in addition to consumers. These include current and potential members of the supply chain, current and future business partners, and present and potential employees.

#### ORGANIZATIONAL INTEGRATION OF HUMAN RIGHTS

The third prong of due diligence involves integration of human rights into the organization. As the SRSR findings reflect, a commitment to human rights cannot simply exist in the exhortations of the responsible sub-entity in the firm or a few commitment-minded employees. The concern for human rights must be organization wide.

Yet before opportunities for firm benefits are discussed, the meaning of this prong must be determined. The SRSR’s reports are obviously only the first step, and ideas will evolve over time. However, the precise definition of this integration prong varies between documents. In 2009, the SRSR described this element as “integrating those values and findings into corporate cultures and management systems.”<sup>79</sup> In 2010, the four elements of due diligence were described again, but this

time the document explained this prong as “integrating these commitments and assessments into internal control and oversight systems.”<sup>80</sup>

This may be unintentional, but the difference in language could be interpreted as meaningful. The 2010 document encourages implementing commitments into management systems. This language encourages a focused approach of incorporating information into formal control mechanisms. If firm-expressed commitments to human rights and findings of assessment are integrated into the key relevant processes of the organization, this appears to satisfy the due diligence requirement of integration.

The 2009 document (which summarizes more detailed language from 2008), however, speaks to a substantially different set of foci and values. The 2009 language is broader, implying that integration of human rights sources from both formal findings as well as informal values. The word ‘values’ invokes a moral and ethical component more strongly than its 2010 counterpart of ‘commitments and assessments’. The 2009 language also implies that due diligence implicates driving these values more deeply and more broadly in the organization. This earlier document uses the words ‘cultures and management’ rather than the more technical and narrow ‘commitments and assessments’. The 2009 language invokes ideals, while the 2010 language calls to mind processes and standardization. The difference may be subtle, but the choice of language does matter. This lack of precision must be resolved by the SRSNG going forward.

Operationalization of human rights principles through oversight systems can generate value for firms. These benefits appear to be largely similar to those expressed in prong two. In a manner similar to assessment, spillover effects from operationalization can offer expected and unexpected learning opportunities and provide data that the firm may use to further its operations.

The 2009 language, however, appears more far-reaching and thus holding greater potential for participating firms. Corporate culture has emerged as a clear source of risk in corporate activity. Human rights policies become vitally important as nations begin to consider corporate culture when determining corporate criminal accountability. Australian law, for example, focuses on firm attitudes, courses of conduct, policies, and rules to determine liability rather than the activity of individual employees.<sup>81</sup>

The focus by the SRSNG appears to be that government authorities will be the leading forces for inculcating a corporate culture respectful of human rights.<sup>82</sup> As the 2008 report states, “[g]overnments are uniquely placed to foster corporate cultures in which respecting rights is an integral part of doing business.”<sup>83</sup> Such efforts involve requiring sustainability reports as well as the redefinition of fiduciary duties for organizations. Focus is placed on state-owned enterprises where shifts in corporate culture should be easier to achieve.

The SRSNG reports, however, do not place sufficient emphasis on the most influential driver of changes in corporate culture - the companies themselves. While government encouragement is important, a renewed focus should be made to encourage private enterprises to change values through efforts of their choosing. Corporations may respond well to reporting mechanisms or changes in fiduciary reporting, and these practices certainly have their benefits. However, if the emphasis is on cultural change, for some firms the key drivers for such change must come from inside the organization itself.

This means the emphasis of the SRSNG and non-governmental organizations could be to interact with corporate leaders or other influential members of the organization to encourage them to embed human rights values into the organization as well as provide tools to facilitate such cultural change. A significant literature already exists in the management discipline on successful and empowering culture change.<sup>84</sup> With such an emphasis on value change originating from top management,<sup>85</sup> including the SRSNG’s own reports,<sup>86</sup> it is this emphasis on leader engagement and persuasion that might produce the most thorough culture change toward human rights responsibility.

The embedding of human rights values into the highest levels of organizations will have trickle down positive impacts on employees. Such organizations should experience improved recruitment, retention and motivation. In addition to the costs savings associated with such developments (such as those associated with protracted recruitment, absenteeism and interruptions in production), a commitment to human rights practices through a robust due diligence process is a source of motivation to workers. Such a process is a strong signal not only to the marketplace and the current workforce but also the labor pool, individual members of which may be motivated to actively seek out such firms for employment. Current employees are motivated to remain and devote maximum time and effort on behalf of an employer perceived to be a good corporate citizen by implementing sound management principles, providing guidance to employees working in difficult environments, and maintaining high ethical standards.<sup>87</sup> Profitability and productivity increase as workers who feel valued by their employer contribute to existing knowledge and skill bases and work to achieve the company’s objectives.<sup>88</sup> Perhaps most importantly, such employees may serve as ambassadors for the business, thereby further enhancing corporate reputation, attracting new customers and recruiting potential employees.<sup>89</sup>

#### TRACKING AND REPORTING OF PERFORMANCE

The final prong of due diligence is the tracking and reporting of performance. Unlike the assessment prong, the goal here is unambiguous across published documents. However, future efforts must clarify several issues relating to tracking and reporting in future recommendations. One such issue is preferred modes of tracking and reporting. The Framework identifies

numerous characteristics of a well-conceived human rights impact framework.<sup>90</sup> Many widely respected and influential frameworks share one or more of these characteristics. Examples in this regard include the Voluntary Principles on Security and Human Rights and the Business Leaders Initiative on Human Rights. Nevertheless, the Framework identifies several other assessment frameworks as equally meritorious.

The identification of numerous alternatives, the shared characteristics of these frameworks and the absence of consensus prevent mandated compliance with any specific tracking and reporting model. This conclusion merely recognizes the SRSG's own words that one size does not fit all and that due diligence processes, including tracking and recording, will differ by industry and operations.<sup>91</sup> Attempts to design and implement a specific tracking and reporting model across industries may exclude worthy initiatives, quash creativity in designing and implementing future guidelines, and reduce incentives to innovate to meet the ongoing and dynamic challenges presented by due diligence in the human rights context. And yet the SRSG is critical of the multitude of human rights initiatives as lacking scale to truly move markets and existing as separate fragments.<sup>92</sup> In their place, the SRSG would provide transnational corporations with "universally guiding principles" for meeting their due diligence obligations.<sup>93</sup> The ability to accomplish this task given the diversity of initiatives and the desirability of a universal framework must be explored in future efforts.

One avenue for future exploration is to how create baseline standards that would level competition between transnational corporations and across industries. This objective is accomplished, in part, through the application of the SRSG's framework to all companies operating in the global marketplace regardless of how they are owned or their overall size and scale of global operations. Such a requirement promotes equity between competitors as well as between divergent industries. The SRSG conceded as much in his final report in which he stated that his reports and the accompanying due diligence requirement were applicable to "all business enterprises . . . regardless of their size, sector, location, ownership and structure."<sup>94</sup> However, the SRSG seemingly backs off of this statement by noting that human rights obligations are proportional to the size of the business.<sup>95</sup> The questions of applicability and proportionality thus remain unresolved.

The Framework also promotes equity across international boundaries as the responsibility to engage in due diligence and track and report the results applies to all companies regardless of where they are headquartered. This result is particularly desirable for corporations based in states that impose reporting and disclosure requirements beyond those established by other legal systems. However, one potential source of confusion is the undefined requirement of "formal reporting" where there is a risk of "severe human rights impacts."<sup>96</sup> These requirements may speak the language of the human rights community but may cause confusion in the business community regarding which impacts are severe enough to merit formal reporting and the intricacies of such reporting should it be required. A greater challenge for those who continue the SRSG's efforts is to create baseline standards for all transnational corporations to follow while simultaneously retaining flexibility in the due diligence protocol such as to allow corporations and industries to select among a range of due diligence options in determining which human rights risks are material to their businesses.

## CONCLUSION

The SRSG's efforts are to be commended. The Framework has correctly rejected past approaches the shortcomings of which were previously noted. The Framework admirably attempts to refocus the dialogue between transnational corporations and human rights. As a result, the Framework will most likely be more successful than previous efforts in this area.

Nevertheless, there is much more that needs to be accomplished. Future energy should be devoted to build upon the SRSG's efforts to bridge the credibility gap through focus on three primary objectives. First, there must be some reward for business accruing from fully engaging in the actions set forth in the Framework. We have suggested a few of these rewards in the context of value opportunities for businesses arising from due diligence processes.

It has also been suggested that "proper due diligence and good faith human rights risk mitigation is likely to provide compan[ies] with crucial elements in a defense against allegations that it is involved in human rights violations."<sup>97</sup> The SRSG has agreed in so far as he has stated that due diligence may serve to lessen support for "disingenuous lawsuits" tempered by the statement that transnational corporations should not expect due diligence to provide an automatic and absolute shield from liability.<sup>98</sup> One commentator has suggested that the good faith performance of due diligence standing alone should serve as a defense to lawsuits alleging human rights violations or corporate mismanagement.<sup>99</sup> Such a defense would reward desirable corporate behavior and expenditures of time and money, address society's growing expectations of business with respect to corporate social responsibility in general and human rights in particular in a manner readily understandable by business and alleviate concerns that transnational corporations will be required to compensate individuals for the civil, economic, political, and social deficiencies of the states in which they transact business. At the same time, blatantly imprudent decisions, clearly inadequate processes and direct participation in human rights violations would not be shielded from scrutiny. Although the SRSG has expressed his lack of support for such a far-reaching proposal, it would serve to considerably strengthen the vital link between business and human rights considerations.<sup>100</sup> At the very least, future implementation efforts must consider more ambitious means by which to further engage transnational corporations.

Continuing the SRSG's positive efforts also entails fostering greater ties between transnational corporations and non-governmental organizations devoted to human rights causes. This relationship has often been adversarial. Due diligence on

human rights issues should encourage greater collaboration between transnational corporations and non-governmental organizations. The complexity of due diligence processes, the dynamic nature of such processes in the human rights context and the growing amount of information to be considered will necessitate greater cooperation between transnational corporations and non-governmental organizations. Transnational corporations will need to increasingly rely on such organizations for information necessary to conduct adequate due diligence. In turn, non-governmental organizations should welcome consultation as a means by which to facilitate the protection of human rights and further their agendas. This potential collaboration and benefits accruing to both sides of the human rights equation should be emphasized in future implementation efforts.

Finally, it will be important for all affected parties, transnational corporations, national governments and non-governmental organizations, not to place too much responsibility for the prevention of future human rights violations on due diligence requirements. Due diligence is not an end in itself but a means of judging corporate performance, providing baseline standards for future assessment and reporting initiatives and institutionalizing triple bottom line. Due diligence must be viewed as complementary to other broader efforts to institutionalize social responsibility and place it more prominently on the corporate agenda. The transparency resulting from the aggregation and public dissemination of information in response to human rights assessments and reporting can only serve to further imbue social responsibility in transnational corporate culture. The SRSG's efforts should be judged as successful to the extent transnational corporations more fully become human rights entrepreneurs competing with one another for customers and investors through an enhanced commitment to fundamental values. As the SRSG admitted in his final report, the Framework and related efforts are "the end of the beginning by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."<sup>101</sup> The true end of the process initiated by the SRSG is miles ahead to be reached, if at all, on a date well in the future.

#### Footnotes

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<sup>1</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy, A Framework for Business and Human Rights*, ¶ 5, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Framework*].

<sup>2</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Clarifying the Concepts of 'Sphere of Influence' and 'Complicity'*, ¶ 70, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/8/16 (May 15, 2008) (citing U.N. Econ. & Soc. Council, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003)).

<sup>3</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., pmb., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>4</sup> However, it bears to note that recent case law in the United States regarding the Alien Tort Statute rejects the notion that international human rights law is applicable to corporations. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); *Doe v. Nestle, S.A.*, 748 F. Supp.2d 1057 (C.D. Cal. 2010).

<sup>5</sup> Jess M. Krannich, *The Corporate 'Person': A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 64, 100 (2005).

<sup>6</sup> For example, in the United States, a specific legislative act was required in order to form a corporation with few exceptions until the mid nineteenth century. PHILIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW* 22 (1993). Similar rules were applicable in the United Kingdom, which required a charter from the Crown or an act of Parliament. Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 84 (1999).

<sup>7</sup> For example, there were only 317 corporations in the United States at the beginning of the nineteenth century. General incorporation, introduced during the Jacksonian era, did not fully take root until after the Civil War. Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1444 (1987).

<sup>8</sup> Concession theory describes a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law . . . [and thus] possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." *Trustees of Dartmouth College v. Woodward* 17 U.S. (4 Wheat.) 518, 636 (1819). Real entity theory provides that a corporation possesses personality due to their nature as full-fledged legal entities possessing free will separate and apart from that of the ever-changing roster of individuals constituting the organization. Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 600 (1999). Aggregate theory provides that corporations are a simple "nexus of contracts" or

aggregation of individuals connected by contractual relations between themselves and management. BLUMBERG, *supra* note 4, at 27-28.

<sup>9</sup> For common law examples, see Corporations Act, 2001, c. 119, 124(1) (Austl.) (providing that a corporation is a legal entity separate and independent from its creators, investors, directors, and managers); *Kosmopoulos v. Constitution Ins. Co.*, [1987] S.C.R. 1, 10 (Can.) (granting separate corporate personality except where the company is “a mere agent” or “puppet” of its controlling shareholder); *Salomon v. Salomon & Co.*, [1897] A.C. 22, 42 (H.L.) (appeal taken from Eng.) (U.K.) (holding that corporations possess separate legal personality from their creators and controlling shareholders); *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886) (in which the U.S. Supreme Court stated that it “[did] not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to . . . corporations. We are all of [the] opinion that it does”).

<sup>10</sup> See, e.g., *Company Law* (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 1993, effective Jan. 1, 2006), art. 3, translated in CHINA LAWS FOR FOREIGN BUSINESSES - BUSINESS REGULATION ¶ 13-518 (2005) (P.R.C.) (providing that a company organized pursuant to Chinese law is “an enterprise legal person which owns independent legal person property and enjoys legal person property rights”); COMPANY LAW art. 7, ¶ 6 (1995) (Indon.) (granting limited liability companies status as legal entities but not explicitly characterizing them as separate persons); Shōhō [Commercial Code], Law No. 48 of 1899, as amended, art. 54 (Japan); Minpō [Civil Code], Law No. 89 of 1896, as amended, art. 43 (Japan) (defining companies as juridical persons whose legal capacity must be considered pursuant to the Civil Code, which in turn grants rights and imposes duties upon such persons).

<sup>11</sup> See, e.g., *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1988*, No. 7, Item 785, art. 2(2-3) (providing that a limited responsibility society formed pursuant to Russian law is a juridical person from the moment of its government registration and possesses civil rights “necessary for the effectuation of any types of activity not prohibited by Federal laws if this is not contrary to the subject and purposes of activity specifically limited by the charter of the society”); Ioanna G. Anastassopoulou, *Public Company Law in Greece*, in CORPORATIONS AND PARTNERSHIPS 27, 46 (Kluwer L. Int'l ed., 1992) (discussing the separate personality and rights of the public company limited by shares (anonymi etairia)); Józef Frackowiak, *Public Company Law in Poland*, in CORPORATIONS AND PARTNERSHIPS 29 (Kluwer L. Int'l ed., 1996) (discussing the separate personality and rights of the share company (spółka akcyjna) and the limited liability company (spółka z ograniczoną odpowiedzialnością)); Koen Geens, *Public Company Law in Belgium*, in CORPORATIONS AND PARTNERSHIPS 59 (Kluwer L. Int'l ed., 1997) (discussing the separate personality and rights of the public company limited by shares (naamloze vennootschap or société anonyme)); Carl Henström, *Public Company Law in Sweden*, in CORPORATIONS AND PARTNERSHIPS 34 (Kluwer L. Int'l ed., 1995) (discussing the separate personality and rights of the public company limited by shares (aktiebolaget)); Ünal Tekinalp, *Public Company Law in Turkey*, in CORPORATIONS AND PARTNERSHIPS 40 (Kluwer L. Int'l ed., 1994) (discussing the separate personality and rights of commercial associations, including companies limited by shares, partnerships with limited liability, general and limited partnerships, and partnerships limited by shares).

<sup>12</sup> See, e.g., *Ley General de Sociedades Mercantiles [Business Organizations Law]*, arts. 84-89, as amended, *Diario Oficial de la Federación [D.O.]*, 6 de Juno de 1992 (Mex.) (granting *sociedades anónimas* separate legal existence from their shareholders, directors, and managers).

<sup>13</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Towards operationalizing the ‘protect, respect and remedy’ framework*, ¶ 57, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).

<sup>14</sup> Larry Cاتا Backer, *Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 306-07 (2006). See also Paul Redmond, *Transnational Enterprise and Human Rights Options for Standard Setting and Compliance*, 37 INT’L LAW. 69, 73 (2003) (stating “[c]orporate law does not explicitly address the problem of corporate compliance with human rights standards; indeed its systemic orientation aggravates the problem of standard setting and compliance”).

<sup>15</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, intro. ¶ 4, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

<sup>16</sup> U.N. Doc. A/HRC/8/5, *supra* note 1, ¶¶ 24, 56; Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Human Rights Impact Assessments - Resolving Key Methodological Questions*, ¶ 10, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/4/74 (Feb. 5, 2007).

<sup>17</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, intro. ¶ 3.

<sup>18</sup> U.N. Doc. A/HRC/11/13, *supra* note 13, ¶ 49.

<sup>19</sup> U.N. Doc. A/HRC/8/5, *supra* note 1, ¶¶ 56-59.

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- <sup>20</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, annex ¶¶ 16-17; U.N. Doc. A/HRC/11/13, *supra* note 13, ¶ 49.
- <sup>21</sup> This value creation provides transnational corporations with a competitive advantage through opportunities to increase profitability and enhance corporate reputation and stakeholder relations (such as shareholder confidence, customer loyalty, employee performance and community trust).
- <sup>22</sup> U.N. Doc. A/HRC/8/5, *supra* note 1, ¶ 53.
- <sup>23</sup> *Id.* ¶ 53.
- <sup>24</sup> Memorandum from Martin Lipton & Kevin S. Schwartz of Wachtell, Lipton, Rosen & Katz, A United Nations Proposal Defining Corporate Social Responsibility for Human Rights 3 (May 1, 2008), *available at* [http://amlawdaily.typepad.com/amlawdaily/files/wachtell\\_lipton\\_memo\\_on\\_global\\_business\\_human\\_rights.pdf](http://amlawdaily.typepad.com/amlawdaily/files/wachtell_lipton_memo_on_global_business_human_rights.pdf).
- <sup>25</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Further steps toward the operationalization of the 'protect, respect and remedy' framework*, ¶ 55, *delivered to the Human Rights Council and the General Assembly*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010); U.N. Doc. A/HRC/11/13, *supra* note 5, ¶ 48.
- <sup>26</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, annex ¶ 11.
- <sup>27</sup> *Id.* ¶ 23.
- <sup>28</sup> *Id.* ¶ 19.
- <sup>29</sup> U.N. Doc. A/HRC/11/13, *supra* note 13, ¶ 49.
- <sup>30</sup> U.N. Doc. A/HRC/8/5, *supra* note 1, ¶ 60.
- <sup>31</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, annex ¶ 16(a-e).
- <sup>32</sup> U.N. Doc. A/HRC/14/27, *supra* note 25, ¶ 56.
- <sup>33</sup> Donald L. McCabe et al., *The Influence of Collegiate and Corporate Codes of Conduct on Ethics-Related Behavior in the Workplace*, 6 BUS. ETHICS Q. 461, 471 (1996); Mark J. Somers, *Ethical Codes of Conduct and Organizational Context: A Study of the Relationship Between Codes of Conduct, Employee Behavior and Organizational Values*, 30 J. BUS. ETHICS 185, 189-91 (2001).
- <sup>34</sup> Lawrence B. Chonko & Shelby D. Hunt, *Ethics and Marketing Management: An Empirical Examination*, 13 J. BUS. ETHICS 339, 356 (1985); Margaret A. Cleek & Sherry L. Leonard, *Can Corporate Codes of Ethics Influence Behavior?*, 17 J. BUS. ETHICS 619, 622 (1998).
- <sup>35</sup> Michael Schwartz, *The Nature of the Relationship Between Corporate Codes of Ethics and Behaviour*, 32 J. BUS. ETHICS 247, 248 (2001).
- <sup>36</sup> *See generally* WORLD BANK, OPERATIONAL MANUAL (2011) (containing operational policies, bank procedures and staff instructions regarding social and environmental sustainability); INT'L FIN. CORP., POLICY ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY (2011).
- <sup>37</sup> CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM, STATEMENT OF INVESTMENT POLICY ¶¶ 1 4(A) (2009).
- <sup>38</sup> Steve Schueth, *Socially Responsible Investing in the United States*, 43 J. BUS. ETHICS 189, 191 (2003).
- <sup>39</sup> Geoffrey Brewer, *Consumers Want Brands and Social Responsibility*, 152 SALES & MARKETING MGMT. 76, 76 (2000).
- <sup>40</sup> Joshua Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 288-89 (2005).
- <sup>41</sup> Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneous Building a Better Business Reputation*, 40 CAL. W. INT'L L.J. 55, 73-74 (2009); Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 460 (2004).
- <sup>42</sup> Dhooge, *supra* note 41, at 460.
- <sup>43</sup> Backer, *supra* note 14, at 287.
- <sup>44</sup> U.N. Doc. A/HRC/11/13, *supra* note 13, ¶ 61.
- <sup>45</sup> U.N. Doc. A/HRC/8/5, *supra* note 1, ¶ 61.
- <sup>46</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, annex ¶¶ 17-21.
- <sup>47</sup> U.N. Doc. A/HRC/11/13, *supra* note 13, ¶ 51.
- <sup>48</sup> *Id.* ¶ 81.
- <sup>49</sup> U.N. Doc. A/HRC/14/27, *supra* note 25, ¶ 70.
- <sup>50</sup> *Id.* ¶ 73.
- <sup>51</sup> U.N. Doc. A/HRC/11/13, *supra* note 13, ¶ 71.
- <sup>52</sup> U.N. Doc. A/HRC/14/27, *supra* note 25, ¶ 81.
- <sup>53</sup> *Id.* ¶ 85.
- <sup>54</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, annex ¶ 13.
- <sup>55</sup> *Id.* annex ¶ 13.
- <sup>56</sup> *Id.* annex ¶ 23.
- <sup>57</sup> *Id.* annex ¶ 19.
- <sup>58</sup> *Id.*

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- <sup>59</sup> *Id.*
- <sup>60</sup> *Id.* intro. ¶ 15.
- <sup>61</sup> Tarek F. Maassarani, et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L.J. 135, 159 (2007).
- <sup>62</sup> Principle One of the Global Compact provides, in part, that "the business community has a responsibility to uphold human rights both in the workplace and more broadly within its sphere of influence." U.N. Global Compact, *Principle One*, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html>.
- <sup>63</sup> Sarbanes Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).
- <sup>64</sup> Robert C. Bird, *Pathways of Legal Strategy*, 14 STANFORD J. L., BUS. & FIN. 1, 30 (2008); Stephen Wagner & Lee Dittmar, *The Unexpected Benefits of Sarbanes-Oxley*, HARV. BUS. REV. 5-6 (Apr. 2006).
- <sup>65</sup> Mark B. Taylor, et al., *Due Diligence for Human Rights: A Risk-Based Approach* 3 (Harvard Univ., Corporate Social Responsibility Initiative, Working Paper No. 53, 2009).
- <sup>66</sup> *Id.* at 8.
- <sup>67</sup> *Id.*
- <sup>68</sup> Anna Triponel, *Business & Human Rights Law: Diverging Trends in the United States and France*, 23 AM. INT'L L. REV. 855, 886 (2008).
- <sup>69</sup> Christopher L. Avery, *Business and Human Rights: Five Common Misconceptions* 1 (1997), available at <http://198.170.85.29/Misconceptions.htm>.
- <sup>70</sup> Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 78-81 (2005).
- <sup>71</sup> William T. Allen, *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 452 (2002).
- <sup>72</sup> FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 93 (1991).
- <sup>73</sup> Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 636 (2007).
- <sup>74</sup> David Rosenberg, *Galactic Stupidity and the Business Judgment Rule*, 32 J. CORP. L. 301, 312-13 (2007).
- <sup>75</sup> U.N. Doc. A/HRC/8/5, *supra* note 1, ¶ 93.
- <sup>76</sup> ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 166-67 (2006).
- <sup>77</sup> Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 468 (2007).
- <sup>78</sup> U.N. Doc. A/HRC/8/5, *supra* note 1, add. 1.
- <sup>79</sup> U.N. Doc. A/HRC/11/13, *supra* note 13, ¶ 49.
- <sup>80</sup> U.N. Doc. A/HRC/14/27, *supra* note 25, ¶ 83.
- <sup>81</sup> Criminal Code Act, 1995, c. 12.3(2) (c-d) (Austl).
- <sup>82</sup> U.N. Doc. A/HRC/8/5, *supra* note 1, ¶¶ 29-32.
- <sup>83</sup> *Id.* ¶ 29.
- <sup>84</sup> CHRISTOPHER S. DAWSON, *LEADING CULTURE CHANGE: WHAT EVERY CEO NEEDS TO KNOW* (2010); Jane Bryson, *Dominant, emergent, and residual culture: the dynamics of organizational change*, 21(6) J. ORGANIZATIONAL CHANGE MGMT. 743 (2008); Andrew Leigh, *Sustaining Culture Change*, 21(1) TRAINING & MGMT. DEV. METHODS 101 (2007).
- <sup>85</sup> EDGAR H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 225-44 (3d ed. 2007).
- <sup>86</sup> U.N. Doc. A/HRC/8/5, *supra* note 1, ¶ 62.
- <sup>87</sup> INT'L BUS. LEADERS FORUM, 'HUMAN RIGHTS: IT IS YOUR BUSINESS' 5 (2005).
- <sup>88</sup> *Id.*
- <sup>89</sup> *Id.*
- <sup>90</sup> U.N. Doc. A/HRC/4/74, *supra* note 16, ¶¶ 11-22.
- <sup>91</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, intro. ¶ 15; U.N. Doc. A/HRC/14/27, *supra* note 25, ¶ 82; U.N. Doc. A/HRC/11/13, *supra* note 13, ¶ 73.
- <sup>92</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, intro. ¶ 5.
- <sup>93</sup> U.N. Doc. A/HRC/14/27, *supra* note 25, ¶ 82.
- <sup>94</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, annex.
- <sup>95</sup> *Id.* annex ¶ 14.
- <sup>96</sup> *Id.* annex ¶ 21.
- <sup>97</sup> Taylor, *supra* note 65, at 18.
- <sup>98</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, annex, ¶ 17; U.N. Doc. A/HRC/11/13, *supra* note 13, ¶ 83.
- <sup>99</sup> Lucien J. Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 EMORY INT'L L. REV. 456, 496-98 (2008).
- <sup>100</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, annex, ¶ 17; U.N. Doc. A/HRC/14/27, *supra* note 25, ¶ 86.

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<sup>101</sup> U.N. Doc. A/HRC/17/31, *supra* note 15, intro. ¶ 13.