

14th Informal ASEM Seminar on Human Rights

Human Rights and Businesses

Concept Paper

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According to a recent Global Trends report, 40 of the world's 100 largest economic entities in 2012 were business corporations¹. Given their economic clout, the influence of businesses also extends to socio-political issues, and increasingly, their role and accountability in human rights protection and promotion has come under examination.

Under international law, States are the only recognised legal bearers of human rights obligations and consequently only they can be held accountable for human rights violations. However, the preamble of the Universal Declaration of Human Rights calls on "every individual and every organ of society" to promote respect for these rights and to secure their universal and effective recognition and observance². And as Prof. Louis Henkin noted "'Every individual and every organ of society' excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to all of them"³.

Although discussions on business and human rights in international law can be traced back to the 1980s⁴, earnest debate on the topic began when the United Nations Sub-Commission for the Promotion and Protection of Human Rights' working group to study and report on human rights and business⁵ produced a report in 2003 titled "*Norms on the Responsibilities of Transnational and Other Business Enterprises with Regard to Human Rights*" which, although it was never formally endorsed by the UN⁶, had significantly positive effects.

First, it promoted a growing consensus that because business firms had the power to affect human rights, they should have direct human rights

responsibilities. Second, it resulted in a series of recommendations that eventually led the UN Secretary General to appoint John Ruggie as the ‘Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ in 2005, to take up the issue of the human rights responsibilities of transnational corporations and other business enterprises.

In 2008, the UN Human Rights Council (UNHRC) unanimously accepted the Special Representative’s proposed ‘Protect, Respect and Remedy’ policy framework and endorsed it in 2011 as the UN Guiding Principles on Business and Human Rights. In his report, the Special Representative noted that the guiding principles were applicable to all States and to all business enterprises and that “nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights”⁷. The 31 principles rest on three key values: *the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and greater access by victims to effective remedies*⁸. To promote the effective and comprehensive dissemination and implementation of the Guiding Principles, the UNHRC also established a working group on the issue of human rights and transnational corporations and other business enterprises⁹.

State duty to protect

Under international human rights treaties, States have the positive responsibility to ensure the rights of all persons under their jurisdiction (or within their territories) are not violated and as such ensure the observance of human rights by all third parties¹⁰. While States are not held responsible for human rights abuse committed by private enterprises per se, they could be in breach of their international legal obligations “where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse”¹¹. However, when it comes to legislation, there is no agreement as to which branch of law should be the test a company’s violation of human rights (domestic criminal law; public international law; tort or company law?) and it is not clear if the State’s ‘duty to protect’ includes adjudicating extra-territorial violations of trans-national corporations¹².

In order to provide a conducive environment for human rights, States may promote certain measures to regulate business activities¹³. In the European Union's (EU) 2012 action plan to implement the new *EU Strategic Framework on Human Rights and Democracy*, Article 25 supports the implementation of the UN Guiding Principles on Business and Human Rights¹⁴. The EU has plans to improve the functioning of the internal market by seeking transparency and disclosure on human rights aspects (amongst others) by European companies¹⁵. In Southeast Asia, Corporate Social Responsibility (CSR) has been incorporated in the Association of Southeast Asian Nations' (ASEAN's) 2009 *Socio-Cultural Community Blueprint* as part of its aim to engage the private sector in the development of the ASEAN community¹⁶. CSR is also included in the ASEAN Intergovernmental Commission on Human Rights' (AICHR's) five-year work plans and is one of the topics on which AICHR will conduct a thematic study - in 2012 it held its first coordination meeting on the topic¹⁷.

State owned or controlled businesses are also subject to the corporate responsibility to respect human rights and often are in the best position to ensure that the relevant policies and guidelines for human rights protection are implemented. Furthermore, when States decide to contract out their public functions to private enterprises, they do not relinquish their international human rights obligations and can be held responsible for a private company's actions – especially when private security firms are hired for detention and immigration services¹⁸. The 2008 *Montreux Document* which was finalised by 17 States affirms the obligations and responsibilities of States¹⁹ in relation to private military and security companies. Although not legally binding, the Document provides recommendations and a good practice toolkit to assist States in establishing oversight and control mechanisms over private military and security companies²⁰.

While the manner in which companies manage their supply chains²¹ is also increasingly scrutinised, the ability of States to support (and not just advocate) responsible supply chain management needs to be addressed, especially in the informal sector where work may be sub-contracted to home workers and difficult to monitor for human rights observance²².

Competitive production costs are also a challenge in relation to responsible supply chain management, especially when it comes to living wages²³. While anti-competitive business practices, import barriers and domestic subsidies all play

their share in distorting price levels, price competitiveness remains a crucial element for financial success of companies. Even though countries may push for better access to markets and fair trade, trade agreements remain sensitive in relation to responsible supply chain management because in order to retain their competitive position, countries have to “balance the desire to provide low production costs with the duty to protect the right of adequate standards of living for workers”²⁴.

While the State’s duty to protect is undisputed, achieving policy coherence within and between different state institutions remains to be achieved. As the Special Representative has stated, “[t]he most prevalent cause of legal and policy incoherence is that departments and agencies which directly shape business practices – including corporate law and securities regulation, investment, export credit and insurance, and trade – typically work in isolation from, and uninformed by, their Government’s own human rights obligations and agencies”²⁵. Such horizontal policy coherence also needs to be matched by vertical policy coherence²⁶ between national and international law, particularly to enhance peer learning and to enhance capacity building on these issues at the international level²⁷.

Corporate (social) responsibility to respect

The corporate responsibility to protect human rights is “a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights”²⁸. Corporate responsibility has been defined by the European Commission (EC) as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”²⁹. In recent years, there have been an increasing number of large multinational companies who have begun to publicly acknowledge responsibility for their corporate actions – reporting on corporate responsibility has increased with about 5,800 reports in 2010 compared to less than 50 in the early 1990s³⁰.

As part of the efforts to regulate corporate behaviour, there have been many initiatives introduced which provide voluntary codes and industry specific guidelines to promote responsible business practices³¹ –the 2002 United Nations Global Compact is one of the best known voluntary frameworks which

elaborates 10 principles in human rights, labour, environment and anti-corruption to which participating companies should adhere.

Like the concept of Corporate Social Responsibility (CSR) itself, all these codes and initiatives are evolving; while they do offer several advantages and can be a powerful regulation tool when adopted by companies, they do suffer from their limitations – being voluntary, their adoption cannot be enforced³²; being sector specific, they have limited application; some may lack formal compliance mechanisms and may have no means to monitor performance.

Very often such initiatives may fail to fully inform or translate the international human rights obligations on which they are based (since international human rights instruments are targeted mainly to States) thereby making the full extension of these obligations to corporations, problematic³³. Furthermore, their observance by Small and Medium-sized Enterprises (SMEs) is challenging - while these companies have less capacity and more informal management structures, they still can have a severe impact on human rights.

Voluntary codes and initiatives to improve conditions in supply chain management ³⁴ also exist but they too, prove insufficient to deal with transparency and non-compliance with human rights standards in the supply chain. Although all actors in the supply chain are expected to follow the same standards, in practice transparency beyond first tier suppliers is difficult to monitor (especially on issues of child labour and in sectors such as the garment industry where work may be contracted to smaller units). Workers, SMEs or suppliers further down the chain may be disadvantaged by lacking knowledge, funds and access to relevant market information³⁵.

Non-compliance in supply chains also often takes place in countries where human rights standards are not guaranteed at the national scale or where enforcement remains weak (especially in relation to labour rights, migrant labour, child labour and living wages); in such situations even though reports emerge of companies exploiting weak regulation, their responsibilities towards their human rights obligations do not diminish³⁶.

The rights of indigenous groups have been protected in international human rights standards (for example, see the UN Declaration on the Rights of Indigenous Peoples and the ILO's convention number 107 and 169) but the focus has been

on State responsibilities and not much on the responsibilities of other actors. Nonetheless, many of these standards have relevance to the conduct of business activities, especially for lands traditionally owned or controlled by indigenous groups³⁷. Additionally, newer guidelines such as the World Bank's Operational Policy on Indigenous people (OP 4.10), International Financial Corporation's Performance standard PS-7, Convention on Biological Diversity's 2004 Akwé: Kon Guidelines impose responsibilities on corporations to ensure that both domestic and international indigenous standards are being observed before they commence any business activity in an indigenous community. The International Council on Mining and Metals has released a good practice guide for mining companies to address the impact of their activities on indigenous communities³⁸.

International efforts such as the *Global Sullivan Principles*, the *Global Reporting Initiative*, and *Social Accountability 8000* encourage companies to be transparent in their human rights impact assessment and reporting to their stakeholders and social partners. Due diligence is an important aspect of human rights impact assessment as it encourages companies to undertake regular assessments and include human rights risk assessment into company decision-making. Increasingly there have been calls for policy coherence in business enterprises as well, to link their human rights responsibilities to their wider organisational policies and practices and also for their other business activities³⁹. In 2013, the Human Rights Resource Centre for ASEAN, together with Shift and Mazars, launched the Reporting and Assurance Frameworks Initiative (RAFI) which is a global, non-proprietary, initiative to develop public reporting and assurance frameworks based on the UN guiding principles⁴⁰.

Greater access to effective remedies

Providing access to remedy is closely tied to State responsibility to protect, reinforced in several international and regional human rights instruments which all emphasise the need for States to “conduct prompt, thorough and fair investigations; provide access to prompt, effective and independent remedial mechanisms, established through judicial, administrative, legislative and other appropriate means, impose appropriate sanctions, including criminalizing conduct and pursuing prosecutions where abuses amount to international crimes; and provide a range of forms of appropriate reparation, such as compensation, restitution, rehabilitation, and changes in relevant laws”⁴¹. The OECD Guidelines for Multinational Enterprises, provide government-backed standards for responsible conduct for multinational enterprises operating in or from OECD

member countries. Although not legally binding, the OECD guidelines are unique in providing a dispute resolution mechanism for investigating and resolving complaints about corporate misconduct⁴²; and reach further than just OECD countries with ten additional non-OECD countries adhering to them.

In particular, special attention should be paid to vulnerable groups (including women, young people, indigenous communities and other minorities) to ensure that they have access to remedies and justice. Access to remedy can be provided by establishing State-based grievance mechanisms (judicial and non-judicial⁴³) which can be supplemented “by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms”⁴⁴; States should facilitate public awareness and knowledge about such mechanisms and provide support where needed.

Access to remedy can also be provided at the company level but is dependent on company goodwill and other contextual factors such as national policies and legislation⁴⁵. In instances where workers’ involvement mechanisms are established, success is dependent on building capacity of workers and getting them to be actively involved⁴⁶. Trade Unions are also important institutions for addressing rights violations but they can face the same difficulties.

Constraints on access to remedy depend on *who can access such mechanisms* - in terms of the *legal barriers that certain groups may face* (for example, migrant workers may be excluded from the same level of legal protection) and also in terms of the restrictions placed on which persons have the legal standing to seek remedy; *at which level abuses take place* (judicial mechanisms may not have the mandate to address extra-territorial violations that take place throughout a company’s supply chain); *how grievance mechanisms are designed* (lack of awareness, trust and transparency, lack of proper representation, inefficient timeframes for redress, high costs, inadequate compensation and restitution, fear of reprisal are all factors that may hinder efficient access to remedy)⁴⁷. Mechanisms may be specific in scope and in what type of complaints can be brought forward⁴⁸.

Multi-stakeholder collaboration

Grassroot activists and the media have put corporate practices under greater scrutiny so that companies risk reputation by not complying with fair practices. However, while ‘name and shame’ approach may have some advantages⁴⁹, increasingly dialogue and constructive engagement between all stakeholder

groups is being followed and several human rights organisations have also entered into dialogue with businesses⁵⁰. Many UN agencies have established their own multi-stakeholder partnerships to improve business practices in different sectors⁵¹.

The UN Guiding Principles recognise the importance of multi-stakeholder cooperation (especially in providing access to remedy), and urge companies to engage in external consultations “with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives”⁵². A growing number of business groups support community-oriented development initiatives both at the local and international level⁵³. In developing countries where domestic and foreign companies have become influential actors in development⁵⁴ questions about the manner in which the private sector can best contribute to development in the post-2015 development agenda are being raised⁵⁵. Private investors⁵⁶ and company shareholders⁵⁷ are also increasingly being recognised as actors who can influence change in the manner in which business is conducted.

National Human Rights Institutions (NHRIs) have an important role in reporting and monitoring human rights violations by non-state actors as well as providing guidance on human rights observance practices⁵⁸. The Danish Institute for Human Rights has international renown for its Human Rights and Business Project which offers a number of services including a web-based self-assessment tool for companies on human rights compliance; business training courses for both companies and NHRIs, advice to improving codes and a human rights hotline providing advice to companies who may not have in-house human rights advisory services. Many NHRIs also exchange information with each other – for example, the South Korean and Philippine NHRIs have a verbal agreement to alert each other where an issue arises in relation to migrant workers. A similar agreement also exists between the Philippines and Malaysian NHRIs.

The 14th Informal ASEM Seminar on Human Rights will be looking at key aspects of business and human rights, especially with regards to the situation in ASEM member countries and regionally in Asia and Europe. The four working group topics are:

1. *State Duty to Protect Human Rights Against Violations by Businesses*
2. *Corporate Responsibility and its Contribution to Human Rights Implementation*
3. *Monitoring, Reporting and Access to Remedies*
4. *Multi-stakeholder cooperation*

Cross-Cutting Questions:

1. What are the limits to the responsibilities of corporations under international law and international criminal law? Are there regional differences about the role of businesses in society (eg, are there different understandings of the concept of corporate citizenship?)
2. At the international level, what can be done to make CSR and human rights protection a bigger consideration in trade agreements and practices? What is the role of organisations such as the WTO and ILO in this aspect?
3. How can policy coherence on business practice and human rights protection be enhanced at the national and international level? What role and support can regional mechanisms and institutions provide in policy coherence?
4. Apart from reputational damage, what is the actual risk to companies for poor practice in respect to human rights standards?
5. What are the different approaches required for different industries and business sectors (eg, extractive industries, textiles, media, service providers, financial institutions etc) when it comes to human rights protection (in the context of each of the 4 working group topics)?
6. What considerations need to be kept in mind for vulnerable groups such as women, LGBT, children and indigenous communities as well as ethnic and religious minorities?
7. Which organisations/institutions have the legitimacy to decide on business standards?

WG1: State Duty to Protect Human Rights Against Violations by Businesses

1. What measures, both preventive and remedial, can States take to redress human rights abuses by businesses, especially transnational corporations? (successful case-studies, best practices of state protection) At what level? What are the challenges faced by States in this regard? (legal, information, knowledge-sharing, lobby groups etc)
2. What is the State's responsibility in ensuring observance of human rights by its transnational companies (TNCs) in another country, especially if the other country is not party to certain international treaties (or if it doesn't regulate against that particular human rights violation)? What efforts can it undertake to prevent human rights violations by its TNCs?
3. When there is no region-wide enforcement or regulation of company fair practices, how can States improve human rights protection from corporate violation at the regional level?
4. What strategies can be utilised to ensure that States are able to adhere and follow the international labour standards to which they have subscribed?
5. What kind of cooperation is needed between States to ensure that economic production does not infringe upon the human rights of populations in host and home countries? How can States best utilise existing fora such as such the Universal Periodic Review to learn and apply in their own domestic protection duties?
6. What kind of support (both legal and non-legal) could States provide to companies to encourage responsible supply chain management?
7. Due to the nature of Special Economic Zones (SEZs) and their exemption from some federal laws, how do governments improve human rights observance while still maintaining SEZs' purpose and effectiveness?
8. When contracting out State functions, how can States ensure that private firms will respect human rights? What (internationally accepted) training/certification do private contractors need to undergo? What is the collaboration required between states and private security companies at the local, regional and international levels?

WG 2: Corporate Responsibility and its Contribution to Human Rights Implementation

1. How do businesses interpret their human rights obligations, especially on issues where there is no international consensus (for example, while there are standards on minimum wages, there are no standards for living wages⁵⁹ so how do companies determine what constitutes living wages?)? When operating in countries where standard differ from their own home countries, which standards do companies follow?
2. While larger multinational companies often have the resources to include human rights into their company policies, how do SMEs, who often lack financial resources and access to financial assistance, incorporate human rights concerns into their business operations?
3. When local legal standards do not guarantee a minimum of rights, how can companies, especially SMEs, be encouraged and supported to uphold their responsibilities?
4. How can human rights impact be included more frequently/made compulsory in other risk assessment exercises that companies undertake? What should such risk assessments include and how would they measure human rights impact?
5. What support can private businesses receive (from national, regional and international institutions) in understanding and implementing their human rights obligations?
6. With many companies contracting work out to informal supply chains, how can companies monitor rights infringement by subsidiaries – especially in the informal work sector?
7. With whom – and to what extent - does the scope of responsibility lie, in relation to suppliers' practices in the supply chain, given the influence that buyers can have on suppliers?
8. How can social audits of supply chain conditions be improved to address all aspects of labour conditions and not just specific working conditions in production facilities?
9. What have been successful methods for businesses to commit to human rights standards (self-regulation, collaborative initiatives or sectoral initiatives, codes of conduct, reporting obligations, legal undertakings etc)?
10. How can companies translate global human rights principles into internal operating policies? Are they expected to pay attention to certain principles in particular?

WG3: Monitoring, Reporting and Access to Remedies

1. What does 'accountability' mean in the context of non-judicial grievance mechanisms? What role do NHRIs/ombudsmen play in enforcing or monitoring non-judicial mechanisms?
2. What efforts can be undertaken to reduce the legal barriers to access remedy? (eg, In addition to being a vulnerable group, working children may be under-aged and require consent/representation)
3. For company level grievance mechanisms, what scope is there for independent investigation and adjudication, in the context of possible bias? How do States encourage private companies to establish fair grievance mechanisms?
4. What are the different monitoring mechanisms required in those countries where parent companies are based and in those countries where supply chain manufacturing occurs? How can the challenge of providing effective grievance mechanisms for extraterritorial abusive activities of companies be addressed?
5. What role does 'access to information' play in 'access to remedy'? How is this translated into practice (especially since in some countries, access to information laws may be limited to public sector enterprises only)?
6. What collaborative multi-stakeholder initiatives exist to provide access to remedy? What are their advantages as compared to state-based or company-provided remedies?
7. For the informal sector, how do States and parent companies monitor violations? How do workers in the informal sector seek grievance redressal? How do they receive information?
8. Rights abuses can take place throughout the supply chain but it has proven difficult to establish grievance mechanisms at each level. How can these obstacles be overcome?

WG4: Multi-stakeholder cooperation

1. In designing different multi-stakeholder initiatives (such as the Global Compact), which stakeholder has the ultimate authority and responsibility in developing and implementing such guidelines?
2. As States retain their international human rights obligations when they participate in multilateral institutions such as international trade and financial institutions, what support can/do international and multilateral institutions provide to helping them discharge their duties effectively?
3. What are the human rights obligations of International Financial Institutions (IFIs)? Do they merely have to respect human rights and make sure that their activities do not have harmful effects on the enjoyment of rights or do their obligations also entail a duty to protect and even fulfil human rights in certain circumstances? What support can they provide for socially responsible investment?
4. What efforts can be made at the regional and national level to encourage and support businesses to incorporate due diligence components as mentioned in the UN framework, into their operating practices?
5. When it comes to workers' rights, how do the different stakeholders (companies, the ILO and trade unions) engage in an effective social dialogue? How can the capacity of workers be improved so as to take equal ownership of such a dialogue?
6. What is the role of the Unions – national and international? If unions are not legally accepted (or not independent) in the country how can workers organise and “claim” their rights?
7. How can shareholders and consumers improve their influence on businesses to incorporate human rights into their operations? How can companies engage in a collaborative civil dialogue with these stakeholders?
8. To improve their capacity to work with private corporations and business enterprises, what training do NHRIs and Civil Society Organisations (CSOs), especially grassroots organisations, require?
9. At the regional level, what level of cooperation can be extended between NHRI networks to provide information, alerts and guidance on human rights and business? What role do regional organisations such as the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the European Court of Human Rights (ECHR) play in improving capacity of member NHRIs? In improving monitoring of business observance of human rights?
10. In what capacity can local chambers of commerce and other national business associations (such as manufacturers' or exporters' associations) encourage members to be responsible for human rights protection – what support can they offer?

ENDNOTES

¹ Corporate Clout 2013: Time for Responsible Capitalism, <http://www.globaltrends.com/knowledge-center/features/shapers-and-influencers/190-corporate-clout-2013-time-for-responsible-capitalism>

² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), preamble

³ Henkin, Louis, *The Universal Declaration at 50 and the Challenge of Global Markets*, *Brooklyn Journal of International Law*, 25:5, 1999, 17-25, page 25

⁴ See the 1984 draft UN Code of Conduct on Transnational Corporations

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2000.WG.2.WP.1.Add.2.En>

⁵ The working group was set up in 1998 to study and report on human rights and business.

⁶ At the core of the 14 norms was the proposal that transnational corporations and other business entities should be brought directly under the ambit of international human rights law, humanitarian law, international labor law, environmental law, anti-corruption law and consumer protection law (Hillmanns 2003: 1070). The Report called for expanding international human rights obligations to include transnational corporations as well. Not surprisingly, the report aroused strident opposition on the part of a significant section of the business community and governments (Arnold 2010).

⁷ Ruggie, John, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Office of the High Commissioner on Human Rights, 2011

⁸ http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁹ Furthermore, the UNHRC also set up a Forum on Business and Human Rights (under the Working Group's guidance) to "discuss trends and challenges in the implementation of the Guiding Principles [on Business and Human Rights] and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices." (paragraph 12, UNGA Resolution A/HRC/RES/17/4). UNGA Resolution A/HRC/RES/17/4, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

¹⁰ For example, see the Convention for the Elimination of Racial Discrimination; the Convention for the Elimination of Discrimination Against Women; Convention of the Rights of Child and its Optional Protocol (OPSC); Convention on the Rights of People with Disabilities; Convention on the Rights of Migrant Workers

¹¹ Ruggie, John, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Office of the High Commissioner on Human Rights, 2011

¹² France, in its 2004 legal reforms, extends criminal liability to all legal entities under French law, including to those crimes committed outside its territories. For more details, see H. Ascensio, *'Extraterritoriality as an Instrument'*, Contribution to the work of the UN Secretary-General's Special Representative on human rights and transnational corporations and other

businesses, available at http://www.univ-paris1.fr/fileadmin/IREDES/Contributions_en_ligne/H.ASCENSIO/Extraterritoriality_Human_Rights_and_Business_Enterprises.pdf.

Another example is the American Alien Tort Claims Act, (ATCA) is a federal statute that provides courts with jurisdiction to consider all causes where an alien sues for a tort only in violation of the law of nations or a treaty of which America is a party. Advisory Council of Jurists (ACJ) *Reference on Human Rights, Corporate Accountability and Government Responsibility*, The 13th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Kuala Lumpur, 27-31 July 2008 –Part 2: Supplementary Paper

¹³For example, in the USA, the Dodd-Frank Act required US-listed companies to disclose payments to governments and other operations. In France, under the Grenelle 2 Act, the government is required to submit a three-yearly report to Parliament on how firms are fulfilling their reporting requirement and on action to "promote corporate social responsibility" taken at national, European and international level. In Indonesia, CSR has been introduced in three laws: the Investment Law (Law No. 25/2007); the Limited Liability Company Law (Law No. 40/2007); and the State-Owned Enterprises Law (Law No. 19/2003).

More details available at <http://csr-asia.com/csr-asia-weekly-news-detail.php?id=10419>. For a comprehensive list of CSR disclosure efforts by national governments and stock exchanges, see

<http://www.stakeholderforum.org/fileadmin/files/Government%20disclosure%20efforts.pdf>

¹⁴ Identifying the responsibilities of both the European Commission (EC) and the member states, the action plan called for the EC to prepare human rights guidance for companies in three sectors (oil & gas; information communication technology; and employment & recruitment agencies) and for small and medium-sized enterprises, and to also report on EU priorities for the effective implementation of the Guiding Principles; the plan called for member states to develop national plans for the implementation of the Guiding Principles.

The 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy, document 11855/12 is available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf. The EC's sector-specific human rights guides can be found at http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm

¹⁵Lambrinidis, S. (2013), Keynote Address, UN Forum on Business & Human Rights, Geneva, 4-5 December 2012.

¹⁶ See section C.3 "Promoting Corporate Social Responsibility (CSR)" in the ASEAN Socio-Cultural Community Blueprint, available at <http://www.asean.org/archive/5187-19.pdf>

¹⁷ CSR has also been added to the revised work plan (2009-2015) of the Initiative for ASEAN Integration (IAI) which aims to narrow the development divide and enhance ASEAN's competitiveness as a region. In addition to providing training on CSR concepts and their effective implementation, the work plan intends to "Develop and implement a comprehensive program to build capacity of CLMV countries [Cambodia, Laos, Myanmar and Vietnam] for effective implementation of international best practices on corporate social responsibility.

See C3. Promoting Corporate Social Responsibility (CSR), Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan 2 (2009-2015), available at http://aseansummit.mfa.go.th/14/pdf/Outcome_Document/IAI%20Strategic%20Framework%20-%20Work%20Plan%202009-2015%5B1%5D.pdf

¹⁸ Human Rights Committee, Communication No. 1020/2001, 78th session, UN Doc CCPR/C/78/D/1020/2001 (2003)

¹⁹ The Montreux Document highlights the responsibilities of 3 types of States - Contracting States (those States that hire private security and military companies), Territorial States (those States on whose territory these companies operate) and Home States (States in which the companies are based).

²⁰ Full text with explanatory notes is available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf

²¹ The International Chamber of Commerce (ICC) defines supply chain responsibility (ICC 2007:2): "as a voluntary commitment by companies to manage their relationships with suppliers in a responsible way. As a result of their purchasing activities, companies may have some opportunities to influence constructively their suppliers' social and environmental performance...Whatever mechanism is used, the most effective way to achieve sustained improvement over time is through the development of a long-term collaborative relation between corporate buyers and their suppliers, through which suppliers can internalize change by participating in the shaping of social and environmental performance objectives, based on their own perception of their business capacity and needs."

²² This is especially true for child labour. As Opijnen and Oldenziel point out in the context of the EU where abolishment of child labour is high on the political agenda, "the further back in the supply chain the child labour occurs, the more difficult it is to detect by EU-based companies. It remains difficult to monitor and control the practices of entities at the roots of the supply chain, also when companies require suppliers to sign their supplier's code of conduct". Opijnen, Marjon van and Joris Oldenziel 2010: Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies.

²³ Ibid

²⁴ Ibid

²⁵ Report of the 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, United Nations Human Rights Council - A/HRC/14/27, 9 April 2010

²⁶ For more information, see United Nations (2011), Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, HR/PUB/11/04

²⁷ Report of the 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, United Nations Human Rights Council - A/HRC/11/13, 22 April 2009.

²⁸ Ruggie, John, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, Office of the High Commissioner on Human Rights, 2011

²⁹ In 2011, the EC published a new policy on Corporate Social Responsibility (CSR) in which it put forward a new, simpler definition of CSR as “the responsibility of enterprises for their impacts on society”. In order to meet their responsibilities, enterprises “*should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders*”.

Please see European Commission (2011), ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, COM(2011) 681 final, http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5511

³⁰ Lucci, P (2012), Post-2015 MDGs: What role for business? Overseas Development Institute. As another example, in 2006, there was only one company in China (State Grid) that filed a CSR report. This figure rose to 1,722 companies in 2012. <http://www.syntao.com/Uploads/file/%E5%95%86%E9%81%93%E6%99%BA%E6%B1%87%E7%AC%AC%E4%B8%80%E6%9C%9F%E5%B0%81%E9%9D%A2%E9%93%BE%E6%8E%A5%E7%89%88.pdf>

³¹ For example, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977); ILO Declaration on Fundamental Principles and Rights at Work (1998); OECD Guidelines for Multinational Enterprises (2000); United Nations Global Compact (2000); the Kimberley Process Certification Scheme (2000); The Extractive Industries Transparency Initiative (2002); United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (2003); Voluntary Principles on Security and Human Rights (2007); Equator Principles (2006); International Organization for Standardisation (ISO) certification schemes such as the recent ISO2006

³² This can be particularly challenging for business codes of conduct that call for the respect of cultural rights and non-discriminatory labour practices. In France, the Cultural Diversity Charter (*Charte de la Diversité*) as signed by over 2000 French companies requires signatories to ensure the promotion and the equitable respect of cultural diversity in their labour force; however, being a non-legal document, compliance is not legally binding on members.

³³ Preuss and Brown’s study in 2012 shows that just over half (57.1%) of the 98 firms in the FTSE 100 index address human rights in either a separate human rights policy or in another CSR tool, such as a code of conduct or a CSR policy. Notably, almost a third (31.6%) of all firms adopted at least one CSR tool but do not discuss human rights in these. In addition, the content of the human rights policies was also found to be rather shallow, as of the 37 rights in the UN Declaration only six are addressed in half or more of the documents by the FTSE 100 firms. Preuss and Brown (2012), *Business policies on human rights: an analysis of their content and prevalence among FTSE 100 firms*, *Journal of Business Ethics*, Sep (I) 2012, Volume: 109 Issue: 3

³⁴ Some of the standards include the SA8000, the Business Social Compliance Initiative (BSCI), FLO Fairtrade Standards, the Ethical Trade Initiative (ETI), the International Council of Toy Industries (ICTI), Worldwide Responsible Apparel Production (WRAP), Electronic Industry Code of Conduct (EICC), the international Council on Mining and Metals (ICMM), Fair Wear Foundation (FWF), Worldwide Responsible Apparel Production (WRAP), the Better Cotton Initiative (BCI), the Better Sugar Cane Initiative (BSI), the Workers' Rights Consortium, the Electronic Industry Citizen Coalition, the Rainforest Alliance and Utz Certified

³⁵ Opijnen, Marjon van and Joris Oldenziel 2010: Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies.

³⁶ See, Hahn (2012), Corporate citizenship in developing countries: Conceptualisations of human-rights-based evaluative benchmarks. African Journal of Business Ethics 2012;6:30-38, Available from: <http://www.ajobe.org/text.asp?2012/6/1/30/104700>

³⁷ See articles 25-29 of the 2007 UN Declaration on the Rights of Indigenous Peoples.

³⁸ See <http://www.icmm.com/publications/indigenous-peoples-and-mining-good-practice-guide>

³⁹ For example, the International Integrated Reporting Council (IIRC) is currently working on proposals for an International Integrated Reporting Framework that will link a company's strategy, governance and performance to its social and environmental context, in one report. <http://www.theiirc.org/>

⁴⁰ The frameworks developed by RAFI will be "non-proprietary and publicly available to all companies and assurance providers to use in their work. They are intended to be relevant to, and viable for, all companies and auditors/assurance providers in any region, and to dovetail with existing reporting initiatives". Detailed information can be found at <http://business-humanrights.org/media/documents/rafi-framing-document-2013.pdf>

⁴¹ UNHRC (2009), Promotion of all Human Rights, Civil Political, Economic, Social and Cultural Rights, including the Right to Development, Report Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Addendum - State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions, A/HRC/11/13/Add.1, 15 May 2009

⁴² Governments that adhere to the Guidelines must establish a National Contact Point (NCP) to handle all matters relating to the Guidelines, including investigating complaints from NGOs and trade unions against companies who have failed to follow the Guidelines. NCPs can be based in a relevant government department or they can be independent structures comprising government officials, trade unions, employers unions and sometimes also NGOs. The OECD Guidelines were updated in 2011. Relevant documents, including a comparison between the 2000 and 2011 texts, can be found at <http://www.oecd.org/corporate/mne/2011update.htm>

⁴³ State-based non-judicial mechanisms are grievance mechanisms initiated by the State with a mandate to handle grievances or to advise in adjudicative or mediation-based grievance procedures. Examples include National Contact Points in the 42 States adhering to the OECD or National Human Rights Institutions. Opijnen, Marjon van and Joris Oldenziel 2010: *Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies for the case-study of the garment industry in Bangladesh*.

⁴⁴ United Nations (2011), Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04

⁴⁵ This is especially true for the right to freedom of association and collective bargaining which are considered as 'enabling rights' but are not implemented in all countries. According to a UNHRC survey about 66% of all companies worldwide recognise both freedom of association and the right to collective bargaining. Outside Europe and the USA this is about 50%. For more details, please see Opijnen, Marjon van and Joris Oldenziel (2010), *Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies*.

⁴⁶ For the example of workers' involvement, see the case-study of the Workers' Forum for factories producing for Reebok and Nike in India, mentioned in Opijnen, Marjon van and Joris Oldenziel (2010), *Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies*.

⁴⁷ For more details, see United Nations (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, HR/PUB/11/04

⁴⁸ While the OECD Guidelines for Multinational Enterprises provide a grievance mechanism, it has narrowed scope in being limited to "investment-like" business relationships only and has limited interpretation (complaints on living wages and biodiversity can be excluded). See Opijnen, Marjon van and Joris Oldenziel (2010), *Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies*.

⁴⁹ When LIFE Magazine published a feature on child workers producing footballs for Nike in Pakistan in the 1990s, the company's sales plummeted as a result of consumer boycotts. Thereafter, the company became the loudest advocate of fair working practices, contributing to the development and diffusion of fair labour standards. Lucci (2012), *Post-2015 MDGs: What role for business?* Overseas Development Institute

⁵⁰ For example, see Amnesty International's Human Rights Principles for Companies www.amnesty.it/ailib/aipub/1998/ACT/A7000198.htm. Human Rights and Global Witness have developed country specific recommendations for oil companies operating in Nigeria and Angola.

⁵¹ For a comprehensive list, see <http://www.business-humanrights.org>. At the regional level, business networks such as CSR Europe (<http://www.csreurope.org/home>) and the ASEAN CSR Network (<http://www.asean-csr-network.org/c/>) engage with regional intergovernmental organisations and other regional actors as part of their efforts to improve CSR in their respective regions. The ASEAN CSR Network, which includes the ASEAN Foundation, framed a CSR Policy Statement for businesses in its participating countries to follow, <http://www.asean-csr-network.org/c/news-a-resources/csr-policy-statement>.

⁵² United Nations (2011), UN Guiding Principles on Business and Human Rights

⁵³ For example, many ICT companies have been active in bridging the 'digital divide' - Hewlett Packard's E-Inclusion initiative, Netcore Solutions in India, Vodacom developing community access centres in southern Africa, Cisco's Netaid, Ericsson's 'First On the Ground initiative' and Microsoft's 'Refugee Registration Project' are notable models.

⁵⁴ For example, the Netherlands National Committee for International Cooperation and Sustainable Development developed the MDG Scan, an assessment framework to measure the impact of private companies in developing countries, in contributing towards achieving progress of the MDGs.

⁵⁵ Lucci (2012), *Post-2015 MDGs: What role for business?* Overseas Development Institute

⁵⁶ The concept of Socially Responsible Investment explicitly recognises the "relevance to the investor of environmental, social and governance factors, and of the long-term health and stability of the market as a whole. It requires investors to pay attention to wider contextual factors including the expectations of the societies of which they are part.

See, UNPRI, "Principles of Responsible Investing", <http://www.unpri.org/viewer/?file=wp-content/uploads/1.WhatIsResponsibleInvestment.pdf>

⁵⁷ Shareholder resolutions have increasingly called on companies to include human rights due diligence into their operations. See <http://www.csrwire.com/blog/posts/812-taking-action-to-respect-human-rights-shareholders-shift-from-policy-to-action> or http://www.huffingtonpost.com/margaret-jungk/mcdonalds-shareholders-no_b_3317423.html for examples.

⁵⁸ The 2008 OHCHR publication *Business and Human Rights: A Survey of NHRI Practices* provides information on the mandate and capacities of NHRIs to manage corporate-related grievances and issues. Measures that NHRIs can undertake include conducting public inquiries and fact-finding missions; investigating individual complaints; dispute resolution, enforcement of outcomes; ongoing compliance monitoring, dissemination of findings, advocacy, developing educational tools for the community and to TNCs, governments and other stakeholders in particular. For more details see <http://www.reports-and-materials.org/OHCHR-National-Human-Rights-Institutions-practices-Apr-2008.doc>

⁵⁹ Only in 26% of the countries in the world, the minimum wage can be said to be a living wage. The position in Europe is better, in 40% of Europe's countries provides the minimum wage for an adequate standard of living. Opijnen, Marjon van and Joris Oldenziel 2010: *Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies for the case-study of the garment industry in Bangladesh*.