



The Jus Semper Global Alliance



Business and Human Rights

Towards a New Paradigm of True Democracy and
the Sustainability of People and Planet or Rhetoric
Rights in a Sea of Deception and Posturing

the good old formula of changing so that everything remains the same...

Álvaro J. de Regil



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Prologue

This study is motivated by the concern and frustration for the lack of meaningful progress in the struggle to establish a normative framework to protect human rights (HR) along the entire domain of business activity. To the best of my knowledge, we endure an era in which, to say the least, a savage and perverse market ethos has been imposed upon humanity and the planet as a paradigm of life, with rules and structures designed in direct line with the conditions demanded by business for its exclusive benefit. As a consequence, societies' human rights are systematically stamped on by business activity in the name of free marketeering. In this context, The Jus Semper Global Alliance (TJSGA) has closely followed the development of the debate, beginning with the publication in 2003 of the draft of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights,¹ by the Sub-Commission on the Promotion and Protection of

Human Rights, dependent on the now extinct UN Human Rights Commission. In those days we expressed our restrained support of such Norms. At the time we regarded them as a vehicle with far more strength than all others available to eventually arrive to a framework of minimally-acceptable norms for business responsibility, despite their broad ambiguity and serious omissions.² To be sure, such Norms constitute a first positive step upon which to build, with the direct participation of global civil society, a true regulating framework that effectively protects HRR from the impact of business activity.

Yet, with the decision of a small group of multinationals (MNCs), conformed as the Business Leaders Initiative on HR (BLIHR) to test the Norms in 2003, that the Norms were rejected for adoption by the HR Commission in 2004, that Mr. John Ruggie was named the Special Representative regarding business and HR in 2005, and that the HR Commission was replaced by the HR Council in 2006, it became evident that it was better to wait until 2007 to prepare an assessment of the progress in the struggle for developing a framework regulating HR in the business ethos. Taking into account that by now different

sectors of civil society and the business world have conveyed their positions, regarding both the Norms as well as the work of the UN on the matter, through Mr. Ruggie and the Global Compact, and that the BLIHR has already tested the Norms for several years, it was better to wait to obtain a comprehensive vision instead of assessing these activities individually as they were taking place.

In this way, I have prepared an assessment of the debate on the responsibilities of business regarding human rights in particular, but also generally on the political, civil, economic, cultural and labour rights; an assessment that, furthermore, constitutes the position of our only initiative: The Living Wages North and South Initiative (TLWNSI) relative to business and HR.

In the interest of doing the most comprehensive and holistic assessment possible, I have laid out a course that starts by making a brief account of the main resources available regarding the social, environmental and HR responsibilities of business. This encompasses both multilateral norms, standards and guidelines as well as multi-stakeholder initiatives. The course continues by assessing the debate on the matter inside the UN and European Union. I have focused on them for these are the multilateral organisations and governments where most of the debate has occurred, with the main actors – governments, business organisations and civil society – performing their advocacy in these spheres. Subsequently, I have continued with the study of Special Representative Ruggie’s mandate as well as of the reports and materials prepared by the BLIHR, since both attempt to contribute to define a future framework for respecting HR in the business ethos from their respective visions. Lastly, I conclude the course proposing a new HR paradigm with respect to corporate social responsibility (CSR), from TLWNSI’S perspective, with true democracy and real sustainability as its underpinnings.

Before beginning this journey, nonetheless, I established clearly the context of the world’s stage, from the economic, democratic, true sustainability and the current state of HR in business perspectives, from which I perform the assessment.

Unfortunately, it is inevitable to reveal in the title of this study my collective perception of the struggle for establishing a framework regulating the responsibilities of business in respecting HR in their environs. It is my conviction that there is a dominant position rejecting regulating the impact of business on the enjoyment of HR through a binding framework, with no other argument but the primacy of business over people and planet. It is more than evident the clear reluctance of the UN member governments to comply with their most basic responsibility: to enhance the current HR framework, in a

world globalised by the owners of the market, and guarantee the protection of the current rights.

Accordingly, despite the overwhelming evidence of the systematic violation of HR by business, what is clearly observed is an unrelenting litany of postures and gesticulations that pretend to change to remain the same, in line with the will of the owners of the market. To be sure, the last word has not been said, and we, civil society, the common citizens of both rich and poor countries, are not letting up nor will we weaken our vigour and pace.

¹ Economic and Social Council. Human Rights Commission. Sub-Commission on the Promotion and Protection of Human Rights. 55th Session. Agenda Item 4. ECONOMIC, SOCIAL AND CULTURAL RIGHTS. Commentary on the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights . E/CN.4/Sub.2/2003/38/Rev.1/Corr.1. 8 August 2003 .

² The Jus Semper Global Alliance. The UN Sub-Commission on the Promotion and Protection of Human Rights has drafted norms that signal a possible advent of compulsory CSR but continue to legitimise a structure that generates sheer inequality between North and South. TLWNSI Issue Commentary. September 2003.





I. The Global Stage in Context

It is important to start by briefly establishing the true socio-economic, democratic and sustainability conditions of people and planet and of how they influence the enjoyment of HR enshrined by the world's community; especially the rights contained in the UN Universal Declaration of Human Rights of 1948, since all the conventions and covenants concerning HR, including the Covenant on the Economic, Social and Cultural Rights, follow the former and use it as the frame of reference. This is necessary for the positive context on the condition of humanity and the planet that is attempted to be imposed is far from reality, which is deplorable. Hence my premeditated emphasis on referring to "true" and "real" and not to false and baseless pretences.

"the dramatic widening of the gap between rich and poor and the gradual concentration of wealth in a microscopic global elite are a constant and a very hard, immoral and irrefutable truth"

I.(a) On the economic and social conditions

As we shall see ahead, the context used by most actors participating in the debate within the UN and in member countries, relative to the current economic and social

conditions of market societies, is bluntly triumphant. It is argued that globalisation has generated "impressive" reductions of poverty in the euphemistically-called "emerging" markets, and overall welfare in northern countries. Unrelentingly, it is argued that social responsibility will make market economies more robust and inclusive, and there is an insistence in the opening of markets, as if the issue were, according to the discourse, only a matter of improving the already intrinsically positive conditions of imposed globalisation to generate even more well being.

This rhetoric cannot be farther from the truth. If we rely on the data provided by the same international institutions from which the apologetic context of the neoliberal paradigm is partially originating, we can assert in all certainty that the dramatic widening of the gap between rich and poor and the gradual concentration of wealth in a microscopic global elite are a constant and a very hard, immoral and irrefutable truth.

UNDP's Human Development Report 2005 –the most recent of its kind evaluating the Millennium Development Goals (MDGs) as a whole– concludes that, relative to the progress achieved in meeting the MDGs, –scheduled to be met in 2015– time is running out. The report explains, among other things, that the MDGs' commitments to reduce extreme poverty to half, reduce the death of

children by two-thirds, and achieve universal elementary education by 2015, under the current trend, will not be fulfilled; something that should surprise only a few given the deplorable state of international relations. Indeed, the report informs that the gap between the MDGs of reducing world poverty in half and the projected results indicate that the amount of people living with less than a dollar a day (more than 1.000 million) will have increased by 380 million in 2015 (34 percent).

The report also emphasises the scale of the international wealth gap: the 500 wealthiest people in the world have a combined income greater than that of the poorest 416 million people. Thus, it is of no surprise to visit new figures grimly illustrating the extremes of the human condition, in which 2,5 billion people, living with less than \$2 dollars a day –40 percent of the world’s population– account for 5 percent of global income, whilst the wealthiest 10 percent, almost all living in high income countries, represent 54 percent of global income.³ To be sure, the extreme concentration of global wealth in a tiny elite can be observed also in countries arguably in development. The most conspicuous case is Mexico. A country with more than half of its population enduring some kind of poverty, has the shameful merit of creating the crony-capitalism conditions to have the wealthiest man on earth since last summer,⁴ who was already the second wealthiest on Forbes magazine’s list last spring.

In 2006, UNDP’s Human Development Report –devoted to water– reported, as could be expected, that the specific commitment within the MDGs is to reduce to half the 1.100 million people with no access to drinking water, and the 2.600 million human beings with no access to sanitation services will not be met as long as the world continues along the same pathway.⁵ Only the human condition can explain that, whilst billions of people in the world have no access to the enjoyment of their most basic human rights, such as access to drinking water, others are proud of scientific breakthroughs, many times used in the scourge of war, and one-fifth of the population lives in extreme hedonism, consumerism and selfishness, with no qualms for human misery.

“the data exhibiting the growing inequality at the heart of the current system leaves no doubt about the mendacity of the triumphant postures adopted by the apologists of the neoliberal paradigm”

In this way, the UNPD informs us in the *forward* page of the 2007 MDGs Report: *The MDGs are still achievable if we act now. This will require inclusive sound governance, increased public investment, economic growth, enhanced productive capacity, and the creation of decent work.*⁶ Unfortunately, hard evidence indicates that we are enduring the opposite trend, with human exploitation

standing out through modern slave work.⁷ This is the main feature of this new mercantilist era of savage, supply-side economics and Darwinian capitalism in which, with respect to North-South relations, an unequal exchange, so well described by Arghiri Emmanuel decades ago, lives on with increasing strength.⁸ Indeed, despite considerable global economic growth in the past decades, inequality has increased exponentially. In the past 40 years, the ratio of income of the poorest 20 percent to the wealthiest 20 percent was 1:30 in 1960, whilst today is of 1:80.⁹

“the current system is a sheer generator of injustice, which inevitably requires the systematic violation of HR”

Relative to the alleged well being generalised in rich countries, the data exhibiting the growing inequality at the heart of the current system leaves no doubt about the mendacity of the triumphant postures adopted by the apologists of the neoliberal paradigm. A report from the Economic Policy Institute shows that economic growth in the U.S. has bypassed everyone but the wealthiest: wages have stagnated despite rapid growth in productivity; wages of younger workers are below those of their predecessors; there is less upward mobility than in similar economies; and the country has the greatest degree of inequality of all OECD countries included in its analysis. The study concludes that *if the findings in the hundreds of tables and figures that follow can be reduced to one observation, it would be that, when it comes to an economy that is working for working families, growth in and of itself is a necessary but not a sufficient condition. The growth has to reach the people. The benchmarks by which we judge the economy must reflect these distributional concerns, and we must construct policies and institutions to address them.*¹⁰ Evidently, the opposite has occurred.

It is then clear that, albeit there has been a somewhat consistent global growth, the wealth generated is increasingly being concentrated in fewer hands, and inequality has grown exponentially. Thus, there is no argument to support the current system as a creator and provider of wealth and well being. On the contrary, the current system is a sheer generator of injustice, which inevitably requires the systematic violation of HR.

I.(b) On the conditions of democracy

If the economic conditions generated by the current neoliberal supply-side economics paradigm, of the owners of the market, have generated a constant trend towards the polarisation of inequality, both North and South, it is not as a result of decisions previously reconciled and democratically approved by market societies, to be sure. The neoliberal paradigm has been an imposition resulting from the elitist system that we endure in the majority of market economies. We can

refer to this system in ways such as *oligocracy*, *marketocracy*, *corpocracy* or *mediacracy*; yet never as true democracy.

“in most cases, nonetheless, the policies and actions emanating from these powers are far from fulfilling the most basic purpose of any government that considers itself democratic: to procure the welfare of every rank of society, especially of the dispossessed”

Although most States take pride in having built democratic systems, reality is far from the usual rhetoric. There is no question that most States periodically celebrate elections, have congresses elected through popular vote and systems with clearly-defined divisions of power. In most cases, nonetheless, the policies and actions emanating from these powers are far from fulfilling the most basic purpose of any government that considers itself democratic: to procure the welfare of every rank of society, especially of the dispossessed.

What we have is a monumental democratic parody. Undoubtedly, there are democratic elements that are used on a daily basis in many countries, especially in the electoral processes, presumably democratic, that take place in all levels of government. Yet, this does not mean that elections ought to be regarded as authentically democratic. With increasing frequency, electoral campaigns are financed and supported by powerful economic interests that collude with candidates; interests that are diametrically opposed to the social demands of any democratic society. Thus, albeit there are nations that have been regarded as democratic for over a century, many elections all over the world continue to be branded as fraudulent by very significant segments of the electorate. Among them the presidential elections of 2000 and 2004 in the United States stand out for, despite the tacit approval of corporate media, they continue to be questioned by large segments of U.S. society that consider that the processes were tainted to a degree that changed the official results. A more recent case occurred in Mexico’s democratic parody in 2006, when the entire electoral process was denounced before and after Election Day as illegally controlled by the executive branch, to a degree that a year later more than one-third of the electorate continues denouncing the fraud and does not recognise Calderon as legitimate president.

“we should ask ourselves who decided that the so-called neoliberal globalisation was going to be applied in a given State? Were people asked to choose from a variety of economic policies so that governments in turn would obey the will of the people?”

Obviously, the root of the problem is not limited to manipulating the electoral process. Even in the cases where electorates regard elections as legal, this does not

change the fact that we do not live in truly democratic ethos in most parts of the so-called democratic world. Evidently, electoral manipulations have an ulterior motive well defined by powerful economic groups –with very private interests– that fund the campaigns of their favourite candidates in the electoral contest. The motive is to control the public agenda by legitimising the alleged winners through electoral competitions supported through mass corporate media –frequently in breach of electoral regulations. The private interest has coerced the public interest. Hence the norm in so-called representative democracy has become the privatisation of the public interest so that politicians can discuss in private the public agenda with the owners of capital.

Therefore, this mock democracy, so-called representative, is far from being a system where power truly emanates from the people and where representatives truthfully obey the popular mandate; a postulate still too distant from reality. Thus, democracy in the XXI century is predominantly an exercise where civic participation is limited to the electoral process, without establishing a true engagement between represented and representatives, with the purpose of producing public policy as a direct product of the permanent cohesion between citizens and public servants. As could be expected, in the current political ethos the norm is that societies formally regarded as democratic endure governments that predominantly serve the interests of the owners of the market.

Given these conditions, the primeval *raison d'être*: to procure and protect an ethos of social justice, is today a utopia by the will and conviction of those who wield true power. Except for a handful of nations, particularly Scandinavian, a market-driven system of exploitation and injustice, that I call *marketocracy*, has been imposed with varying degrees, both North and South, to, at the very least, a very significant segment of the population, if not to the majority. Otherwise, if we were living in a truly democratic ethos –direct, participative and bottom up– it would be impossible to imagine a globalised world with a capitalist paradigm designed to impose economic structures for the benefit of the owners of capital, at the expense of the majority.

“in a nutshell, were people informed that the market was going to be placed more than ever above the people and that the primeval responsibility of so-called democratic governments, to procure the welfare of all ranks of society, was going to be ignored? The answer to these questions is consistently “no” throughout the world. “

Indeed, more than thirty years after demand-side economics was abandoned, none of the citizens of the “democratic” nations, where the so-called “new economy” of neoliberal supply-side globalisation was

imposed, have been called to engage in a decision-making process and asked for their duly democratic endorsement of neoliberal economics. If there is any doubt, we should ask ourselves who decided that the so-called neoliberal globalisation was going to be applied in a given State? Were people asked to choose from a variety of economic policies so that governments in turn would obey the will of the people? At the very least, were people informed, in layman's terms, that the deregulation and privatisation of entire economic sectors was part of the neoliberal paradigm, and that this means that economic policy would stop supporting the generation of demand on behalf of the support of supply, which belongs to global capital? Were they informed that, to this endeavour, the neoliberal mantra calls for the reduction of taxes and the drastic reduction of the Welfare State? In a nutshell, were people informed that the market was going to be placed more than ever above the people and that the primeval responsibility of so-called democratic governments, to procure the welfare of all ranks of society, was going to be ignored? The answer to these questions is consistently "no" throughout the world. Instead of calling on the citizenry to reconcile the private with the public interest, subordinating the former in order to deliberately design public policy to guarantee the social welfare –with the enjoyment and protection of HR standing out, as in the case of economic policy, such as the enjoyment of labour endowments that procure a quality of life worthy of human dignity– these decisions, in real politics, are taken in "very private chambers" in line with their very private interests.

It is then of fundamental importance to establish that the decisions affecting social and economic policy, as all others, are overwhelmingly taken by governments, as the norm, without a duly democratic process, because there is no real engagement and no debate between the branches of government and society, and the worst thing is that this norm keeps consolidating.¹¹ Governments have betrayed representative democracy, and instead of responding to the interests of the people, they are mere agents of the market who overwhelmingly respond to *marketocracy's* will, with whom many politicians are in close connivance. Thus, the working agenda of governments moves in the opposite direction of true society's demands. In this way, democracy has been almost completely corrupted to its core, including the functioning of the key multilateral institutions, and only a democratic façade is kept to justify a legitimacy that is rapidly eroding.

"the current ethos is completely unsustainable, not only for, evidently, being unacceptable, but because the current ethos rapidly traverses towards the break and exhaustion of all life systems"

It is in this reality of enormous democratic deficit that engulfs the world where the struggle to force business to respect HR takes place. In an ethos where the market –of savage Darwinian capitalism and supply-side economics– of the institutional investors and their corporations, has been imposed as a religion over the sustainability of people and planet, it is rather naive to harbour any political will to enforce and protect human rights from the battering of the market. To be sure, this ethos is full of all kinds of hurdles to give precedence to HR over the market in both multilateral and national government spheres. Marketocracy, the logic of the market and its owners, rule over nations. Thus HR criteria are analysed, many times inadvertently, but many others perversely, by making them subservient to the so-called prerogatives of private rights and free enterprise. The prevailing pseudo-democratic logic is, thus, guided to a great degree by the interests of global corporations. This same logic is used to manage respect and protection for HR both multilaterally and nationally and both in the centre and the periphery. Although democracy is declared our way of life, savage capitalism is imposed. In this ethos, the god of Money and its paradise, the market, in the images and interests of major institutional investors and its corporations, have been proclaimed our faith's dogma, in a rather mendacious way, as the pathway to prosperity, well being and social harmony. In contrast, when the people mobilise to build a truly democratic ethos, repression is unleashed, violating the most basic civil and political human rights. In recapitulation, the structures of economic exploitation that reproduce and accumulate capital for a global elite are pronounced as democracy and the efforts to build a truly democratic ethos are repressed. It is then inevitable to acknowledge that before establishing respect and protection for HR in the sphere of business it is essential to first eliminate our enormous democratic deficit.

I.(c) On the conditions of true sustainability

Given the deplorable socio-economic and democratic conditions, the current ethos is completely unsustainable, not only for, evidently, being unacceptable, but because the current ethos rapidly traverses towards the break and exhaustion of all life systems, as is well known. Most of the world is dominated by a savage, Darwinian and perverse supply-side capitalism in which billions of people live in dire misery so that a global elite can live in the most contemptible wealth. Some argue that we are far better than in other times, but the crass and overwhelming reality is that we have returned to times quite reminiscent of enlightened despotism and the Industrial Revolution. As I have illustrated, far from the chants of the market's apologists, we are returning to obscurantism, as more people live worse in absolute terms and, thus, more people endure the systematic violation of one or more of their HR. To be sure, well-known philosophers of modern capitalism, such as Adam

Smith or John Stuart Mill, would sadly regret the current state of the world. Smith's work clearly reflects how, when he argued for *laissez faire*, his vision drew an ethos of thousands and thousands of small merchants and not of big merchants companies, which he abhorred. In fact, with the arrival of the Industrial Revolution, Smith did observe the trend towards the pauperisation of the working masses due to monopolies, which he located in the antipodal point of his thinking. Stuart Mill has the opportunity to see with greater clarity in his times the dichotomy between what he regarded as the natural laws of production, ruled by nature, and the laws of distribution, ruled by human will.¹² To be sure, we are back in the times of the *robber barons* and the *gilded age* with corporations controlling the lives of people and planet.

The great difference with earlier times, nonetheless, is that we have now reached our limits, for the planet and its resources no longer have the capacity to recover to meet the demands of today's capitalist consumer societies, manipulated and alienated and submerged in our exacerbated individualism. It is then essential to take notice, to become conscientious, about the unsustainability of the current system of great inequality and accelerated depredation of natural resources. Despite the unrelenting insistence of those holding true power, we are approaching ever greater conflicts that put the planet's future in grave danger. In our anthropocentric exhilaration, in which we boast to be the superior species in every way, we are making it clearly evident that we are the worst of all species, the only one capable of ending our own existence, and that of every species and of the planet itself.

“balance requires that no participant benefits at the expense of others. A condition impossible to create under the current Darwinian supply-side capitalism paradigm”

In this way, the impossibility of sustaining the current paradigm is systemic. Nature's capacity to recover, especially of those resources that are essential for life, such as water, is unsustainable. The 2006 Human Development Report declares unambiguously that, *put bluntly, the world is running down one of its most precious natural resources and running up an unsustainable ecological debt that will be inherited by future generations.*¹³ The UNDP has not left doubts as well about the failure in complying with the MDGs under the current paradigm. Obviously, goal seven, to guarantee environmental sustainability, including the access to drinkable water, as I have already shown, is unsustainable. In consequence, the current context upon which we are struggling to respect and protect human rights is unsustainable.

I.(d) On the incompatibility of capitalism with true sustainability

There are dozens of definitions of sustainability. Most coincide in that a sustainable ethos must offer a high standard of existence in the social, economic and environmental dimensions with long-term sustainability. This entails an equilibrium in each dimension, so that its participants: human beings, nature and the entire planet, enjoy a high quality of life. Balance requires that no participant benefits at the expense of others. A condition impossible to create under the current Darwinian supply-side capitalism paradigm, where savage competition is the standard and the logic of the market is to win at the expense of other human beings, Mother Nature and the planet. Overwhelming evidence, including the UNDP reports already mentioned, show that the logic of the market is completely unsustainable in the three dimensions, including the owners of the market, and it will take us in the not-too-distant future to the irreversible extinction of all living things and the planet.

The current system is plagued by situations that are in themselves unsustainable and that additionally cause great misery and suffering on a daily basis to billions of human beings and other species. At the core of the current paradigm lie the interests of the major institutional investors. They are who demand from the corporations excessive and ever greater dividends every quarter. Shareholder value is the supreme end of the current paradigm. Speculation in financial and commodity stock markets is one of their main mechanisms to amass wealth, which in turn devastates billions of human beings.

A paradigmatic example is coffee. When the quota clauses of the International Coffee Agreement (ICA) ended in 1989 when the U.S. government backed out of it –at the time the ICA was the main instrument to keep international coffee prices stable– consumers spent approximately US\$30 billion per year (1990) on coffee, of which the share for producing countries was approximately US\$12 billion (or 40 percent). Today consumers spend an average of \$80 billion per year on coffee, and the share for producing countries has collapsed to approximately \$5,5 billion (6,9 percent).¹⁴ The collapse in participation can be mainly attributed to the speculative system imposed by those controlling the market.

This speculative system operates across the wide array of commodities that mainly come from southern countries. The UNDP asserts that unfair trade policies continue to deny millions of people in the world's poorest countries an escape route from poverty and perpetuate obscene inequalities.¹⁵ Indeed, whilst northern countries keep maintaining protectionist measures for their exports, they impose deliberate structures of exploitation. Among them the activities of the WTO and of the Bretton Woods

multilateral Institutions and the regional development banks stand out. Multilateral financing generates usury indebtedness –charging interest over interest– and forces the opening of markets through conditioning policies. These structures have no other purpose but to support the predatory practices of the MNCs, the queens of the system.¹⁶ Exploitation does not take place only in the commercial exchange of products and services but also in a very meaningful manner in the wages incorporated in the exchange of goods. Thus, the system imposes high labour endowments for the North and quasi-slavery labour endowments for the South. These remunerations, as Jedlicki explains, are not determined following the logic of the market, but by way of institutional policies, which are exogenous or outside of the economic realm. This is the commercial imperialism described by Emmanuel. In this way, the terms of trade between North and South are predatory and thus, absolutely unsustainable for Southern societies. This system of exploitation inherently carries the systematic violation of HR of billions of people every year; particularly, but not exclusively, of their economic, social and cultural rights.

The unrelenting insistence on the current system, of the State agents of global capital, is so obstinate that even in the case of alternative and sustainable sources of energy the criteria of the logic of the market persist. Today we are facing –due to oil, automotive and other powerful interests– the reluctant acquiescence of most governments to the use of alternative non-fossil sources of energy, supposedly renewable and less polluting. If there really were a commitment with holistic sustainability, there would be great interest and political will to establish as the overriding purpose, *a sine qua non* condition, to develop a balanced ethos in the consumption of all energy sources, awarding precedence to the less polluting, and in their long-term sustainability. To succeed, it is quite evident that we would need to modify our consumer habits at the core. We would need to stop being consumer societies par excellence and become societies anchored in the culture of true sustainability. In this cultural frame, we would grant absolute priority, for instance, to mass transportation means. Instead, the current position of governments clearly exhibits their intention to partially substitute oil consumption with ethanol –from corn, sugar, soy and other grains– without altering energy consumer patterns or consumer patterns characteristic of our current ethos, irrespective of whether or not the products are truly necessary; ergo, leaving the prevailing market system untouched. By command of global capital and their partners in governments, there is a dogged insistence in maintaining the same individual vehicles of transportation as the main means of transportation. All the inherent negative social and environmental consequences are disregarded. The destruction of woodland ecosystems that will be used to increase ethanol production –particularly in the South–

the impacts on the supply and economics of food chains, on the food sovereignty of many nations and on global warming in itself, with its huge baggage of problems –for ethanol ought not to be regarded as pollution-free energy just for being green– are sent to oblivion. Automotive advertising, with the enthusiastic consent of governments, is creating the myth that a vehicle using ethanol instead of petrol is not polluting, when it is only polluting less since it keeps discharging carbon monoxide (CO) and carbon dioxide (CO₂). There is a good reason why Norway has just prohibited advertising using terms such as “clean”, “ecological” and “green.”¹⁷ These impacts, all negative, derive directly from the hard-headed insistence on reasoning with mercantilistic criteria.

“through a series of myths such as that biofuels do not generate deforestation, hunger and rural impoverishment in the South, our attention is diverted away from the interests of global capital”

So-called biofuels let politicians *greenwash* themselves without committing to building a truly balanced ethos, sustainable for all in the long-term, particularly for the billions of dispossessed. As Eric Holtz-Giménez explains, through a series of myths such as that biofuels do not generate deforestation, hunger and rural impoverishment in the South, our attention is diverted away from the interests of global capital. In this way, MNCs are making major investments in the development of biofuels. Behind the scenes, despite anti-trust laws, grain, automotive and genetic engineering MNCs: ADM and Monsanto; Chevron and Volkswagen; BP, DuPont, and Toyota, are partnering to consolidate research, production, processing, and distribution chains of food and fuel systems under one industrial roof. Indonesia and Malaysia are expanding oil-palm plantations to supply up to 20% of the EU biodiesel market. In Brazil the government is planning a 500% increase in sugar cane acreage. Holtz-Giménez explains that the rapid capitalisation and concentration of power within the biofuels industry is extreme, with an increase of 800% in biofuels venture capital investment over the last three years.¹⁸ As a consequence, the future of alternative sources of energy is being completely managed with the mercantilistic criteria of powerful private interests, and governments feel quite comfortable with a vision that, by definition, cannot be sustainable, democratic and respectful of HR. A case apropos, Friends of the Earth Europe has just published a study precisely denouncing the close association of European-Union governments and multinationals to funnel public funds to private enterprises for projects that are far from benefiting the public interest. These are the projects of the so-called “bio-knowledge economy,” which focuses on the production of biofuels and genetically-modified organisms (GMOs) in which the European Commission is enthusiastically closing deals with Bayer Cropscience, DuPont/Pioneer, Monsanto and Syngenta among others.

The report puts into serious question the absence of commitment of the European Union with its apparent democratic principles, by completely ignoring public opposition to these projects.¹⁹

In the meantime, one fourth of the planet, the middle class that has been completely alienated by consumerism, individualism and the obsession that to feel good you have to own instead of being, continues to be manipulated through the decoy of instant gratification and the addiction to consume to satisfy created needs that are not real, without realising that we are crossing a threshold with no return, which is rapidly heading towards our extermination.

“it is in the sphere of business where HR violations are most prevalent and transcending”

This mercantilistic ethos is completely incompatible with long-term holistic sustainability and with the respect of HR. The capitalistic paradigm goes against true sustainability's nature. Obsessed with power, the owners of the world insist, in spite of falling into complete ignominy, on imposing on the world the same prevailing system, irrespective of its final consequences. Yet reality shows that there are no more options than to change the system or deplete the planet. A system anchored in exacerbated inequality is completely unsustainable. How can we expect that a market system based on the reproduction and accumulation of capital at all costs be sustainable? By nature and “par excellence” such a system is predatory. This sole characteristic makes it completely incompatible with true sustainability. Thus, to change this course, *marketocracy* the capitalist system, will have to be replaced by a new ethos of true sustainability, with a real commitment with our survival, that unrelentingly goes in pursuit of high-quality sustainability in the economic, social and environmental dimensions and, to be sure, of HR.

“the discourse tries to avoid bringing into the discussion that the debate is precisely about businesses being systematic violators of HR and that the subject matter is as simple as that they stop doing it”

I.(e) On the state of HR

With a huge democratic deficit and a rather unfair economic paradigm, predatory by nature and in itself incompatible with true sustainability, we endure a huge deficit in the respect of HR in all spheres of life. Nonetheless, precisely because neoliberal globalisation, for the benefit of the very private interests of global capital and their partners in governments, has been extolled to become the ubiquitous power ruling the future of societies and the planet, it is in the sphere of business where HR violations are most prevalent and transcending.

As we will see in the documents and in the discourse of those who pretend to define the role of business, in the exercise and respect of our inalienable HR, it is argued that globalisation is a complete success, and that it has brought enormous benefits for the great majority of this planet's inhabitants. We are told that it is only a matter of contributing to increase these benefits and of the further enjoyment of HR. It is argued that when these are not respected it is the responsibility of governments but not of capital nor of the market system and its enterprises; that the purpose of business is only that: to reproduce and accumulate capital and not to be watchful to ensure that HR are respected.

Evidently, the discourse attempts to direct the debate towards public responsibilities vis-à-vis those of business, which, indeed, have nothing to do with ensuring that HR are respected. Actually, the discourse tries to avoid bringing into the discussion that the debate is precisely about businesses being systematic violators of HR and that the subject matter is as simple as that they stop doing it. It is about making businesses responsible before society of their own acts of violation of HR, by action or by omission, relative to any human right that is violated as a result of the impact generated by its activity. As the Interfaith Centre on Corporate Responsibility rightly argues: *the company is not responsible for raising the standard of living in a country. It is responsible for its actions, and its impact, positive or negative, on that country's efforts to improve living conditions for its citizens.*²⁰

It is impossible for business to evade its responsibility in the violation of HR each time a company pays a miserable wage to thousands of workers, or when it outsources production to demand a price that can only be guaranteed by paying miserable wages, as, for instance, Wal-Mart does strategically, culturally, by financial analysis, by best practices, systematically. These companies violate, as we read this paragraph, their workers' right to earn a living wage. Yet, as we shall see, the issue of living wages is oddly absent from practically all the existing voluntary multilateral frameworks, such as the OECD CSR guidelines, or the voluntary multi-stakeholder frameworks, such as the GRI.²¹ As we shall see, this indisputable right enshrined in article 23 of the Universal Declaration of HR and in article 7 of the Economic, Social and Cultural Rights is stealthily omitted or carefully left in ambiguity so that it can be interpreted as anyone deems convenient.

Despite this odd omission, it is a fact that this right, the most systematically violated by business in the South, the main reason why –and often the exclusive motive– northern corporations invest in the South, bears an enormous impact on the prosperity of the people of the South. If southern workers are systematically exploited –

not only by global corporations but also by domestic corporations of the, arguably, developing countries— there is no wealth distribution, no aggregate demand and no markets in the South. These fundamental features of North-South exploitation have enabled a good portion of northern societies, despite the recent setbacks, to have access to a standard of living far superior to the standard in the South. Indeed, this North-South relationship constitutes a subsidy that the South provides for the North's good living.

Respect for the right to a living wage is the main generator of access to a dignified quality of life and of the subsequent positive impact on the economic development of a social ethos. Its systematic institutional violation constitutes the violation of a fundamental human right. This prevents a company from being regarded as socially responsible. Companies violating this right, the vast majority of MNCs –all those that systemically practice modern work slavery, unequal exchanges, trade imperialism– are the direct culprits of the misery of tens of millions of people in the world. They are the direct perpetrators –intellectually or materially– of the violation of the right to a life worthy of

human dignity. Thus, the issue is not about whether companies or governments are responsible or not for respecting HR. This is not the real issue. The authentic discussion is to demand that companies stop systematically violating the HR of their workers or of those in their supply chains in the South, as is the case of living wages; a right with the greatest social impact, but certainly not the only one.

This is how we will analyse, with the greatest detail possible, the positions of two groups. One group is a proponent of making HR only part of best business practice and not a direct obligation of all actors to respect them at all times, and keeping many of the concepts as ambiguous as today. This is proposed through a subterfuge. Instead of addressing the violation of these rights by business, they are addressing the responsibility for their protection and the punishment for their violation, which obviously falls on governments. The other group in contrast, insists on and demands the establishment of a universal legal framework that forces companies to stop violating HR, as they do today on a daily basis, and that violators be punished through a legal framework with real power for persuasion and penalisation.

³ Human Development Report 2005: International cooperation at a crossroads: aid, trade and security in an unequal world, United Nations Development Programme, New York, 2005, p. 3 -5.

⁴ Mexican Carlos Slim Zips Past Gates in Rich Ranks: Report. Reuters, 3 July 2007.

⁵ Human Development Report 2006: Beyond Scarcity: Power, poverty and the global water crises, United Nations Development Programme, New York, 2006, p. 56.

⁶ Millennium Development Goals. 2007 Report. United Nations Organisation, Nueva York, U.S., 2007, p. 3.

⁷ Alejandro Calvillo Unna and Álvaro de Regil Castilla. Modern Slave Work. The Jus Semper Global Alliance, TLWNSI Issue Commentary, March 2007.

⁸ Claudio Jedlicki. Unequal Exchange. The Jus Semper Global Alliance, TLWNSI Issue Brief, September 2007.

⁹ Jean Marie Harribey, DO WE REALLY WANT DEVELOPMENT? Growth, the world's hard drug, Le Monde Diplomatique, August, 2004

¹⁰ Lawrence Mishel, Jared Bernstein and Sylvia Alegretto "The State of Working America 2006-2007", Economic Policy Institute, Cornell University Press 2006

¹¹ Françoise Castex. Europe's undemocratic Union. Le Monde Diplomatique, January 2007.

¹² Álvaro de Regil. The Neo-Capitalist Assault. The Historical Background in the XVIII and XIX Centuries. Essay II of Part I (The Economics of Reference). GLOBAL ECONOMIC DEVELOPMENT – A TLWNSI ISSUE ESSAY SERIES. The Jus Semper Global Alliance, April 2003

¹³ Human Development Report 2006: Beyond Scarcity: Power, poverty and the global water crises, United Nations Development Programme, New York, 2006, p. vi.

¹⁴ Human Development Report 2005: UNDP, New York, 2005, p. 140.

¹⁵ UNDP. Unfair Trade Policies Damaging Growth Prospects in Developing Countries. 2005 Human Development Report, Press release, 7 September 2005.

¹⁶ A current good example can be observed in the natural gas projects in the Peruvian Amazonian basin, in the Camisea I y II projects. For further information see: Tom Griffiths. Holding the IDB and IFC to account on Camisea II. A review of applicable international standards, due diligence and compliance issues. Amazon Watch, September 2007.

¹⁷ Manuel Ansedé. Los coches 'verdes' también contaminan. Público. Madrid, España. 27 de septiembre de 2007

¹⁸ Eric Holtz Giménes. Exploding the biofuel myths. Displaced peasants, higher food prices – and a crutch for the petrol economy. Le Monde Diplomatique. July 2007.

¹⁹ Friends of the Earth Europe. Too Close for Comfort. The relationship between the biotech industry and the European Commission. An Analysis. October 2007.

²⁰ Interfaith Centre on Corporate Responsibility. Letter to John Ruggie of 10 October 2006.

²¹ Álvaro de Regil Castilla. Living Wages: The GRI's Missing Link. The New GRI's "G3 Sustainability Reporting Guidelines" Continue to Avoid Living Wages, the Missing Link of Sustainability. The Jus Semper Global Alliance. TLWNSI Issue Essay, March 2006.



II. Brief account of CSR development, particularly in the HR ethos

The development of the debate concerning the social and environmental responsibilities of business dates back to at least the seventies. I remember in my youth the consumer boycotts against Nestlé's instant infant formula, whose roots can be traced back to 1939.²² It was in the 1970s, with the transformation of many companies into global entities, that the negative effect that business activity was having in all aspects of life and the planet began to be discussed with growing emphasis. Until then, conventional wisdom took for granted that the effects of business were naturally positive. These concerns carried an inherent undertone underpinned on HR. Business activity was weighed relative to its impact on the enjoyment of HR that were regarded as natural rights, particularly in Northern societies.

In this way, since the 1970s several efforts were initiated at the United Nations, intended to control the impact of business on HR. In 1974, The Transnational Corporations Commission, as part of the UN Economic and Social Council (ECOSOC), with 48 Member States, was created and developed a code of conduct, as well as the Centre for Transnational Corporations, as an autonomous UN organism. These organisms, as recounted by jurist Alejandro Teitelbaum, were never able to fulfil their original missions due to the joint opposition of the leading powers in connivance with their MNCs.²³ In regards to the UN Member States, the development of national normative frameworks with legal force, as would be their responsibility, regulating the effect of the activity of domestic companies or MNCs in their sphere of influence, as could be expected, have gone starkly lacking. Only this past summer a first legislation on CSR was approved by the Indonesian Parliament. The law, nonetheless, does not define the CSR standards nor the sanctions for violations, albeit it conveys that it will be done in the near future.²⁴

II.(a) The UN Norms

The “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regards to Human Rights” were prepared by the Working Group, created for this endeavour by the Sub-Commission on the Promotion and Protection of Human Rights of the ECOSOC, in a resolution dating back to 1998. The Sub-Commission asked the Working Group to investigate the working methods and activities of MNCs, and to study the information submitted by governments, specialised agencies, non-governmental organisations and other stakeholders, and to convey these commentaries and recommendations to MNCs or other relevant businesses, governments and non-governmental organisations or other relevant sources of information. According to Teitelbaum, who directly participated in the debate, the mandate of the Working Group was to give continuity to a study regarding impunity in the violation of economic, social and cultural rights. In this way, after four years of debate and strong opposition from leading nations,²⁵ the Sub-Commission unanimously approved the Norms,²⁶ in the 55th session of August 2003, adopting them as a draft, and decided to transmit them to the Commission on Human Rights for its consideration and adoption in March 2004.²⁷

Despite the long debate, the Norms proposed by the Sub-Commission on HR were never adopted. The Commission was grateful for the effort and announced that it would evaluate them, but it asserted unequivocally that the draft had not been requested by the Commission and that, as a draft proposal, had no legal standing whatsoever, and asked the Sub-Commission to abstain from carrying out any monitoring activity with companies.²⁸ Thus, the Norms Draft, until today neutralised by those opposing it, only remains as a reference of the effort to develop a normative framework.

“as many social sectors have expressed, the common feature of all the instruments, despite their voluntary nature, is to aspire to the lowest common denominator in defining the responsibility of business for the impact of its activity”

II.(b) The Global Compact

If there is any doubt about where the interest of those in control of the UN lies, the so-called Global Compact is a clear illustration of the postures that appear to change so that everything remains the same. The Global Compact, proposed by the UN Secretary General in 2000, originally had nine principles, to which the principle to fight corruption was later added.²⁹ Beside this matter, the Compact covers the areas of HR, labour rights and the environment. Having a moral nature, the principles are offered to be observed by companies exclusively on a voluntary basis. In most sectors of organised civil society they are regarded as a rhetorical instrument of public

relations, given its nature deprived of a balance since they are extremely business friendly.

II.(c) Other multilateral frameworks

Besides the HR Norms draft and the Global Compact, there are a series of multilateral CSR frameworks that somehow attempt to reduce the great gap existing between the responsibility of business for the effects of its activity in its sphere of influence and the untrammelled neoliberal economic ethos prevailing. In this case, there are three frameworks that stand out:

◆ **OECD Guidelines for Multinational Enterprises.** The OECD Guidelines are recommendations made by member governments of this organisation to the MNCs that operate in or from the States that have adhered to the Guidelines. Their purpose is to help ensure that MNCs act in harmony with the policies of the countries in which they are active and with societal expectations. They constitute the only code of conduct for MNCs backed multilaterally. The Guidelines consist of a series of principles and norms for responsible business conduct in the areas of HR, transparency, corruption, taxes, labour and environmental relations and consumer protection, on a strictly voluntary basis. Standing out in this framework are the National Contact Points (NCPs), which are considered part of the responsibility of the member States, to set them up for undertaking promotional activities, handling inquiries and contributing to the solution of problems which may arise in this regard.³⁰ Far from representing a lofty regulating framework, the Guidelines leave much to be desired, despite their improvement. This is the case, since 2000, of recognising civil society’s right to use the NCPs in member States and in non-member States adhering to the Guidelines to submit concrete complaints against irresponsible acts perpetrated in any country by an MNC.³¹ Besides the huge weakness of their voluntary nature, their other great weakness is their dependance of the mostly lacking political will of governments to pressure companies to incorporate the Guidelines into their business culture.

◆ **Tripartite Declaration of Principles Concerning Multinational Enterprises (MNEs) and Social Policy.** The MNE of the International Labour Organisation (ILO) dates back to 1977 to express and promote the association and cooperation between business, workers and governments to maximise the positive contributions that MNCs can contribute to social and economic progress, and to help resolve the difficulties that may arise due to such investments. This declaration consists of a set of principles intended to guide MNCs regarding employment, training, conditions of work and life and industrial relations, some of which are inspired in the Universal Declaration of HR. Its provisions are reinforced by core and priority ILO Conventions and

Recommendations. The Declaration urges MNCs to voluntarily bear in mind and apply its principles to the greatest extent possible.³²

◆ **Green Book.** This instrument was conceived by the European Union to promote CSR. It declares as its purpose to initiate an ample debate on how the European Union may promote CSR in Europe and internationally. The Green Book does not establish norms or principles. It provides a series of concepts covering the economic, environmental and HHRR dimensions in the sphere of activity of businesses. The instrument represents a rare case on the matter from the perspective of governments. Yet, as we shall see ahead, in recent years the EU has adopted positions clearly supportive of the current voluntary context, rejecting the development of any legislation.³³

II.(d) Multi-stakeholder voluntary frameworks

In addition to the multilateral instruments, there are nearly a dozen international norms, guidelines, codes of conduct and principles of multi-stakeholder origin, some of them partially backed by business. Among them stand out the Ethical Trading Initiative (ETI), SA 8000, Instituto Ethos, Caux Round Table Principles, GRI, AA 1000 and the Global Sullivan Principles. All directly address respect for HR and, to be sure, all are proposed in the context of a voluntary responsibility. Some, such as the GRI, even allow companies to choose the activities that they want to report on and to disregard those not relevant according to their own criteria.³⁴ In recent years the GRI and SA 8000 seem to have become the most popular frameworks of reference among companies. The GRI addresses all dimensions affected by business activity and the SA 8000 specialises in labour rights.

Clearly, both multilateral and multi-stakeholder instruments share as backbone the voluntary responsibility context. The great majority, in each of the areas addressed, are based on international conventions and declarations, such as the Universal Declaration on Human Rights and, regarding labour rights, on the Conventions and Recommendations of the ILO. Yet, besides sharing their voluntary nature, all share omitting the right to a living wage. Although some rhetorically propose a progressive perspective towards a living wage, their codes demand, voluntarily, a minimum wage. Furthermore, none defines what should be an adequate income for the enjoyment of a dignified quality of life and much less what a living wage should be. Everything remains in ambiguity or in frank omission. As many social sectors have expressed, the common feature of all the instruments, despite their voluntary nature, is to aspire to the lowest common denominator in defining the responsibility of business for the impact of its activity. From Jus Semper's perspective, it is necessary to emphasise the common feature of all in the virtual absence of the payment of a living wage as an indefeasible right; not only because it is a fundamental trigger for economic growth but because it is behind, and at the core, of the system of exploitation that mankind endures, particularly in North-South relations. Thus, by default, all the previously-covered instruments condone the systematic violation of this, I stress, indefeasible human right; the *raison d'être* of Jus Semper.

This is not the case of the draft of the UN HR Norms. In contrast with the preceding instruments, and despite the Norms requiring, as I will show ahead, the adequate clarification of many concepts, they outline the possible advent of a binding framework, with control systems, and generally are more precise when addressing respect for HR in the workplace.³⁵

³² Noemí Bromberg Bar-Yam, *The Nestle Boycott: the story of the WHO/UNICEF Code for Marketing Breastmilk Substitutes*, Mothering Magazine, invierno 1995.

³³ Alejandro Teitelbaum. *EL TEMA DE LAS SOCIEDADES TRANSNACIONALES EN LA ONU*. Agosto 2006.

³⁴ Andi Haswidi, *The Jakarta Post*, Jakarta. CSR becomes mandatory for most companies. 21 de julio de 2007

³⁵ Alejandro Teitelbaum. *EL TEMA DE LAS SOCIEDADES TRANSNACIONALES EN LA ONU*. Agosto 2006.

²⁶ COMMISSION ON HUMAN RIGHTS. Sub-Commission on the Promotion and Protection of Human Rights. 55th session. Topic 4 of the programme. ECONOMIC, SOCIAL AND CULTURAL RIGHTS. Commentary on the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. E/CN.4/Sub.2/2003/38/Rev.1. 4 de agosto de 2003

²⁷ The Jus Semper Global Alliance. The UN Sub-Commission on the Promotion and Protection of Human Rights has drafted norms that signal a possible advent of compulsory CSR but continue to legitimise a structure that generates sheer inequality between North and South. TLWNSI Issue Commentary. September 2003.

²⁸ COMMISSION ON HUMAN RIGHTS. Sixtieth session.. REPORT TO THE ECONOMIC AND SOCIAL COUNCIL ON THE SIXTIETH SESSION OF THE COMMISSION, regarding E/CN.4/2004/L.11/Add.7 22 April 2004: Resolution 2004/116, pg. 81.)

²⁹ United Nations Organisation. *The Civi Responsibility of Business in the World Economy. The Global Compact*. May 2005.

³⁰ Organisation for Economic Cooperation and Development. *The OECD Guidelines for Multinational Enterprises. REVISION 2000*. Paris, France, 2000.

³¹ OECD Watch. *FIVE YEARS ON. A Review of the OECD Guidelines and National Contact Points*. SOMO - Centre for Research on Multinational Corporations. Amsterdam, Netherlands. 2005

³² ILO. Tripartite Declaration of Principles on Multinational Enterprises and Social Policy, Third edition. Geneva, Switzerland. International Labour Organisation, 2001

³³ European Communities Commission. GREEN PAPER. Promoting a European framework for corporate social responsibility. Brussels, Belgium, 18.7.2001

³⁴ Álvaro de Regil Castilla. Living Wages: The GRI's Missing Link. The New GRI's "G3 Sustainability Reporting Guidelines" Continue to Avoid Living Wages, the Missing Link of Sustainability. The Jus Semper Global Alliance. TLWNSI Issue Essay, March 2006.

³⁵ Alyson Warhurst and Katy Cooper, in association with Amnesty International. The 'UN Human Rights Norms for Business'. Maplecroft. Bradford on Avon, UK. 26 July 2004.





III. The debate at the core of the UN and the European Union on the responsibilities of business with respect to HR

The debate generated by the impact of business activity on the respect of HR has developed mostly within the bureaucracies of the UN and the EU, or has been aimed at them, with States pushing their views within these organisations or simply keeping a low profile. Although the debate has been going on for decades, it is since the publishing of the draft of the UN Norms for HR that it has intensified, reflecting the growing pressure that civil society is exerting worldwide to harness business practices. Two sides have clearly emerged in this debate.

III.(a) The central case of the UN Norms

As is foreseeable, multilateral organisations, governments of many States, businesses and business organisations

oppose the Norms, whilst the greater part of organised civil society, including many scholars, legal practitioners and consultants on the matter support them.³⁶

◆ *Positions in favour.* Succinctly, those who support them share the consensus that the Norms, considering the current neoliberal context and the available CSR resources, are a clear step forward, legitimate and with authority, towards a legal framework to govern the impact of business on HR. This position has been clearly expressed by highly-credited organisations such as Amnesty International³⁷ and the International Federation of HR (FIDH), as well as by thousands of social organisations, including consumer organisations and HR professionals worldwide. Standing out, singularly, is the decision of the group of MNCs, of the previously mentioned BLIHR, that, in contrast with the vast majority of businesses, did not reject the Norms from the start, and, in turn, decided, since the end of 2003, to put them into practice for several years to assess the results.³⁸

Other positive arguments worth mentioning:³⁹

- goes beyond labour standards,
- by focusing on HR it adds to instead of duplicating other initiatives,
- proposes a comprehensive series of HR norms and a level playing field for all business,
- establishes an adequate balance between the obligations of States and business concerning HR,
- proposes a model to establish national legislation on the matter,
- addresses the current fatigue and mistrust amongst civil society in relation to voluntary initiatives,

◆ **Positions against.** Those opposing the draft of the Norms allege that it represents a major change departing from voluntary adherence of business to HR norms and that this change has not been demonstrated. It is argued as well, with a legalist tone, that many of the Norms have not been ratified by many States and that the Norms attempt to adjudicate to business responsibilities exclusive of States. Main objectors of the Norms, besides many companies and business guilds, were the International Chamber of Commerce and the International Employers Organisation (IEO), two major global “pinnacle” business organisations. Other negative arguments worth mentioning:

- use of a negative style and an unbalanced tone against business,
- ambiguous and inaccurate content,
- the standards applied to companies go beyond those applied to States,
- implementation of provisions of the Norms are burdensome and unworkable,
- duplication with OECD Guidelines ILO’s Tripartite Declaration

“the norms follow a different and positive course vis-à-vis what is currently available either multilaterally or of the multi-stakeholder kind”

❖ **Assessment of the Norms.** The draft of the Norms has many concepts that should be clarified and provide mechanisms that measure how specific standards are applied by corporations. From TLWNSI’s perspective the best illustration of this argument is the core concept of a living wage, given its great lack of clarity. The Norms make no reference of the payment of living wages. Yet, as explained in their commentaries, the Norms enunciate the concept of fair remuneration that ensures an adequate standard of living with a view towards progressive improvement, emphasising the need to take particular care in paying just wages in the least developed countries. The living wage upheld in the Universal Declaration on HR (article 23) and in the ECOSOC Rights (article 7 of the International Covenant on Economic, Social and Cultural

Rights), which is fundamental in our aspiration for a truly sustainable ethos, is implicitly addressed in norm 8 by referring to the need for a just and reasonable remuneration. Yet this norm keeps the same criterion currently used by the ILO concerning minimum wage of “national practice and conditions.” There is no reference to “national conditions” in the Universal Declaration of HR nor in the ECOSOC Rights. This makes the concept of fair remuneration of the Norms clearly ambiguous by declaring that a just and reasonable remuneration must be *freely agreed upon or fixed by national laws or regulations (whichever is higher)*.⁴⁰ How can national laws provide living and adequate wages when most only establish the minimum wage based on ILO’s Convention 131 and Recommendation 135, concerning minimum wage? There is no ILO living-wage Convention. If in the leading economic powers a minimum wage is far from being a living wage, how can a living wage be defined based on national laws and regulations that only address the minimum wage? There is an enormous gap between living and minimum-wage concepts. Furthermore, there is no definition of what is a just, reasonable, adequate standard of living, least developed countries and so on. These sort of ambiguities need much clarification and precise criteria and mechanisms in order to adequately establish a universal living-wage concept. The same occurs with other concepts used by the Norms, as I will address ahead.

It is quite possible that this great ambiguity is a direct result of the struggle in the debate between those who desire a legally-binding framework –and in full congruency with the Declarations upholding respect for HR– and those opposing it, as Alejandro Teitelbaum recounts in his commentary concerning the four-year debate to produce the draft of the Norms. It is quite possible as well that this is the reason why –pressures from governments and business– all voluntary frameworks are very consistent in how they obliquely address the issue of living wages, always based on national practice and conditions and always very ambiguously. Nonetheless, there is no doubt that the norms follow a different and positive course vis-à-vis what is currently available either multilaterally or of the multi-stakeholder kind. The following features stand out:

- **Binding.** The Norms are proposed as a model for the development of national legislation. This is the fundamental difference but not the only important one.
- **A single level of HR in business.** Instead of envisioning different generations of HR, the so-called “essential, expected and desired” that, as we shall see, are being promoted both inside and outside the UN, the Norms establish a “common standard” to be achieved, in which everything is binding instead of providing competitive options with mercantilist criteria.

- **Inclusive process.** Instead of letting business decide what is essential, the outcome is a binding framework, notwithstanding the shortcomings of a first effort, defined after a four-year debate. Despite the evident power asymmetries between participants, the draft reflects a meaningful consideration for civil society's views.
- **Ubiquitous responsibility.** The Norms are considered rights to be respected in all countries within the "sphere of influence" of business, regardless of the political willingness or lack thereof, among governments to protect them.
- **We are all stakeholders.** In contrast with the great majority of available instruments, in which the corporation decides who are its stakeholders, the Norms make a good effort of declaring everyone a stakeholder. Norm 22 defines any individual or group affected by the activities of business as stakeholders, including consumers, customers, governments, neighbouring communities, indigenous peoples and communities, non-governmental organisations, public and private lending institutions, suppliers, trade associations and others.
- **Monitoring and compensation.** Another norm worth mentioning is #16, which binds companies to periodic independent monitoring and verification, nationally and internationally; albeit we can hardly expect objectivity if the monitoring entities are governments of the UN itself. "Other mechanisms to be created", which are also considered, would be far more appropriate. Moreover, lack of compliance with a norm will require adequate reparation or compensation.
- **Sustainable context.** Norm 10 makes an effort to establish the context of the right of societies to a sustainable ethos, including respect for national sovereignty and development policies.

In sum, despite its many shortcomings –and despite the assumed context of continuity of the current neoliberal paradigm, incompatible with true sustainability– the Norms were envisioned from inception to have teeth and, for this sole reason, are a good platform upon which to build a truly binding framework regulating the impact of business on HR, in which the purpose of business becomes the social good and not shareholder value.

III.(b) Reactions of the UN Commission on HR

As we know the Commission on HR rejected, in resolution 2004/116, the draft of the Norms to be considered for its adoption by member States. The same resolution requested the Office of the HR High Commissioner to prepare a report to set the scope and legal state of the existing initiatives and standards, *inter alia* the draft of the Norms, relative to the responsibilities

of business, and to consult the opinions of relevant stakeholders in its preparation. The Report lays out the main "outstanding issues" to be resolved:

- What are the responsibilities of business with regard to HR?
- What are the boundaries?
- In relation to which HR does business have responsibility?
- How can the responsibilities of business be guaranteed?
- Is there a need for a UN statement of universal standards for the responsibilities of business regarding HR?
- What would be their legal nature?
- What tools are needed to promote respect for HR within the sphere of business?

"the intervention of the Commission on HR, relative to the Norms and the responsibilities of business for its impact on HR, is clearly anchored in the market context as the cornerstone of human societies' life"

The High Commissioner's Report⁴¹ also arrives at a number of conclusions, with the following standing out:

- There are gaps in understanding HR in the sphere of business.
- There is growing interest in further discussing a UN statement of universal HR standards for business.
- There is growing interest in continuing a dialogue, particularly incorporating the opinions from the South.
- There is merit in considering the Norms and identifying their useful elements. The "road-testing" of the Norms by the BLIHR could provide greater insight into the responsibilities.
- The main issues requiring further clarification and evaluation include:
 - sphere of influence,
 - complicity,
 - the nature of positive responsibilities of business to support HR,
 - the HR responsibilities of business in relation to their subsidiaries and supply chain,
 - questions relating to jurisdiction and protection of HR when a State is unwilling to protect them,
 - sector specific studies on HR and business,
 - situation specific studies on HR and business.

Despite the rhetoric about the merit of the Norms, from the moment they were issued irreconcilable positions in favour and against them clashed.⁴² Thus, in the interest of resolving the dispute, the Secretary General was asked to appoint a Special Representative on the matter of the HR responsibilities of business.⁴³ In this way, on July 2005, Mr. John Ruggie was named Special Representative on the matter with an initial mandate of two years, requesting

from him an interim report in 2006 and a final one in 2007. Less than a year later, due to the extreme polarisation emanating from the struggle for the political control of the UN by the main powers, the HR Commission was dissolved, given its great discredit, to be replaced by the current HR Council.⁴⁴ This caused the first report from Mr. Ruggie not be properly reviewed in the next and last session of the Commission.⁴⁵

“the current market system is a systematic violator, by nature, of many of the human rights enshrined in the Universal Declaration of HR. Among all of them, the most conspicuous is the payment of a remuneration worthy of human dignity”

❖ **Assessment of the Commission’s work.** The intervention of the Commission on HR, relative to the Norms and the responsibilities of business for its impact on HR, is clearly anchored in the market context as the cornerstone of human societies’ life; ergo: the market is king. This naturally places its position in line with other UN initiatives on the matter, such as the Global Compact, that clearly favour the private interest of the owners of the market.

❖ **Voluntary bias.** Consequently, although the Report prepared by the Commission does not discard the scenario of binding Norms, its inclination for business’ voluntary perspective is evident. Most of the so-called outstanding issues of the Report are reasonable questions that need to be discussed and clarified under a wide consensus. It is right that the draft of the Norms, as a first detailed UN effort on the subject, leaves several pending gaps. However, there are fundamental postures in the Report that clearly expose the market vision. The most illustrative case is the posture asking whether a universal framework for respecting HR in the business ethos is necessary or not, despite plentiful evidences of HR violation by companies.

❖ **Lack of acknowledgement of the customary violation of HR by business.** Parting from an overwhelming avalanche of evidences documented by innumerable civil organisations across the planet, as well as by different annual reports from multilateral organisations, we can assert, in all certainty, that the current market system is a systematic violator, by nature, of many of the human rights enshrined in the Universal Declaration of HR. Among all of them, the most conspicuous is the payment of a remuneration worthy of human dignity. It is necessary to insist that it is well known that companies do not pay living wages to their workers in the South, that the main reason why they establish or outsource manufacturing operations in the South is to have a miniscule labour cost, which bears no relationship with the economic logic but with the institutional logic between governments and business.

It is well known as well that labour is treated as another production component in the supply chain and used or discarded as such. Corporations are perfectly aware of this. Their plans premeditatedly incorporate these conditions in their strategies. The practice is ingrained in today’s business culture, with full awareness about the miserable quality of life endured as a result by many of the human beings who participate in their operations.

Juan Somavía, Director General of the ILO, when he talked about what fair globalisation should be, declared that the decent-work concept has led to an international consensus that productive employment and decent work are key elements to achieving poverty reduction.⁴⁶ In great contrast, business and governments have done everything possible to globalise the demands of institutional investors to protect their shareholder values through a variety of instruments, among them trade treaties and investment rules. Thus, these rules universalise access to consumer markets and labour and globalise as well the prices of goods and services. Nonetheless, it is impossible for these actors to grasp why it is necessary to universalise, in a universal market context, the rules of business responsibility and much less the payment of living wages, in a universal and binding context. Where was the international consensus that Somavía referred to left? Without being overly dramatic, questioning the need for a universal framework, at this stage, seems to me a blatant act of cynicism. It could be understood as a rhetorical question, but regarding a universal framework as an outstanding issue clearly conveys the message that its need is still in doubt, despite the enormous inequality that depicts our era, which makes this question reprehensible.

“there is no notion about the human exploitation that the great majority of business entities carry out each minute in the work shifts of millions of human beings, and thus, in the lives of their families”

❖ **Bias in favour of centring on worst crimes against humanity.** Another emblematic case of the lack of balance is the postulate with which the Commission backs its exposition about the outstanding issues. The Report declares: *business has an enormous potential to provide an enabling environment for the enjoyment of human rights through investment, employment creation and the stimulation of economic growth. The activities of business have also threatened human rights in some situations and individual companies have been complicit in human rights violations. The clarification of responsibilities of business with regard to human rights could help prevent human rights problems from arising, help States regulate business entities more effectively and at the same time assist in channelling the benefits of*

business towards the promotion of human rights. The Report backs its reference to “complicit in HR violations” with a footnote that refers to situations in which companies *have even initiated armed conflicts in order to plunder destabilised countries to enrich themselves.*⁴⁷ That is, the acknowledgement of HR violations by business is limited to the worst crimes against humanity. There is no notion about the human exploitation that the great majority of business entities carry out each minute in the work shifts of millions of human beings, and thus, in the lives of their families. The disparity between extolling the positive role of business in the enjoyment of HR and the total absence of acknowledgement of the customary violation of the same rights through labour exploitation is pathetic and offends common sense, particularly when declaring the need to clarify the responsibilities of business. As if the payment of hunger wages or the repression of the right to freely associate need greater discussion in regards to HR violations.

“in the Report and in most UN documents on the matter, there is no reference whatsoever to democracy”

◆ **Market context.** In full congruence with the market context used by the Report, the business concept of “essential, expected and desired” rights proposed by corporations is maintained, and the business opinion receives particular importance –as is the case of the BLIHR– in defining what rights belong to each classification. No previous consensus, about whether it is reasonable or not to rank human rights by different levels of importance was sought. I must make clear that the Report reflects the views of a wide universe of stakeholders in which, broadly, there are almost as many civil organisations as businesses –albeit several of the former do not represent citizen postures but multi-stakeholder postures, including prominently the views of business, as is the case of the GRI. Thus, despite the diverse universe, the market context, and not the context of true democracy and sustainability, prevails throughout the Report.

◆ **Little inclusion of the South.** Furthermore, it is surprising that the Report does not reflect the opinions of Southern grassroots organisations. This engenders a clear bias towards Northern societies’ perspective. Nonetheless, despite the lack of balance in the visions included, it should be acknowledged that the Report at least entertains the possibility of a wide consultation, with particular emphasis in Southern stakeholders, in the near future. In this way, core issues, such as a binding framework, the identification of the rights affected by business activity, the boundaries between HR and the right to profit, the sphere of influence and complicity, among others, lie, in principle, open to

debate among all stakeholders. We have yet to see congruency between rhetoric and facts.

◆ **Democracy in oblivion.** Lastly, there is a critical factor to stress. In the Report and in most UN documents on the matter, there is no reference whatsoever to democracy –surely because the concept is considered to be implicit in the context of its role. This makes all the more evident the lack of a democratic concept, for the business perspective receives far more consideration, precisely because the true context is the market and not democracy. If the opposite would be true; if those making the decisions would be the civil societies; if governments would be responding to those they represent, if the context would be people and planet, the only opinion to be considered would be the opinion of the citizenry, systematically, for business, as an organ of society, would be subject to the will of the people. The common good, the public good would be privileged over the individual good or the good of a group, the private good. This is not the case. In the rejection of the Norms the rejection of the owners of the market was prominently considered. If the will of the people would have had precedence, the draft of the Norms would have been admitted to be considered for adoption and, thus, all the details, all the gaps, would have been put to debate. The parliaments of States would be in close contact with the citizenry they represent. The issue would be debated and then brought up to a social vote, through national referendums, so that subsequently States would take the position approved by their societies to the seat of the UN for a final debate and vote at the General Assembly. This does not exist but by exception in a few countries; and the fact that there are still five countries with veto power at the UN eliminates any possibility that this organisation can even aspire to proceed in a truly democratic manner. Thus, the influence of societal participation in the process to establish a HR framework in the sphere of influence of business is rather relative. Yet, we should never stop demanding our participation.

III.(c) Assessment of the Vision and Influence of the Global Compact

It is important to assess the Global Compact, for it reveals the prevailing line of thought in the UN and because of its influence in the postures of the Commission in its Report, since it frequently uses it as a reference and as a positive example to be followed: *Internationally, many companies participate in the UN Global Compact, which stipulates that those companies should support and respect internationally proclaimed human rights* (paragraph 23).

“the context is unambiguously the market. In this way, business should determine its own values and not society”

◆ **Scarce business interest.** The truth is that the Compact enjoys scarce participation despite its excessive consideration for the interests of the owners of the market, as I have stated. According to the Compact's own portal, there are only 4.326 corporations out of 70.000 global businesses and almost 700.000 subsidiaries, according to the UN.⁴⁸ Moreover, currently it has 782 inactive companies, since they have failed to have ever reported –or at least have not done so in the last two years– about their compliance with the ten principles of the Compact. It also has 441 businesses that have not reported after they missed their deadline.⁴⁹ This is despite, as even the Commission's Report explains, the principles of the Compact reliance on public accountability, transparency and the enlightened self-interest (paragraph 16) and that the Compact does not specify what HR should be respected by business (paragraph 17). Such business interests are further discredited by the report of *The Economist* – a magazine so emblematic of the business vision– that many U.S. companies decided to join the Compact only after a three-year effort by the UN and the U.S. Bar Association, that produced a letter, full of legal boilerplate, which shields them from lawsuits based on claims that they have failed to live up to the compact. According to the magazine, this is how companies such as Gap, Starbucks and Newmont Mining had rushed to sign up.⁵⁰ Coincidentally, it is quite interesting that at the end of 2007 –three years later– the Compact only has 95 active U.S. companies, 17 that have not reported on time and 32 inactive for not reporting. Considering that the U.S. is the largest economy in the world, it is surprising that less than three percent of all active companies in the Compact are from this country.

◆ **The market is king.** The very low popularity of the Compact among companies, considering its extreme affinity with the business vision, which is reflected in the predominance of business members on its Board, is indeed surprising. What is not surprising is that Mr. Klaus Leisinger, who was Special Advisor (to then Secretary General Kofi Annan) for the Global Compact and who is Director of the Novartis Foundation (from pharmaceutical transnational Novartis) as well as a professor at the University of Basel, mirrors with crisp clarity the backdrop of the business thinking conveyed by the Compact. In his assessment of corporate responsibility for HR,⁵¹ Leisinger is consistent in all his appraisals. To him the context is unambiguously the market. In this way, business should determine its own values and not society. Accordingly, business should independently determine and design what he qualifies as “values management.” He asks: *Where do we draw the limits of our responsibility...how do we define our sphere of influence? How should a company competing with integrity define “complicity”?*⁵² By the same token, in regards to the “decision-making process”

relative to the commitments of business with HR, Leisinger declares that *part of this homework is to identify the stakeholders essential to the company and to address their concerns and demands.*⁵³ That is, it is the company that decides who are its stakeholders and not society. This vision also implicitly carries the context that everything should be voluntary, for if business defines its values and the stakeholders affected by its activity then there is no place for a legal universal framework, resulting from a broad and democratic social consensus, making such decisions.

“the fact that wages are misery wages is irrelevant. It is meaningless to verify whether wages really enable workers to secure a dignified quality of life”

◆ **Amnesia and denial of wage exploitation.** In another posture in line with business, Leisinger accuses the social sectors that we portray companies operating on a global scale as major violators of HR and as the principal rogues in a *chronique scandaleuse* that paints all with the same broad brush. To back his claim, he argues that criticism is based in the worst cases, which come from the extractive sectors; and contends that such crude generalisations can easily be disproved through *serious empirical analysis.*⁵⁴ Evidently, Leisinger ignores or does not acknowledge the customary wage exploitation that the vast majority of global, regional and domestic companies practice in the South, which can be proved objectively and accurately through “serious empirical analysis” using both official data published by governments and multilateral organisations as well as doing field work, visually observing the shanty towns of enormous misery where hundreds of millions of salaried people live all across the South.

◆ **Legality is above morality.** For Leisinger legality is the only valid context. Thus he argues: *it is the basic social function of companies to produce products and services in a legal way and to sell these on the market. To this end, they hire employees of an adult age who work of their own volition in exchange for pay as defined in legally binding contracts or collective bargaining agreements. In addition, companies pay contributions into the social security system. In this way, they enable their employees to secure their own economic human rights.*⁵⁵ Ergo, everyone is in a state of bliss. The fact that wages are misery wages is irrelevant. It is meaningless to verify whether wages really enable workers to secure a dignified quality of life, for this is what Article 23 of the Universal Declaration of Human Rights asserts. It is unimportant if governments block the organisation of free trade unions or if those existing are often repressed and not allowed to make use of their right to strike. It does not matter as well that the system's nature keeps workers trapped inside the

choices of famine, poverty mitigation through misery wages, or a forced and risky migration to the North, for Darwinian capitalism, of open economies, blocks the enjoyment of basic economic HR essential for life. For him, evidently, what counts is strictly the legal code; and, in sync with the business logic of “essential, expected and desirable,” a living wage is not an essential right but a second class or second generation right,⁵⁶ as he qualifies it, given that it currently does not constitute a legally-binding right.

“what does the arguable scarcity of resources of poor countries have to do with this if corporations are the entities paying the wages and not governments?... companies are indeed systematic and customary violators of the human right to a dignified quality of life...the discussion is not about the transfer of responsibilities from the States to business but about the demand that corporations become responsible for the HR violations that they commit, promote, participate or instigate”

◆ **Myths and fallacies of underdevelopment.** According to Leisinger, the reason why people in poor countries do not enjoy these rights is the lack of resources. An enormous fallacy that both business and governments have made sure of promoting. Arghiri Emmanuel, in *Unequal Exchange*,⁵⁷ established decades ago that wage remunerations are not established using the economic logic but according to the political or institutional logic. Today such argument can easily be demonstrated making a very simple comparison. According to the U.S. Department of Labour, the average manufacturing hourly wage in 2004 was \$23,17, but in Mexico it was only \$2,50. Yet Mexico’s living cost, according to the World Bank, is 70%, based on purchasing power parties. Thus, the equivalent wage in Mexico should be \$16,32. There is a gap of \$13,83 because manufacturing workers earn on average 15% of what they ought to be earning.⁵⁸ In this way, while workers in the automotive industry in Mexico earned in 2003 between \$2,10 and 2,60/hour, in the United States workers earned \$21 dollars, to perform the same task; but Mexico’s cost of living was 70% and not 10 to 15% of that in the U.S. If multinationals can accrue a profit in the North with far higher wages, they can perfectly do the same with living wages in the South, which are significantly lower anyway because living costs are generally much lower. As for the issue of productivity, multinationals extract similar levels and even superior ones, without including the much lower labour cost. Indeed, in 2003, Mexico’s Ford, GM and Chrysler plants enjoyed the highest efficiency qualification of all plants of these corporations in the world.⁵⁹

Furthermore, what does the arguable scarcity of resources of poor countries have to do with this if

corporations are the entities paying the wages and not governments? It is well known that business in the South enjoys far superior profit margins –even if, in the case of MNCs, their home offices overcharge their subsidiaries with high fees for services and components to evade taxation– because labour cost is minimal at the expense of the right of workers to a dignified life. In the case of automotive plants in Mexico and Brazil, production cost savings per vehicle in 2003 fluctuated between \$300 and \$1.500 dollars. As a result of the current international division of labour, which is unfairly institutionalised, corporations appropriate the income that belongs to workers in the first place. Therefore, companies are indeed systematic and customary violators of the human right to a dignified quality of life, despite the myths and fallacies that Leisinger argues. As we shall see ahead, the discussion is not about the transfer of responsibilities from the States to business but about the demand that corporations become responsible for the HR violations that they commit, promote, participate or instigate. It is about making them stop violating HR in their sphere of influence and nothing more.

In a world economy globalised through imposition, we have global markets with goods marketed globally at global prices and with global access to labour. Therefore, the true reason why the right to a dignified quality of life in the South is withheld is because of a perverse centre-periphery oligarchic alliance. An alliance so perverse that workers in the South subsidise the good quality of life of Northern workers with their misery. What lies in the backdrop are the unfair terms of trade and of unequal exchange demanded by corporations; what Hoogvelt branded the second Neo-colonial period.⁶⁰ The true reason behind poverty in the South is the withholding of the fair distribution of wealth for the benefit of the global oligarchy. “Poverty” is the symptom of this withholding and not the cause of a miserable life. Thus, institutional investors of the corporations, if they only had the political will, could honour the right of all of their workers in the planet to enjoy a dignified life, for the former are in the driving seat of the economy, and not because of the fallacies alleged by Leisinger to justify the non enjoyment of this right in the South. Accordingly, the argument about being poor countries is, in the best of cases, a myth.

“market interests dominate the development of a HR and business framework inside the UN”

◆ **Extreme defence of neoliberalism.** It is to be expected that Leisinger, in sync with the UN’s tune, does not allude whatsoever to the need to place democracy above the market. In contrast, he does make a clear extreme defence of neoliberalism by defending the opening of markets in his defence of the Global

Compact's conviction that *weaving universal values into the fabric of global markets and corporate practices would help advance broad societal goals while securing open markets*;⁶¹ to be sure, at any cost.

Despite this entirely business vision, the Commission regards the Compact as *a learning forum revolving around ten principles*, in spite of its two main features, which the Commission recognises: its ambiguity and its voluntary adherence. Making dozens of references to a rather unbalanced instrument –and yet mostly ignored– inevitably establishes a precedent and reinforces the image that the market interests dominate the development of a HR and business framework inside the UN.

III.(d) The European Union (UE) position

Lastly, we will examine the posture of the EU regarding HR and business. To this endeavour we will examine the two main documents issued by the EU. The first was the Communication Implementing the Partnerships for Jobs and Growth: Making Europe a Pole for Excellence on Corporate Social Responsibility.⁶² In this report, EU governments unambiguously aligned themselves with business, proposing an alliance. Its main positions are outlined:

- Business should practice self-limitation
- Calls on the European businesses to demonstrate its commitment to sustainable development, economic growth, more and better jobs, and CSR.
- CSR is fundamentally voluntary.
- The Commission proposes a business response beyond the minimum legal requirements.
- A binding approach would increase business risks and would run contrary to the principles of self-regulation.
- The alliance is a political umbrella for new or existing CSR initiatives.
- It is not a legal instrument and it is not to be signed by enterprises.
- The EU must make its regulatory environment more business-friendly, while business must in turn develop its sense of social responsibility.
- The Commission invites European enterprises to “move up a gear” in their commitment to CSR.
- CSR practices are not a panacea and cannot be expected to be a substitute for public policy, but they can contribute to a number of its objectives:
 - Social inclusion.
 - Better addressing social problems.
 - Better rational use of natural resources.
 - More respect for HR, environmental protection and labour rights, particularly in the developing world.

The report additionally makes several recommendations to advance the development of CSR practice. Standing out among them:

- Exchange of best practices.
- Support of multi-stakeholder initiatives.
- Use of trade incentives to improve respect for main human and labour rights, as well as environmental protection and good governance, given that CSR is a mirror of the EU's core values.

The report provoked such annoyance in civil society that well-known HR organisations made their disturbance clear. Amnesty International and the International Federation of HR (FIDH) expressed their frustration, regarding the UE's position as a truly lost opportunity in defence of HR. The press release emphasises several points:⁶³

- The agenda to complement the CSR tools with laws has failed.
- Using the Norms as example it emphasises the broad recognition of the need for a regulatory framework.
- Accuses the EU of ignoring the opinions of civil society conveyed during the 2004 multi-stakeholder forum.
- Accuses the EU of partiality because its position only reflects the business vision, which aims at the lowest common denominator possible, and for refusing to accept to fully assume its role on this issue.
- The EU is using demagoguery when calling to observe greater respect for human and labour rights for they must be fully respected at all times and in all circumstances.

The European Union apparently reacted with some sensitivity without changing its original position. In a new report, at the end of 2006, the European Parliament re-establishes the EU's position. Of the new reports' seventy-three paragraphs, the following excerpts are worth mentioning:⁶⁴

- Acknowledges concerns regarding the lack of transparency and impartiality.
- Recognises that an open debate remains between different stakeholders on an appropriate definition of CSR.
- Calls for the European CSR debate to be 'depolarised' by neither supporting exclusively voluntary nor mandatory approaches.
- Reiterates an essentially voluntary approach but enabling –without obligation– research based on clear social and environmental objectives and without excluding further dialogue and research on binding commitments.

- Considers that credibility of voluntary CSR initiatives is further dependent on incorporating existing internationally-agreed standards and principles, and on a multi-stakeholder approach.
- Believes that the CSR debate must not be separated from questions of corporate accountability.
- Notes the Commission's decision to set up a European Alliance for CSR in partnership with business networks.
- Supports the principle of "responsible competitiveness."
- Notes a contradiction between competitive sourcing strategies seeking continuous improvements in flexibility and cost, and voluntary CSR commitments seeking to avoid exploitative employment practices, and welcomes further dialogue on this point.
- Suggests that the assessments of European companies be extended to cover their activities and those of their subcontractors outside the European Union, especially in developing countries, in accordance with the ILO conventions and, in particular, the core conventions.
- Believes that consumers, customers, employees and investors must have the opportunity to select or reject companies depending on their perceptions on their social and environmental behaviour.
- Recommends future CSR research to focus on the link between competitiveness and sustainable development.
- Calls on Member States to contribute to supporting and strengthening the OECD Guidelines, particularly in respect of European national contact points (NCPs).
- Calls for support of the Global Reporting Initiative (GRI).

♦ **Civil Society reactions.** Civil society reaction to the European Parliament's report was far more constructive vis-à-vis the reactions provoked by the European Commission's report.

The FIDH expressed particular appreciation for the support of the Parliament to greater transparency, to keeping together CSR and corporate accountability, as well as for the suggestion that public procurement awards preference to socially responsible enterprises. Accordingly, the FIDH cautiously regarded the report as an attempt to put the debate on CSR back on track.⁶⁵

"governments, instead of fulfilling their mandate, partner with global capital, acting as their agents to preserve the current system where the market is king"

The European Coalition for Social Justice (ECCJ) considers the new report from the European Parliament as a pragmatic step forward that seeks to eliminate the polarisation of the debate between voluntary and mandatory visions. It applauds as well that the EU

considers CSR as an integral part of corporate accountability. Nonetheless, as a whole, the ECCJ severely regretted the European Commission's report for it regards CSR as a strictly voluntary instrument, and accused the Commission of excluding civil society from the preparation of the report whilst it included the business sector. The ECCJ considered that the Parliament's report does not address many core issues conveyed by civil society whilst it puts excessive emphasis on protecting the competitiveness of business. The ECCJ also regretted the absence of a call for legislation to force corporations to adhere to their voluntary codes, for, otherwise, such codes are of very little value. Consequently, the ECCJ provided its qualified support to the Parliament's report to be approved in the next plenary, declaring that it will continue to press in pursuit of a strong, direct, effective and mandatory CSR policy.⁶⁶

♦ **Assessment of the EU in regards to CSR.** Evidently, as expressed by the main HR civil society organisations, the EU's behaviour is rather reprehensible due to its egregious partiality in favour of private corporate interests relative to their social and environmental responsibilities. Such position constitutes a new confirmation of the current predatory market ethos, in which governments, instead of fulfilling their mandate, partner with global capital, acting as their agents to preserve the current system where the market is king. It is really startling, moreover, that the EU did not issue a specific report about the state of HR in the area of activity of business. From TLWNSI's perspective it is necessary to convey the following value judgements in support of our assessment:^{67*}

- The strong bias in favour of business carries three main characteristics:
 1. **Voluntary ethos.** In spite of the rhetoric about a willingness to explore a mandatory concept, the business perspective is adopted ex ante by insisting on the voluntary ethos.
 2. **Competitiveness capacity.** The excessive concern for protecting business competitiveness automatically places the market above democracy and, thus, above people and planet. The EU acknowledges the contradiction between competitive supply chains and CSR's commitment to avoid human exploitation, and acknowledges the responsibility of business for supply chains outside the EU. Yet, instead of clearly adopting a position against making competitiveness subservient to justice, it calls for greater dialogue.
 3. **Lowest common denominator** The EU focuses exclusively on the eight core ILO conventions (report paragraphs 23, 53 and 65) and excludes the rest –several are critical– ignoring fundamental rights enshrined in the Universal Declaration of HR, such as article 23 concerning the right to a

remuneration worthy of human dignity, which, furthermore, is fundamental in addressing the systematic human exploitation.

- Substantiates its framework of reference with the so-called soft laws such as the OECD guidelines and multi-stakeholder initiatives such as the GRI.
- By focusing only on ILO's core conventions, which do not address North-South inequality, the EU premeditatedly ignores once again North-South exploitation, cornerstone of the current system, despite admitting that the greatest potential for a positive impact of CSR to fight poverty is in the supply chains in the South. Thus, the EU exposes its enormous contradictions by privileging the voluntary angle, competitiveness and market context.
- The EU admits that CSR is no substitute for an adequate legislative framework, but instead of proposing the development of European law it reiterates the natural voluntary CSR essence. Accordingly, it defines "best business practice" as the point of departure for CSR success; another huge incongruence.
- Despite social pressure for a legal framework, it trusts that credibility will be obtained through the norms and principles of soft laws (OCDE, Global Compact...)
- Approves of the alliance between the European government and business.
- Timidly and ambiguously (paragraphs 24 and 25) admits to the importance of fair wages without demanding them.

- Acknowledges consumers' right to choose and encourages the development of a European labelling standard. Yet who is going to believe in norms developed by a clearly pro-business parliament? Consumer organisations must develop their own norms.
- Puts fair trade as an example, but it does not acknowledge that, until now, fair trade only mitigates poverty.*
- Hopes for CSR to serve as the guide to develop legislation, but does not show any intention of developing tough laws.

In summary, from TLWNSI's perspective, both the European Commission and Parliament reports are a brazen rhetoric exercise in favour of the corporate private interest that is full of contradictions and hypocrisy and that exposes the role of European governments as the agents of business. It is important to make clear that we only assessed the EU's position for it is the governmental actor on a global scale that has been the most outspoken about its position regarding CSR. In the case of the U.S., for example, where corporations are far more reticent about becoming socially responsible –as can be attested by their rather low adoption of the quite friendly Global Compact– the subject of HR and business has been basically ignored by the government institutions.

³⁶ HUMAN RIGHTS COMMISSION. REPORT OF THE SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS. Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights E/CN.4/2005/91. 15 February 2005.

³⁷ Amnesty International. The UN Human Rights Norms For Business: Towards Legal Accountability. London, UK, 2004.

³⁸ Business Leaders Initiative on Human Rights Report 2: Work in Progress. London, UK, December 2004.

³⁹ The arguments in favour and against can be reviewed in detail in the report concerning the issue of HR Commission in: HUMAN RIGHTS COMMISSION. REPORT OF THE SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS. Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights E/CN.4/2005/91. 15 February 2005.

⁴⁰ COMMISSION ON HUMAN RIGHTS Sub-Commission on the Promotion and Protection of Human Rights Fifty-fifth session Agenda item 4 ECONOMIC, SOCIAL AND CULTURAL RIGHTS. Commentary on the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. E/CN.4/Sub.2/2003/38/Rev.1. 4 August 2003.

⁴¹ HUMAN RIGHTS COMMISSION. REPORT OF THE SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS. Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights. E/CN.4/2005/91. 15 February 2005.

⁴² Klaus M. Leisinger. On Corporate Responsibility for Human Rights. Basel, Switzerland, April 2006, p. 3.

⁴³ OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. Human rights and transnational corporations and other business enterprises. Resolución 2005/69, 20 April de 2005.

⁴⁴ UN General Assembly. Resolution adopted by the General Assembly. 60/251. Human Rights Council. 3 April 2006.

⁴⁵ COMMISSION ON HUMAN RIGHTS. Sixty-second session. PROMOTION AND PROTECTION OF HUMAN RIGHTS. Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. E/CN.4/2006/97. 22 February 2006

⁴⁶ International Labour Organisation. Facts on Decent Work. June 2006

⁴⁷ HUMAN RIGHTS COMMISSION. REPORT OF THE SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS. Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights. Pages: 13-14. E/CN.4/2005/91. 15 February 2005.

⁴⁸ United Nations Conference on Trade and Development. World Investment Report 2005. New York y Geneva, 2005

⁴⁹ See: <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>

⁵⁰ The Economist. Bluewashed and boilerplated. June 17th 2004

⁵¹ Klaus M. Leisinger. On Corporate Responsibility for Human Rights. Basel, Switzerland, April 2006,

⁵² *ibid*, pages 6, 9 y 13.

⁵³ *ibid*, page 8.

⁵⁴ Klaus M. Leisinger. On Corporate Responsibility for Human Rights. Basel, Switzerland, April 2006, pages 4 y 5.

⁵⁵ *ibid*, pg. 10.

⁵⁶ *ibid*, pg. 10.

⁵⁷ EMMANUEL A. (1969) : L'échange inégal. François Maspero. París

⁵⁸ The Jus Semper Global Alliance. TABLE T4: 1975 - 2004 REAL-WAGE GAPS FOR TWELVE ECONOMIES, IN PURCHASING POWER PARITY (PPP) TERMS, FOR MANUFACTURING WORKERS. : <http://www.jussemper.org/Resources/Labour%20Resources/Resources/T4rcrs1br.pdf>

⁵⁹ Álvaro J. de Regil. The Neo-Capitalist Assault. The Case of Mexico III: A New Neo-Colonisation. – A TLWNSI ISSUE ESSAY SERIES. The Jus Semper Global Alliance: <http://www.jussemper.org/Resources/Economic%20Data/The%20Neo-Capitalist%20Assault/Resources/TheCaseofMexicoIII.pdf>

⁶⁰ Ankie Hoogvelt, Globalization and the Postcolonial World (Baltimore: John Hopkins University Press, 1997)

⁶¹ Klaus M. Leisinger. On Corporate Responsibility for Human Rights. Basel, Switzerland, April 2006, pg. 7.

⁶² COMMISSION OF THE EUROPEAN COMMUNITIES. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. IMPLEMENTING THE PARTNERSHIP FOR GROWTH AND JOBS: MAKING EUROPE A POLE OF EXCELLENCE ON CORPORATE SOCIAL RESPONSIBILITY. Brussels, 22.3.2006 COM(2006) 136 final

⁶³ Amnesty International and International Federation of Human Rights. New EU Communication on Corporate Social Responsibility: a Missed Opportunity. Paris/Brussels, 24 March 2006

⁶⁴ European Parliament. REPORT on corporate social responsibility: a new partnership. FINAL A6-9999/2006 20.12.2006

⁶⁵ FIDH. The International Federation for Human Rights (FIDH) welcomes the report of the Committee on Employment and Social Affairs of the European Parliament on Corporate social responsibility: a new partnership (A6-999/2006). 06/03/2007

⁶⁶ ECCJ. European Coalition for Corporate Justice Position on the European Parliament Report on CSR . 20 March 2007.

⁶⁷ Álvaro J. de Regil. How Sustainable is Our Latte? An Assessment of Trends and Standards in Fair-Trade From the Perspective of a New Truly Sustainable People and Planet-Centred Paradigm. The Jus Semper Global Alliance. TLWNSI Issue Essay. May 2007.





IV. The Work of the Special Representative on HR – The First Report

To be sure, the reason why the UN Secretariat General appointed Mr. John Ruggie Special Representative to the Secretary General on HR (SRSG-HR), was the open polarisation, which persists today. Mr. Ruggie, Professor at the Kennedy School of Government of Harvard University, immediately applied himself to fulfil his mandate which, as he himself describes it, is about the effort to clarify the topic of business and HR; identifying, clarifying, researching and elaborating to compile compendia and develop materials on the subject. Moreover, he is asked to make recommendations with the goal of strengthening the promotion and protection of HR in the field of business. Furthermore, he is asked to go beyond the legal sphere and evaluate the policies and best practices of States and business and even conceive

methodologies for the assessment of the impact of business activity on HR.⁶⁸

“Mr. Ruggie has not been able to get rid of the market context as the omnipresent power and ruler of the life of societies and the planet”

As part of his mandate, SRSG-HR conducted a survey aimed at the world’s top 500 companies, using Fortune Magazine’s list, a study of global patterns and regional and sectorial variations in HR business practices, and a study of business perceptions on the topic. By the same token, until now he has delivered, in line with what was requested, the interim report in February 2006 and the final report in February 2007, of his two-year work, including a series of addenda focusing on various subjects and other minor surveys.

IV.(a) Assessment of the 2006 interim report of SRSG-HR

Mr. Ruggie has not been able to get rid of the market context as the omnipresent power and ruler of the life of societies and the planet. Thus, his tone often excuses, given the stark evidence, the reality of business activity. Thus, for instance, Ruggie writes about the difficulties in the value chains, where companies lose control (paragraph 22), a control that MNCs such as Wal-Mart do not lose for imposing their predatory conditions; he writes as well about the symbiosis between the greatest abuses on HR in business and the recipient countries with relatively low incomes and corrupt governments (paragraph 30), a corruption in which corporations are frequently the instigating part *sine qua non*; and he writes about the proliferation of different codes of conduct that companies impose on one supplier (paragraph 44), as if companies were not the culprits of such hardship by opposing a universal and binding framework.⁶⁹

At the time he prepared his interim report, the survey that the Special Representative commissioned, aimed at the world's top 500 companies on Fortune's list, was in progress. The survey sought answers on whether companies have established policies and practices on HR and, if they have, what norms are used as reference, whether they do evaluations on the repercussions on human rights, and what responsibility do they believe they have regarding HR with the different stakeholders (paragraph 4). Ruggie explains that at the time he wrote his report he had only received 80 responses, and that it was very likely that the first to respond were the most enthusiastic and committed. Thus, the results he advanced were provisional (paragraph 32). Unfortunately, judging from the final results, interest among the 500 global companies left much to be desired, for only a total of 102 responses was obtained. Moreover, his impression that the first 80 responding were the most enthusiastic and committed can be extended with a high degree of confidence to most of the 102 participants. The SRSG informs us that most participants indicated having HR management principles, which were incorporated because they regarded them to be of importance and not due to violations they committed. Accordingly, the fifth group responding was the segment that had positive things to share. The remaining 80 percent that did not respond, ignored the request even after their CEO received a special letter calling their corporations to participate. Consistent with other indicators, such as in the case of the Global Compact, Ruggie notes the low participation of U.S. companies in comparison with European ones as well as of corporations with headquarters in the arguably "emerging markets."⁷⁰ Ruggie also analyses responses by sector and by region, which have no quantitative value given the small total sample.

The impression of the SRSG-HR that the 102 global corporations responding are the most committed, is substantially reinforced by another survey that Ruggie has just finished in China. Although this survey has a sample of only 25 companies, all Chinese, and hence has no statistical value, the study found that those Chinese companies belonging to the top global 500 group had a greater probability of having published HR policies than those that do not, even when belonging to the Global Compact.⁷¹ That is, there is a very consistent trend showing that the better things to say, the greater the response to the UN call to participate in their HR activities. Those not having positive things to say, the great majority, ignore the call.

“designers of the codes choose their own definitions and standards of human rights, which have much to do with what is politically acceptable within and among the participating entities”

From the interim report of the SRSG-HR there are several positive and negative aspects worth covering and assessing. My commentary is conveyed using italics.

◆ ***Evident weaknesses in the codes of conduct.*** Ruggie acknowledges that there is no doubt that the codes of conduct share a series of weaknesses. Among them the SRSG stresses one opinion, in my opinion, fundamental: designers of the codes choose their own definitions and standards of human rights, which have much to do with what is politically acceptable within and among the participating entities. Moreover, even when taken together these “fragments” leave many areas of human rights uncovered. In this way, Ruggie concludes, the challenge is to make the promotion and protection of HR a more standard and uniform corporate practice (paragraph 53).

- *It is pertinent to insist that civil society's pressure pursues universal and binding norms, with concrete penalties, and not an array of less heterogeneous voluntary instruments.*

◆ ***Relevant jurisprudence is not effective.*** The scarce jurisprudence on HR applicable to business instead of to States refers to the most heinous crimes against humanity, including torture, and mainly comes from cases of the U.S. Alien Tort Claims Act. Yet its influence has basically been existential since not one of the cases has been filed in favour of the plaintiffs (paragraph 62).

- *A commentary that exposes how far governments are from promoting and protecting HR violated by business through legal instruments. As Ruggie's commentary makes obvious, there is an absolute void in jurisprudence to make business responsible for the systematic violations to HR in their daily operations, in*

labour rights, in the conditions they impose to the supply chains, and so on. There is no jurisprudence whatsoever capable of making corporations responsible not for the duties of governments pertaining to HR but of their own act of HR violation.

◆ **Social and moral norms also count.** In addition to laws imposing constraints on business practice, social and moral norms also constrain them. Thus, concepts such as “essential, expected and desirable,” concerning business behaviour with respect to HR, have a very different basis in society’s fabric from those used by business and respond to different incentive and disincentive mechanisms (paragraph 70). Identifying those differences would be rather useful for companies, governments and civil society alike, Ruggie argues.

- *Indeed, one of the most noticeable features in recent years is the growing adoption by civil society of consumer habits with a social and environmental conscience that prominently incorporates the protection of HR. Given the absence of laws that pertain to business and HR, the citizenry is increasingly using its consumer power as an incentive and disincentive leveraging mechanism vis-à-vis clearly identified specific business practices.*

“if governments were to apply existing laws and to take advantage of the available instruments for policy development, the debate regarding respect for HR by business would not be nearly as polarised as it is today”

◆ **The fundamental role of the State.** Ruggie stresses the obvious: if governments were to apply existing laws and to take advantage of the available instruments for policy development, the debate regarding respect for HR by business would not be nearly as polarised as it is today (paragraph 79).

- *To be sure, Ruggie is not going to expose the immoral symbiosis existing between markets and governments and the democratic parody in which the world lives.*

“the demand of civil society worldwide does not attempt to assign State responsibilities to business. It attempts, simply and straightforwardly, to make corporations responsible for their own acts and to end the hypocrisy and cynicism vis-à-vis what is in itself rather evident”

◆ **Short-sighted vision of the dispute over the Norms.** In his analysis, Ruggie fails to depart from the extremely limited angle of the established order when assessing the draft of the Norms. In this way, Ruggie puts up a defence of the duties of the State and of business based on national and international law. He alleges that the Norms took the HR instruments that assign legal responsibility to States and simply asserted that they are now binding on

corporations as well (paragraph 60), despite not being a microcosm of the entire social body. Thus, by nature, they do not have a general role to play regarding HR as do States; they only play a specialised role (paragraph 66). He also argues that the Norms were very imprecise in assigning the obligations corresponding to States and those corresponding to business. He suggests, moreover, that if the Norms would have constrained themselves to compiling an inventory of the HR affected by business and to establishing some benchmarks, then the discussion could have proceeded to focus on defining what is essential, expected and desirable, and how can broad principles best be translated into best operational practices. Ruggie scorns the idea of a monitoring/verification mechanism, which he regards to be very contentious and merely symbolic (paragraph 58). He asserts, relying on the current legal frameworks, that corporations can only be legally responsible for participating in war crimes and crimes against humanity (paragraphs 60, 61 and 63). He ends by asserting that his argumentation should not be taken as implying that innovating solutions on the matter of HR and business are not necessary or that further evolution of legal principles are not part of those solutions, for he considers them to be essential. However, the SRSG concludes that the flaws of the Norms are, in reality, a distraction rather than a basis for moving the Special Representative’s mandate forward (paragraph 69).

- *Although, without conceding, Ruggie may be right in some of his arguments, from the legal perspective, his failure to deliver a balanced assessment of the Norms is evident. To start, his mandate was precisely the result of the dispute between civil society and business. Thus, if the Norms had not been drafted he would hardly have a mandate. The important thing, nonetheless, is that by constraining himself to the legal angle, to the current undemocratically established order, he refuses to admit that corporations are customary and systematic perpetrators of the daily violations of many HR. As I have previously expressed, the demand of civil society worldwide does not attempt to assign State responsibilities to business. It attempts, simply and straightforwardly, to make corporations responsible for their own acts and to end the hypocrisy and cynicism vis-à-vis what is in itself rather evident. Corporations love the term “good corporate citizen.” Accordingly, if companies are citizens, then, as everybody else, they cannot go on a binge of stealing, swindling, exploiting or killing. In sum, they cannot go on violating HR; even if such stealing, swindling exploiting or killing takes place slowly, in a veiled way, in gradual doses, indirectly, even if these acts are not typified in the legal frameworks. Corporations are organs of society composed of individuals, and they cannot demand, as they do, that society accepts that these individuals leave behind their moral values every time they cross the*

threshold of the place of work. What the Norms did was not assign State responsibilities to business but to compile, from relevant instruments, the norms addressing the HR violations customarily perpetrated, directly or indirectly, by business, so they could be adopted with the intention of forcing corporations to accept responsibility for their own acts, and not for the responsibilities of governments, as they attempt to argue.

An important feature permeating throughout the SRSG's entire interim report is its strong inclination for the business vision. Considering that Ruggie's assessment should be neutral, his bias in favour of the market context engenders a clear lack of balance.

- **Excessive focus on the business angle.** The SRSG report, in spite of its good intentions, is inevitably characterised for being impregnated by the market context, which can be confirmed by observing that his opinions frequently part from the business perspective and give far more importance to the needs of business than to societal needs. Accordingly, Ruggie expresses the importance of inquiring, by visiting the physical operations of business and by calling for regional consultations with enterprises, about their specific needs in different contexts, with the intention of acquiring a better understanding (paragraph 54). One cannot perceive, nonetheless, the same emphasis on permanently engaging civil society, nor can one find surveys aimed at this universe. By the same token, while he makes specific references to the opinions of business organisations, such as the International Chamber of Commerce, the IEO and the BLIHR, there are no specific references to, for instance, unions or to societal organisations and coalitions. To be sure one cannot observe a balanced assessment. One can observe in contrast extraordinary similarity with the business arguments included in the report of the extinct Commission regarding the reactions in favour and against the Norms, which I have summarised in chapter III, but can be reviewed in detail in the Commission's Report E/CN.4/2005/91. Finally, it is not surprising that, in sync with the market, Mr. Ruggie makes an open defence of neoliberal Darwinian globalisation, when he declares that *while its benefits are unevenly shared, globalisation has generated numerous positive effects in terms of higher living standards and in some parts of the developing world it has provided the opportunities for unprecedented rates of poverty reduction* (paragraph 13). As I have discussed from the onset, the truth is the widening of inequality between rich and poor even in the world's leading economies. Ruggie also argues that civil society and those responsible for policy are increasingly aware that business participation is an essential ingredient for success. Whose success? A system that is a net generator of enormous inequality

cannot be an ingredient for success in a truly democratic ethos. He also warns, paradoxically, about nationalism and fundamentalism and proposes anchoring globalisation in common values. Where are the common values when civil society is demanding real democracy and sustainability? For, I must insist, what has been imposed is the empire of the market, of global Darwinian capitalism, of predatory and perverse supply-side economics. Most agents of civil society are struggling in pursuit of a new paradigm, in pursuit of another world and not for the world that has been imposed.

- **Absence of balance in the use of consultation sources.** The SRSG informs in his report about the use of advisors, especially of legal experts, to support his mandate. To this endeavour, he explains, he makes use of Harvard's School of Law, and of the advice of legal practitioners and scholars from the U.S., United Kingdom and Australia (paragraph 5). It is startling that all his advisors come from countries with a legal tradition in Anglo-Saxon Common Law, which he does not balance with a group of experts with a tradition in Roman-Germanic Law used by many countries and even with experts with non-Western legal traditions, such as Japanese Law. The point is important, for part of the debate lies on the current precedence, in daily praxis, of the market over people, which is unacceptable from the perspective of true democracy. It should be recognised, however, that he makes use of works prepared by the International Jurists Commission (paragraph 70) in Geneva, which does enjoy the membership of a diverse array of jurists, representing both North and South. Nonetheless, albeit Ruggie expresses interest in receiving advice from legal experts from the developing world, their presence is starkly lacking. This would be the case, for instance, of the American Association of Jurists, with strong Iberian American participation and with consultive status before the UN Economic and Social Council. Furthermore, this association has members who have conveyed their opinion on business and HR, as is the case of Alejandro Teitelbaum, its permanent representative before the UN organisms based in Geneva,⁷² who conveys his perception of the attempt, at the seat of the UN and in some States, to dismantle and neutralise the HR mechanisms, and even reduce their content.⁷³

IV.(b) Civil Society's Reactions

The Interim Report of the SRSG-HR generated immediate reactions from the social sector. The reactions insist on many of the positions previously expressed, given the evident perception of the dominance of the business vision in the Report. Accordingly, a coalition of more than one hundred organisations wrote a letter to Mr.

Ruggie in which they express the following points regarding business and HR:⁷⁴

- *Universal Norms are required.*
- *They need to be clearly defined and with effective mechanisms to enforce them.*
- *CSR Norms should be derived from HR laws and principles.*
- *They should be applicable to all companies irrespective of their nature, trade or location.*
- *It would be shameful to aim at the lowest common denominator.*
- *The increasing relevance of HR and humanitarian law to non-state actors should be taken into account.*
- *It is important that you recommend to States how to regulate business practices*
- *It is requested that you take advantage of the efforts already made and that you go beyond the current framework and the status quo.*
- *A universal framework must clarify the obligations of States to regulate business as well as business direct obligations regarding HR, which must be applicable to all business in all countries.*
- *It is requested that you visit the communities most affected by the activity of MNCs and that you consult with organised civil society at all levels (local, national and international).*

The letter does not need further commentary. Yet it is only pertinent to emphasise the context, in which the hope that the so-called democracies of the world ratify the Universal Norms in their laws, once they are sanctioned as international law, is evident. Ruggie's response is constructive and he attempts to emphasise the coincidences between his mandate and the letter's demands in all aspects, pointing out the importance of developing forms of regulation, and he tries to offer assurances that he will take into account the position of all sectors through consultations. Nevertheless, the SRSG-HR asserts that he is going the right direction in his mandate.⁷⁵

Another relevant document from civil society is the position from the FIDH, representing 141 HR organisations in more than one hundred countries. The relevant points in the assessment of the FIDH are:⁷⁶

- Ruggie's mandate is only a step in the process.
- He should part from the existing efforts, including the Norms, to develop instruments that improve accountability.
- The challenge is to clarify concepts such as "sphere of influence" and "complicity" and examine the different vehicles that could be explored to ensure that re-establishing the international obligations of MNC

under the Norms can be equipped with a monitoring mechanism.

- The implementation of the Norms can be ensured based on existing monitoring mechanisms, including those based on treaties to monitor the obligations of States regarding HR, by stating the obligation of both home and host States to guarantee the protection of communities, ensuring that corporations do not violate HR in their activity outside their home office.
- FIDH accepts the SRSF's proposal to explore, through brain-storming sessions between legal experts, the possible extra-territorial extension of a home-country's jurisdiction on their corporations when these abuse HR.
- This can also be ensured by developing a new monitoring mechanisms directly approaching MNCs without relying on the international HR responsibilities of States.

"a coherent regulatory system requires an international institutional framework to ensure a minimum of democratic, transparent and participatory procedures"

The FIDH clearly argues in favour of moving forward, parting from the Norms, towards new international laws – and then national laws– defining, regulating and penalising the responsibilities of business, particularly when acting outside the home base. To be sure, in spite of the naïveté of hoping today's arguably democratic States take charge and support a new legal paradigm of direct obligations of business concerning HR, maintaining the pressure on States and to remind them of their actual responsibilities is essential. The most interesting feature of the FIDH, however, is envisioning another route for the development of a monitoring mechanism independent from States and directly approaching corporations. Certainly, if this takes passing new legislation, it would have to depend on the States' legislative branches. Yet, there are other options available, such as the market mechanisms based on consumer power. Lastly, the fact that the FIDH document is dated the same day Ruggie's Interim Report was published, implies that the FIDH had already anticipated the Special Representative's posture and planned on conveying its own position on the issue without delay.

"all economic structures and processes should be governed by democratic decision-making instead of "autocratic procedures."

◆ ***A perspective underpinned on democracy.*** A study from Theodor Rathgeber, one of the observers to the HR Council, on its assessment of the draft of the Norms and of the resulting debate, argues that *a coherent regulatory system requires an international institutional framework to ensure a minimum of democratic, transparent and participatory procedures.* Rathgeber reckons that *there is*

nothing new about the notion of “responsibility” as a fundamental normative category for the actions (or omissions) attributed to businesses within society. He explains that ideas have been developed around a fundamental postulate aimed at humane, democratic business practice. In this way, *all economic structures and processes should be governed by democratic decision-making instead of “autocratic procedures.”* Both the employees, who are directly dependent on the production site, and the state, which is legitimised by democratic means, should have their say in the company’s structure and basic orientation. Thus, owners cannot decide unilaterally. By analogy, Rathgeber explains, the stakeholders who are thus affected should receive “countervailing powers;” such as unconditional opportunities to file complaints and launch legal proceedings. Transparency must allow the participation of all stakeholders and victims.⁷⁷ His assessment stands out for being the only one, in my research, making explicit, and emphasising the democratic context as a *sine qua non* element for corporate business responsibility to exist.

IV.(c) Final assessment of the SRSG-HR Interim Report

The corollary of the Interim Report is that, despite Ruggie’s emphasis on including as much as possible of his mandate, consulting extensively with all sectors (paragraph 3), the truth is that his best effort was aimed, up to that report, to listen, investigate and assess the business perspective on their HR responsibilities. Ruggie includes some contact with civil society and with people affected by corporate globalisation, but his report is dominated by business visions, particularly from Angle-Saxon countries. Accordingly, for example, whilst he conducts surveys with multinationals he does not explore civil society’s perspectives in the same way. While his attitude with business is proactive, his attitude with civil

society, particularly with communities most afflicted by corporate predatory practices, is reactive. This absence of balance cannot offer objective views that truly address the root of the problem, which in spite of the persistent refusal of the owners of the market to admit their direct responsibility, civil society has clearly and accurately depicted it.

It is necessary as well to point out the consistent characteristics shared with those who lean with the status quo. In addition to his insistence on the market context, Ruggie favours voluntarism; classifying HR in business as “essential, expected, and desirable”, based on their own preference; not making any reference to the need to dignify compensations, to put an end to customary labour exploitation; and for his stark omission of any mention about the importance of placing people and planet above the market, assuming that the context of democracy and of a sustainable paradigm are implicit in his mandate. In respect to the application of the responsibilities of business on the entire geographical sphere of influence, he only favours applying the existing laws but not a new regulatory framework. Lastly, in regards to new monitoring mechanisms he rejects them openly.

Mr. Ruggie begins his defence of neoliberal globalisation pointing out that his commentaries are not judgemental, but he himself ends up admitting, in his last paragraph, that inevitably his report makes normative judgements, which evidently express a clear position. From the very start, the appropriate thing should have been that then-Secretary General Annan would have created a balanced team of experts in all aspects and representing all stakeholders both North and South. But it has always been clear that there is an enormous gap between the appropriate thing, the balanced perspective, and *realpolitik*.

⁶⁸ John G. Ruggie. Re: Joint NGO Response to Interim Report. 22 May 2006.

⁶⁹ COMMISSION ON HUMAN RIGHTS. Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. E/CN.4/2006/97 22 February 2006

⁷⁰ HUMAN RIGHTS POLICIES AND MANAGEMENT PRACTICES OF FORTUNE GLOBAL 500 FIRMS: RESULTS OF A SURVEY. Conducted by John Ruggie, 1 September 2006.

⁷¹ HUMAN RIGHTS POLICIES OF CHINESE COMPANIES: RESULTS OF A SURVEY. Conducted by John Ruggie, September 2007.

⁷² Alejandro, Tetitelbaum. EL TEMA DE LAS SOCIEDADES TRANSNACIONALES EN LA ONU. Agosto de 2006.

⁷³ Alejandro, Tetitelbaum. LOS INTENTOS DE REFORMAR LAS NACIONES UNIDAS - EL NUEVO CONSEJO DE DERECHOS HUMANOS. Agosto de 2006, pag. 9..

⁷⁴ Joint NGO Response to Interim Report., 18 May 2006.

⁷⁵ John G. Ruggie. Re: Joint NGO Response to Interim Report. 22 May 2006.

⁷⁶ FIDH. POSITION PAPER. COMMENTS TO THE INTERIM REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, 22 FEBRUARY 2006

⁷⁷ Theodor Rathgeber. UN Norms on the Responsibilities of Transnational Corporations. Dialogue Globalisation. OCCASIONAL PAPERS. N° 22. Friedrich-Ebert-Stiftung. Geneva April 2006. Geneva.



V. Assessment of the 2007 Final Report of the SRSG-HR

It should be recognised that the final Report⁷⁸ of SRSG Ruggie's first mandate, before it was extended until 2011, delivers far more comprehensive research, more in accordance with current reality and less charged with personal commentary that, nonetheless, does not disappear altogether.

"the SRSG insists on the mythological success in poverty reduction of the current economic paradigm"

V.(a) Main value judgements

The SRSG makes several value judgements that he considers his work draws, which I in turn assess in italics:

◆ ***Adequate institutions.*** Without adequate institutional underpinnings, markets will fail to generate all their benefits and may even become socially unsustainable because markets frequently do not consider the social and individual harm they generate (paragraph 1).

- *Ruggie acknowledges what is evident: markets need to function under strict and clear rules and institutions that enforce them, that do not let the private good be obtained at the expense of the public good.*

◆ ***Markets' mythological success.*** Ruggie argues that neoliberalisation, as a result of trade and investment treaties and of privatisation, have contributed to impressive poverty reduction in emerging markets and to generalised welfare in the entire industrialised world, albeit this has imposed costs on individuals and communities. He then states that the era of Victorian laissez faire and the first part of the twentieth century failed in this aspect because governments did not control their negative impacts on the core values of the social

community; but there is little evidence those situations have taken root. Yet this is the dystopia that States and businesses need to avoid, as they assess the current situation and where it might lead. (paragraphs 2 and 83).

- *The SRSG insists on the mythological success in poverty reduction of the current economic paradigm. It is unnecessary to demonstrate again the fallacies and myths of the apologists of neoliberalism. Nonetheless, it should be pointed out that Ruggie seemingly does not consider that such defence is a direct contradiction of his first argument about the need of adequate institutions. The current neoliberal paradigm demands that governments stay out of the market; they demand total deregulation. Moreover, in a truly democratic ethos, the market is only a vehicle and not an end in itself. Its only purpose is the welfare of all ranks of society, particularly of the dispossessed. Hence adequate institutions must be the underpinnings, developing and establishing with precision the direct binding responsibilities of business for their impact on all types of HR, and strict laws to protect citizens, through due penalties, when such impact violates their rights. How can there be adequate institutions defending HR regarding business vis-à-vis a deregulated market system, which, additionally, is the symbol of predatory social Darwinism and of mankind's perversity, and not of the myths its apologists dare to ascribe to such system?*

“to admit the lack of control of business implies that democratic institutions do not fulfil their most basic responsibility of procuring the common good, while they do allow and protect the welfare of the most powerful private actor: the corporate citizen”

◆ **Business environment permissive of HR abuses due to misalignment between market forces and common good.**

There is a permissive environment of business violation of HR due to a clear fundamental institutional misalignment between the scope and impact of economic forces and actors and the capacity of societies to manage their adverse consequences. As long as States do not fix this misalignment, the most vulnerable people and communities pay the heaviest price (paragraphs 3 and 82).

- *Ruggie exposes the democratic parody we endure. To admit the lack of control of business implies that democratic institutions do not fulfil their most basic responsibility of procuring the common good, while they do allow and protect the welfare of the most powerful private actor: the corporate citizen. The corruption produced by the mix of political and corporate interests, all private, particularly through campaign financing, creates an ethos in which public servants in positions of power are mere agents of*

corporate interest. This is the underlying reason beneath the not only permissive environment but also the encouragement and protection of the private interests of the owners of the market inside the arguably democratic governments of the world. This is the misalignment Ruggie is referring to. It is the conflict between the democratic mandate and the private interest of those who wield political power. It is a conflict deeply rooted on corruption. A truly democratic government devotes itself entirely to procure the welfare of its citizens and not of corporations. Domestic and foreign enterprises are only vehicles to generate wealth, and it is the obligation of governments to guarantee it is distributed fairly.

◆ **Participation of other actors and market mechanisms.**

Although governments should play a key role in representing the public interest, they need the participation of other social actors and other social institutions to succeed, including market mechanisms (paragraphs 4, 53-55 and 85).

“at the end, the corporate citizen will not have a say in citizen decisions, which should be taken through consultations in which only human beings participate”

- *In a truly democratic environment –direct and bottom up– citizen participation is essential for overseeing public management of all aspects of public matter. This may include the participation of societal institutions, including enterprises, as long as social welfare and the common/public good, in a sustainable manner, are upheld as the only purpose of democratic societies; and after explicitly establishing that the market is only one of several vehicles to procure the common good and not as the omnipresent end, property of its owners, which pretends to rule over human life and planet. In this way, the opinions of the owners of the market must not deal with the defence of their private interest. They must deal with how the market can be more efficient in generating wealth and fairly distributing it to generate commensurate welfare, so that the market stops being a private good, particularly dominated by MNCs. At the end, the corporate citizen will not have a say in citizen decisions, which should be taken through consultations in which only human beings participate. This scenario is likely to be far from what Ruggie envisions, where market actors and mechanisms participate contributing to social responsibility, which is materialised in self-regulating normative systems. In an ethos of genuine real democracy and the rule of law, what reigns are the laws created to protect HR. Accordingly, the participation of other actors and institutions may be welcome as a complement in the form of additional norms that clearly go beyond the duly defence of all HR in the sphere of influence of business. These may be market mechanisms encouraging competitiveness by*

qualifying the performance of business in fully respecting HR and in the long-term sustainability of its activity in the economic, social and environmental dimensions. This may include consumer mechanisms when we align our consumer power with our perceptions on the socio-environmental performance of business.

“if we really had democratic governments there would not be such a growing social polarisation, not just on the sphere of HR but on the questioning of the current paradigm that rules the life of the great part of mankind”

V.(b) The SRSG's Assessment of standards and practices regulating business responsibility

Ruggie organises his report in five clusters of standards and practices regulating business in relation to the legal, social or moral obligations imposed on them with the following perspectives:

1. State duty to protect. International law firmly establishes that States have the duty to protect from non-State human rights abuses within their jurisdiction, and that this duty extends to protecting against abuses by business entities. This is established by both UN HR treaties and by customary international law (paragraph 10). This implies that the duty of States, as in the case of the International Covenant of Civil and Political Rights, will only be fully discharged if individuals are protected by the State, not just against violations by its agents, but also against acts committed by private persons or entities. Failing to comply constitutes a State's breach of its obligations (paragraph 13). Ruggie admits that States leave much to be desired on this issue by showing much disdain for their obligations, as confirmed by the questionnaire he sent them, in spite of the obligations of States on HR being one of the fundamental underpinnings of the international HR regime (paragraphs 16-18).

- *The Representative's arguments on this aspect are not debatable and it is very positive he recognises the crass reality. If we really had democratic governments there would not be such a growing social polarisation, not just on the sphere of HR but on the questioning of the current paradigm that rules the life of the great part of mankind. The need to create explicit and concrete laws on the behaviour of business in the area of HR would be less than the current need, and probably complimentary, just to fill the existing voids. Governments would take charge for duly protecting the respect of all HR and for strictly punishing its violators, and they would be more than willing to fill the voids. Yet, given that governments are instead agents and partners of the market, citizen mechanisms are essential, particularly the power of consumers since it*

follows the logic of the market. Consumer power, which often has proven its effectiveness to change business decision making, should be instrumental for pressuring governments to fulfil their obligations, by improving the HR legal framework, by defining the direct responsibilities of business, such as the payment of living wages, and by making the new framework mandatory.

“the use of the ICJ is of the utmost importance and we should make an effort to push for the extension of its jurisdiction to cover all human rights entirely and not just the worst crimes against humanity, fully incorporating the responsibility of business”

2. Corporate responsibility and accountability for international crimes.

For quite a long time, besides States, individuals are responsible for international crimes of piracy and slavery. Beginning with the creation of the International Court of Justice (ICJ) in 2002, individuals may be directly responsible for crimes of genocide, crimes against humanity, and war crimes if States parties fail to act (paragraph 19). Enterprises are increasingly recognised as “participants” in the international sphere with rights and duties. This makes it increasingly difficult to sustain that business should be exempted from responsibility in the international sphere such as HR (paragraph 20). Thus, in the same way the absence of international accountability mechanisms did not preclude individual responsibility for international crimes, it does not preclude as well the emergence of business responsibility. Moreover, there is increasing effervescence between the two processes creating jurisprudence, one international and the other domestic, whose interaction is generating a network in constant expansion that is shaping corporate responsibility. Thus probability suggests that businesses will be subject to ever increasing responsibilities against these crimes in the future, especially in the area of complicity, judging from the growing collective experience (paragraphs 19-31).

- *The progress gained in the area of the responsibility of business for worst crimes against humanity, such as the murders of peasants or indigenous people, in complicity with governments and local oligarchies, to appropriate their lands, is quite positive. The case of the Mapuche Indians in Chile or the “Sem Terra” (landless) Movement in Brazil are emblematic cases of this kind of corporate malfeasance. The problem here is precisely the absence of democratic institutions and of the rule of law, in which governments are facilitators, judges and malefactors. Therefore, the use of the ICJ is of the utmost importance and we should make an effort to push for the extension of its jurisdiction to cover all*

human rights entirely and not just the worst crimes against humanity, fully incorporating the responsibility of business.

“there is nothing that prevents States from imposing international responsibilities directly on companies... when the entity directly responsible for protecting people from the violation of their HR is a major perpetrator of such violations, little can be expected from the entity to enforce the law and much less to promote and execute new laws to make business responsible for their acts against humanity”

3. Corporate responsibility for other human rights violations under international law.

In contrast with the growing acceptance of business responsibility in international crimes, its responsibility in the violation of other HR is far from enjoying consensus (paragraph 33). Yet nothing precludes States from directly imposing responsibilities on business; the question is whether they have not done it already (paragraph 36). The Universal Declaration of HR takes a unique place in the international normative order, but it does not have a legally binding effect. Many of its provisions have entered customary international law, but it is generally accepted they are only binding on States, and their operational paragraphs do not explicitly indicate that they are binding on companies. The responsibilities of business under the ILO conventions continue being indirect (paragraphs 37-42).

- *Although in the wide array of HR not contemplated as direct responsibilities of business is where most violations take place, Ruggie’s assessment of this HR area is precise. Such is the case of labour rights, beginning with a living wage, which is not even contemplated as the responsibility of States in any law. His conclusions about this great void are rather evident. The absence of political will in arguably democratic governments to change this situation is all the more evident, particularly in the light of the SRSG’s commentary that “nothing prevents States from imposing international responsibilities directly on companies.” This is hard proof of the lack of political will not only due to the connivance between States and business but because many governments violate all kinds of HR in and outside their jurisdiction. In labour’s sphere many governments are systematic violators of rights upheld in the ILO conventions ratified by their States. This brings us to the following conclusion: when the entity directly responsible for protecting people from the violation of their HR is a major perpetrator of such violations, little can be expected from the entity to enforce the law and much less to promote and execute new laws to make business responsible for their acts against humanity. Indeed, it is this system of systematic*

exploitation, deeply rooted in the current ethos of social Darwinism, that has sequestered the so-called democratic institutions.

4. Soft-law mechanisms. Their normative force resides in the acknowledgment of societal expectations by States and other key actors. Ruggie groups these mechanisms in three categories: those with a traditional standard-setting role, such as the ILO’s Tripartite Declaration and the OECD Guidelines; the enhanced accountability mechanisms, such as OECD’s national contact points (NCPs); and the multi-stakeholder kind, such as the Voluntary Principles on Security and Human Rights in the extractive sector (paragraphs 45-48, 50 and 52). All of them may still be seen as experimental. Their value depends on the effectiveness and the structure of its governance, which in turn depends on its degree of transparency, participation and constant improvements (paragraphs 56 and 57). Its role is important to materialise the norms emerging from the international community. The fact there is greater interest in some intergovernmental agreements, combined with the innovations in soft law directly involving business in the creation of regulations suggests States and business are acknowledging societal expectations and the need to share responsibilities (paragraph 62).

- *Indeed, many of them can serve as reference to materialise some norms, as long as the objective is to impose direct legal responsibilities on business in regards to HR and many other rights affected by its activity. Nonetheless, these euphemistically called soft-law mechanisms must not be an end but only a step towards a strict and legally-binding framework that gives sense to the relationship between rhetoric and reality. Thus, interpreting these mechanisms as a sign of acknowledgement of societal expectations is erroneous for such mechanisms would appear more as a tactic to evade the majority’s demand for imposing a legally-binding framework on business. Human rights will never be protected or respected with voluntary instruments. OECD Watch has just published the results of a study finding that governments completely disregard the NCPs.⁷⁹ The SRSG also talks about “sharing responsibilities.” Since when do governments share responsibilities when an individual steals or rapes a woman or kills another person? Why should we share the responsibilities of business when they commit acts violating a human right? The societal demand is to define with clarity all the direct responsibilities of business for the violations they commit within their sphere of influence, so that States define and execute the corresponding penalties in each case. The responsibilities of States have already been defined partially, and they certainly need to be improved to include many human rights lacking legal norms. Yet there is no reason whatsoever to share the*

responsibilities exclusively attributable to corporations for their practices. This argument reinforces the perception of the eagerness of the SRSG to promote a non-binding ethos that intrinsically awards special treatment to business.

“these mechanisms are an option for business that may strengthen respect for HR, to be sure, but cannot ever substitute a legal framework”

5. Self-regulating mechanisms. This has to do with a considerable variety of voluntary mechanisms in which business leaders recognise human rights and adopt measures to ensure a basic accountability. Nonetheless, their weaknesses are evident, standing out the ambiguity in the criteria, the elasticity in their interpretation and use and the fact that companies often do not recognise the rights on which they have the greatest impact (paragraph 74). As an example, the GRI is used by less than 200 companies in accordance with their norms; 700 do it partially, while others say they do it informally (paragraph 78). Finally, in both voluntary and statutory initiatives determined laggards find ways to avoid scrutiny (paragraph 81).

- *All voluntary mechanisms are contrary to social demands for a binding framework as long as they are positioned as an alternative. Furthermore, along with so-called soft-law mechanisms, none address issues that are the cornerstone of human exploitation, such as the absence of payment of salaried compensations worthy of human dignity. The only contribution these mechanisms can make is developing sustainable business practices that go beyond the laws establishing the direct responsibilities of business concerning HR, with the purpose of offering corporations business tools that increase their competitiveness. The greater the competitiveness, the greater the possibility of gaining market share through greater good will (intangible assets) of their target markets, by improving their perceived image. These mechanisms are an option for business that may strengthen respect for HR, to be sure, but cannot ever substitute a legal framework. Nonetheless, its traditional laxity has redounded in miniscule credibility amongst civil society, and, as Ruggie says, exposes its weaknesses*

V.(c) The Report’s Addenda

Ruggie’s Report includes five addenda that focus on his assessment of different relevant aspects of his Report.

V.(c1) State responsibilities to regulate and adjudicate corporate activities ⁸⁰

The relevant points of his assessment are:

- The treaties require States to play a key role in effectively regulating and adjudicating corporate activities regarding HR.
- This role is considered as part of the State’s duty to protect against abuse by third parties.
- Treaty body commentaries show a trend towards increasing pressure on States to fulfil this duty on this matter.
- All of this indicates the emergence of clear State obligations to prevent and punish corporate abuse by all types of entities.
- There is less guidance as to whether the State may fulfil its duty to protect by focusing on the acts of natural persons within the offending enterprise or whether it is obliged to regulate and adjudicate the enterprise as an entity.
- The treaty-based human rights machinery has been paying increasing attention to the regulation of States and adjudication of corporate activities and already plays an important role in elaborating the duties of States.
- More guidance on the scope and content of State obligations in this field could further support States in the fulfilment of these duties and bring additional clarity to rights-holders and business enterprises.
- It would be desirable that HR bodies were to systematically request States to include information about steps taken to regulate and adjudicate corporate abuse in their periodic reports.

“paradoxically, the Achilles hill of trade imperialism is the power of consumers. Neither enterprises nor governments can control our freedom to choose”

❖ **Assessment of addendum one.** There would hardly be disagreement in civil society about the key role of the State in the protection of HR against any offending entity. It is very positive that pressure on the State to control HR violations by corporations is increasing, as well as a trend towards greater clarity and less ambiguity and flexibility in the interpretation of concepts. The problem is how to prevent this trend from progressing at a snail’s pace, and, particularly, how to make governments fulfil their duty to enforce the existing laws, when we are living in an ethos of global institutional corruption and where the owners of the market are in command. Undoubtedly, pressure must continue and even increase in the multilateral organisations, despite the opposition of most governments. In the same way, pressure should increase through all types of civil actions, including pressure on corporations to incorporate in their culture practices to be increasingly clear and delimited about their responsibilities for not violating HR. Nevertheless, concurrently with these efforts, it is essential to pressure business and governments through the logic of the market

using our consumer power. Paradoxically, the Achilles heel of trade imperialism is the power of consumers. Neither enterprises nor governments can control our freedom to choose –as Darwinist Friedman liked to argue– to align our consumer habits with our democracy ethics. Our consumer decisions directly and immediately affect the economics and sustainability of businesses. Thus, they react far more expediently than a law they can evade by corrupting those in charge of enforcing it.

V.(c2) Issues pertaining to corporate responsibility under International law and issues in extraterritorial regulation⁸¹

This addendum to the Report of the SRSG covers the conclusions of two seminars on business responsibility under international law and extraterritorial jurisdiction, held in New York and Brussels, respectively. According to the Report, best efforts were made to achieve broad regional representation and include academic experts, legal practitioners and representatives from NGOs.

◆ **Business responsibility under international law.** The main conclusions were:

- There was broad consensus that substantial work is needed to adequately define the scope and content of corporate responsibility for human rights violations under international law.
- There was caution against over-simplifying the current state of international law, as this is one area in which legal doctrine appears to be lagging behind practice.
- One proposal was to develop an international statement of public policy that would define a minimum corporate duty to respect (and possibly protect) human rights, with the UDHR seen as a good starting point for identifying appropriate standards.
- There was broad agreement that a corporate duty to fulfil rights would only be appropriate in very limited circumstances, such as where corporations have effective control of an area or assume government functions.

◆ **Business responsibility under extraterritorial jurisdiction.** The main conclusions were:

- Although it is necessary to avoid modern-day imperialism on the part of home States, it should be acknowledged that home State action may often be necessary to ensure violations are actually addressed. One option would be controlling MNCs through various “points of control” in the home State itself.
- Apart from the principle of non-intervention in the internal affairs of another State, there are no significant international legal impediments to States exercising extraterritorial jurisdiction; yet whether they are required to do so remains an open question.

- Two particular challenges in regulating MNCs were identified:
 - Determine corporate nationality to ground State jurisdiction.
 - The need to look beyond the formal separation of legal entities in a corporate group to attribute liability to hold the parent company accountable for its subsidiaries’ acts, or by holding the parent company directly liable for its own acts and omissions in relation to its subsidiaries. There was real interest in home States requiring HR reporting and impact assessments from “their” MNCs.
- While host State legal systems should generally be respected and strengthened, it was agreed that the overarching goal must always be to provide victims with justice.

❖ **Assessment of addendum two.** The light drawn by the preceding conclusions about the predominant vision among the seminars’ participants makes the following assessment pertinent:

☑ **States are the main obstacle.** Above all legal considerations there is a moral obligation in corporations to immediately stop violating HR, which weighs on them every minute, and which they cannot evade. In spite of the broad consensus on the need for governments to clarify the areas of legal responsibility, of the state of progress of national and international law on the matter, so that jurisprudence is congruent with the current need of preventing corporations from violating HR, the greatest obstacle is the States’ governments in themselves. Although the seminars’ participants declared that the overarching goal must always be to provide victims with justice, it seems that all are satisfied with only using the legal route; this in spite of the major reason why the legal route is moving at a snail’s pace is due to the opposition of the great majority of governments to the comprehensive control of business practices violating HR. Moreover, many governments are direct violators of HR. Therefore, even though the legal route is essential, it is unrealistic to put all our bets exclusively on the legal route through States. Considering that the use of the ICJ, as Ruggie already notes in his report, is an alternative of the utmost importance to be developed, with the objective of individuals being entitled to using it and not only States; for in the absence of political will, this emerges as the only alternate legal route. By the same token, market mechanisms should be used concurrently as long as legal routes fail to effectively protect HR from business practices.

“it is really an illusion and a self-deception to consider that home States of the majority of MNCs are “strong-governance zones” that will have the political will to control their corporations’ foreign operations”

✓ ***There are no zones of strong governance that translate into moral authority.*** Relative to extraterritorial jurisdiction, possible susceptibilities to attitudes that could be considered imperialistic are a distraction from the real issue, which is the absence of moral authority in the great majority of governments. Governments seldom fulfil their most basic responsibility, in the democratic social contract, of procuring the social welfare, which inevitably includes the unconditional protection of HR before any entity violating them. It is really an illusion and a self-deception to consider that home States of the majority of MNCs are “strong-governance zones” that will have the political will to control their corporations’ foreign operations. In realpolitik home governments advance and protect the economic interests of their MNCs overseas, starting with the promotion and support of host governments willing to cooperate with their national interests, which inevitably redounds in the violation of a wide array of HR. This is the true imperialism: the trade imperialism exerted on a daily basis through the centre-periphery symbiosis, in which both kinds of governments systematically operate in connivance, partnering with global capital. Consequently, what government is going to exert moral authority over a subsidiary of an MNC when all are enthusiastic promoters and protectors of the current Darwinian paradigm controlled by global capital? Moreover, albeit less systematically, violation of HR is nothing unusual in the so-called “strong-governance zones.” Thus, in reality there are no strong-governance zones given that true democracy is starkly lacking.

✓ ***Acknowledging the system of exploitation that the world endures is the first step towards a HR legal framework for business.*** One gets the impression that all the conclusions drawn from the seminars are that we are dealing with a problem that is not unusual but that takes place occasionally here and there, when in all truth it is systematic and ubiquitous. Accordingly, it is essential that the first thing to admit through a declaration is that we endure a rather manifest system of exploitation practised daily both by domestic and global corporations and all the more so in the latter.

“MNCs conscientiously and premeditatedly have built a system of exploitation, particularly North-South, in which they build supply chains where they impose conditions they know very well force suppliers to subhuman practices, and in which they have complete and absolute control”

✓ ***The system of exploitation is directly designed, imposed and controlled by corporations.*** Accordingly, it is clearly unacceptable to declare that corporate responsibility in HR should be limited to only areas with direct control. MNCs conscientiously and premeditatedly have built a system of exploitation, particularly North-South, in which they build supply chains where they

impose conditions they know very well force suppliers to subhuman practices, and in which they have complete and absolute control. They may not consider them to violate HR. Yet they are fully aware they maximise profits at the expense of miserable lives for the affected workers. This is the primeval reason why they go overseas, for they cannot extract nearly as advantageous conditions in their home countries, and they do it with the full support of their own governments and of host governments. This is a practice of exploitation they manage directly or indirectly in a rather conscientious and perverse manner. They are material or intellectual authors of HR violations through their complicity in strategic schemes they directly plotted.

✓ ***Corporations are responsible for every relation they establish.*** A natural person is morally responsible for supporting, as a consumer, a tomato producer or a shoe repairer –when the natural person is aware that they exploit their families or workers in their operation. The individual has no control of the situation. Yet the individual does have direct control of the buy-sell relationship. The same logic is perfectly applicable to business. Currently there are no laws that formulate such responsibility, but corporations have the moral obligation, whether they admit it or not, to control their procurement relationships. The big difference with natural persons is that corporations are the authors of the schemes of exploitation they impose on their supply chains.

V.(c3) Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments ⁸²

I highlight the most relevant points of addendum 3 about the States’ survey. The results of the survey of the top 500 companies in Fortune’s list, also included in the addendum, are not included for they were released in 2006 and were already included in the assessment of the Interim Report. The governments’ survey generated such a scant response that any statistical value is lacking. Only 29 out 192 UN members responded. Nonetheless, the most relevant points highlighted by the SRSG are included below:

- Most States gave priority to CSR, instead of focusing on HR in the sphere of business.
- States draw on only a limited number of potential methods available to address issues of business and HR, such as voluntary programmes, OECD’s NCPs and some novel market regulations where they have particular jurisdiction, such as government procurement policies and export credit agency requirements among others.
- With the exception of the EU, States still rarely include specific HR requirements in bilateral investment treaties and free trade agreements and there is no pertinent inter-ministerial co-ordination.
- States cite the lack of international or agreed-upon standards as a major challenge in addressing business in HR.

- Less than a third of responding States have a national legal system permitting the prosecution of legal persons, domestically or overseas, for HR violations.
- Several States hold the view that non-State actors cannot be held responsible for HR violations at all, since promotion and protection of human rights are strictly a State duty. The low response rate may mean that, despite the importance that many States claim to place on the issue, very few have acted upon their political commitments.
- States are engaged in some regulation of HR, most notably the most egregious violations and little more.

“it is about corporations refraining from committing HR violations and for taking responsibility for the violations they commit. Only the State, as the only public servant, can be responsible for promoting and protecting HR. Yet we are all responsible for the violations committed by our own acts.”

❖ **Assessment of addendum three.** The survey, its lack of statistical value notwithstanding, shows what is evident. States, conscientiously and often perversely, have abdicated from their most basic democratic responsibilities –turning into mere market agents– in which the promotion and protection of HR is the cornerstone for their proper fulfilment. On the other hand, an erroneous argument appears once again: the rationale for making businesses promoters and protectors of HR is debated, when the right argument is making businesses responsible for their own violating acts, as any organ of society. The right debate is about corporations refraining from committing HR violations and for taking responsibility for the violations they commit. Only the State, as the only public servant, can be responsible for promoting and protecting HR. Yet we are all responsible for the violations committed by our own acts.

Another problem is if States fail to act, for we do not lose our responsibility. Thus, considering the circumstances, it is of the utmost importance to lobby with all institutions in order to succeed in permitting all individuals to turn to the ICJ to denounce HR violations by businesses, as long as the void on this issue persists in legal frameworks. There is already a precedent in the OECD’s NCPs. Initially, only States could make use of them. However, since 2000 all of the world’s citizens can resort to the NCPs.

V.(c4) Business recognition of HR: Global patterns, regional and sectorial variations ⁸³

The SRSG commissioned a study aimed at identifying the HR policies of 300 companies in a sample including all regions of the world and a significant section of businesses in the arguably emerging and developing countries. The study is only about companies with HR policies incorporated in their operational policies. In the

same way, eight multi-stakeholder initiatives and five socially-responsible investment indices were evaluated from a HR angle. The study is not a survey, but a documentation of what is available in the three areas.

❖ **Assessment of addendum four.** There is not much to say in this respect given that the study’s purpose is to identify what is available regarding HR in a sample of companies, in the main instruments of CSR and in the ethical investment indices. The main findings are not surprising whatsoever. The rights most included are labour rights, especially all the ILO conventions; the rest are scantily acknowledged. There is more sensibility towards HR in European and from the U.S. than in Asian or Iberian American companies, which minimally acknowledge them. As could be expected, the right to a living wage is starkly lacking; a fact confirming the generalised disdain –emblematic of the world’s current business culture– for remunerating their workers, including those in their supply chains in the South, at a level where they can enjoy a quality of life worthy of human dignity. In the same way, the use of external verification is extremely low. Finally, since everything is voluntary and each company chooses whatever is convenient, there is an enormous variety and ambiguity in the way to approach the issue of HR.

V.(c5) Impact assessments and methodological questions ⁸⁴

The SRSG-HR considers that the social and environmental impact assessment culture is relatively well established and is routine in projects with a considerable footprint, particularly in the extractive sector. Ruggie considers as well that impact assessment (IA) should always be ex ante and not ex post. Given that the topic is practically new in the HR area, the SRSG develops the following rationale for HRIAs:

- Should consider the full business life cycle.
- Should describe HR conditions in the area surrounding the business activity to be established and define the limits of its sphere of influence.
- Engagement of HR and industry sector experts, local stakeholders and internal and external personnel is critical to this step.
- Should also consider community perceptions of what is likely to change.
- It is critical that HRIAs are based on consultations carried out in a manner that promotes genuine dialogue.
- Should be framed by the International Bill of HR, which consists of the Universal Declaration of HR and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.
- In contrast with social and environmental IAs, should instead force consideration of how the project could possibly interact with each and every HR.

❖ **Assessment of the HRIA addendum.** Impact assessments are fundamental and should be considered as part of the legal requirements for any project, whether new or an acquisition. The following considerations are presented:

☑ **Ex ante.** It is very positive that Ruggie considers them always as ex ante since they should be a requirement for approving a project or the very incorporation of a new business.

☑ **Three possible judgements:** 1) approve a project as is, 2) amend it to put it in line with the HR and business legal framework in force and 3) reject it for being in itself harmful to HR.

☑ **Universal norm.** The SRSG does not appear to contemplate that these studies be a control tool of a legal common and universal HR framework, and that the main motive of States be precisely the promotion and protection of HR in lieu of competing for foreign direct investment.

☑ **Full participation.** It is very positive that the SRSG gives primordial importance to the full incorporation of stakeholders, especially the affected communities, in a climate of dialogue and cooperation;

☑ **Universal framework.** Very positive as well that he signals the International Bill of Human Rights as the framework of reference (from which future laws should part).

☑ **A priori judgement.** Unfortunately, Ruggie continues to not acknowledge the systematic human exploitation, by commenting that it would be reasonable to expect HRIAs when important investments are considered in conflict zones or in spheres where HR abuse has prevailed (paragraph 39). It seems his perception is that HR violations in business are the exception and not the norm. This is incongruent with his call to use the International Bill of HR as the framework of reference, for the bill goes well beyond the worst crimes against humanity, beginning with the most violated right: remunerations worthy of human dignity. Although he has always acknowledged that HR and business responsibilities need to be clarified with precision, the above commentary is an a priori opinion that considers that there is no systematic and customary violation of HR in business.

☑ **Independent assessment.** An important aspect remaining unclear (paragraph 18) is that companies cannot evaluate their own project impact assessments. They should pay for the cost of these studies but their execution and control must be performed in principle by governments, and with broad participation of

independent organs of civil society in the country in question. These cannot be executed by for-profit organisations because, as Ruggie himself comments, their credibility has been put much in question.

V.(d) The Business Position

With the exception of the BLIHR –whose work will be reviewed in detail in the next section– that embarked on the project of testing the draft of the Norms, the attitude of the majority of corporations and their organisations is to insist on the status quo. Their position concerning HR in their ethos is socially irresponsible and mercantilistic. They insist on resorting to legal subtleties and to unilaterally defining the concepts. The document prepared by Mr. Leisinger –previously reviewed in the assessment of the Global Compact positions– illustrates with clarity their arguments, which are deeply anchored in a distorted interpretation of Smith’s *laissez faire*: companies should be completely free to roam the world in search of the best conditions to maximise shareholder value without any constraint whatsoever that contravenes its only purpose, which is the reproduction and accumulation of capital. Accordingly, in regards to HR, their reaction is to maintain a strictly voluntary ethos in which CSR and HR may be integrated, if the company elects to do so, as one more competitive instrument to gain market share by building a good corporate citizen image. We confirmed this in section III, both in the HR Commission report –reporting the main business organisations’ position about the responsibilities of business apropos of the draft of the Norms (E/CN.4/2005/91)– as well as in Mr. Leisinger’s paper.

It should be pointed out that the entire context of the business argumentation against regulation is centred on the question of whether business should be responsible for promoting and protecting HR, which they reject with good reason, for that is the responsibility of States. With this sophistry, which has transcended to the UN organs involved in the issue, including the SRSG, it attempts to evade the real controversy to be settled: that companies become responsible for their own acts violating HR. A controversy that, albeit I have often elaborated from inception, it is necessary to emphasise. Accordingly, for business, besides its insistence on voluntarism, companies should be the ones defining all issues: limits of responsibility, sphere of influence, who should be their stakeholders, complicity, what should be reported and what is optional, whether responsibility is applicable in all countries or just in those with direct operations, whether there should be external monitoring and audits and so on.

◆ The Geneva Declaration in the context of the Global Compact

In the summer of 2007 the world’s “business leaders” issued a declaration accurately illustrating this vision in a

grand display. Gathered in Geneva for a GC summit, hundreds of business people committed to complying with labour, HR, environmental and corruption norms with the goal of making globalisation more beneficial for people. The so-called “Geneva Declaration” calls for “urgent action,” *for poverty, income inequality, protectionism and the absence of decent work opportunities pose serious threats to world peace and markets.* In the same way, they reckoned that *business, as a key agent of globalisation, can be an enormous force for good...globalisation can act as an accelerator for the diffusion of universal principles, creating a values-oriented*

*competition for a “race to the top.”*⁸⁵ It is good they see themselves as the agents of globalisation, but the universality of the “universal principles” they implicitly assume is a matter in deep controversy. To begin with, they evidently do not regard themselves as the main source of the poverty and income inequality they allude to in their call for an “urgent action.”

The Declaration includes 21 points that reinforce their position adorned with open hyperbole and cynicism. Following are the points summarised and my comments in italics:⁸⁶

● The role of business in society.

- ✓ Globalisation is redefining the role of business in society. *Globalisation is the craft of business, and it is being imposed in an absolutely undemocratic manner, as I have already argued.*
- ✓ Proactive companies implementing corporate citizenship practices are more sustainable. *The voluntary context in which companies make all the decisions is evident.*
- ✓ Responsible business practices may contribute to the UN’s fundamental goals. *Again, may is a voluntary option.*
- ✓ Communication on progress on the integration of the UN Global Compact is important for companies. *Once more, the voluntary context prevails in a climate where many participants have legally boiler-plated themselves against any possible suit for not complying with the GC principles, as I have previously mentioned.*
- ✓ Partnership and collaboration with stakeholders is essential. *This is not about partnering but about the obligation to not violate HR. Partnering continues to be a voluntary option.*
- ✓ Using standardised methodologies and indicators is essential to allow investment decisions to be made on the basis of comparable data. *The context remains voluntary.*
- ✓ In situations of weak State governance, investors and companies rather than divest can increase their engagement provided such activities are in line with the principles of the Compact. *The same optional and careful posture not alluding to anything presupposing an obligation.*
- ✓ Investors can encourage companies to be transparent, while urging governments in weak states to act responsibly. *In addition to the voluntary context, they insist on the responsibilities of governments but not on their own for not violating HR.*
- ✓ Lenders can ensure that loans are applied in line with international standards. *The same context.*

● Actions for UN Global Compact Participants

- ✓ Participants commit to advancing the ten Compact’s principles and giving them a concrete meaning. *Additionally to the optional moral expectation, they arrogate the right to define their meaning as they best deem convenient.*
- ✓ We will engage in responsible advocacy on global challenge and collaborate with other stakeholders to arrive at practical solutions to common problems. *More best wishes.*
- ✓ We will ensure that our corporate commitments and policies are embedded throughout our organisations. *More rhetoric always in control of defining their commitment with no obligations.*
- ✓ We will seek to mobilise our subsidiaries so that the Compact’s principles are embedded everywhere. *Another way of saying the same thing as in the preceding point.*
- ✓ We will encourage our supply chains to do the same. *If they were genuinely committed, they have all the control and power to demand the adherence of their supply chains to the symbolic Compact, or to any other norm, just by just conditioning their contracts to compliance with the instrument.*
- ✓ We commit to build on best practices and form alliances with other industry sectors. *They define their practices.*
- ✓ We will seek to instil the tenets of corporate citizenship in tomorrow’s business leaders. *Business leaders define corporate citizenship.*

● Actions for governments

- ✓ Our commitments to make the global economy more robust and inclusive will be beneficial only if governments provide long-term stability and promote transparency and entrepreneurship. *A call to reinforce the status quo of the market as life giver God. What happens to the rule of law and the democratic ethos?*
- ✓ We urge Governments to ratify and effectively implement relevant conventions and declarations, including the ILO core conventions. *Although the call is appropriate since many conventions have not been ratified and those ratified are often violated, their hypocrisy is unparalleled, for companies are instigating accomplices in many instances, such as in the right to strike. On the other hand, the call reveals the intention of not adding new norms and laws, but of maintaining the status quo in international law.*
- ✓ We call on Governments to support responsible businesses on national and international levels through public advocacy and educational support. *Having unilaterally set themselves up as responsible businesses they ask for support for the ethos they insist on imposing, revealing their concern for the growing social criticism that prevails.*
- ✓ We call on Governments to support an open international trading system and discourage protectionism and inward orientation. *A clear and unambiguous call to preserve the neoliberal mantra.*
- ✓ We encourage the Member States to continue supporting the Global Compact initiative and uphold its position within the UN. *A consistent call to maintain the status quo.*

❖ **Assessment of the business vision.** Fortunately, although this is the majority's position, it does not represent a monolithic block. The receptive attitude from the MNCs of the BLIHR towards the draft of the Norms and their disposition to test it is in stark contrast. To be sure, this is the exception to the rule. Yet given the enormous power that global capital has over governments and their societies, this exception is especially valuable. As I will show in the next section, the BLIHR's position is in the middle of the wide ocean separating the dominant position in organised civil society and that of the Geneva Declaration. Whilst the latter is reactive, the BLIHR's posture is proactive and a proponent of alternatives. Thus, with the exception of the BLIHR, the attitude towards the work of Mr. Ruggie is reactive among the business sectors. Indeed, the lack of any reference in the Geneva Declaration to the mandate of the SRSG –which currently constitutes the core of the most serious exploratory and investigative work regarding corporate responsibility in the UN– is quite noticeable. In contrast, besides testing the Norms, the BLIHR developed a close rapport with Ruggie. Last but not least, whilst the declaration clearly establishes voluntarism as the overarching principle throughout each of the 21 points, and makes a harangue to reinforce the globalisation of neoliberalism, any reference to democracy is starkly absent.

V.(e) Civil society position

The wide ocean between societal and business visions is clearly observed in reviewing the social declarations and assessments made, both from the scholar and large organisations angles, as well as from the perspective of grassroots organisations.

◆ **Grassroots organisations.** Without a doubt, it is in the declarations of grassroots organisations from the South where consternation for market imperialism is more noticeable. This is notably clear in a communiqué from an Iberian American grassroots organisations network.

Iberian America endures some of the greatest wealth inequalities –as in Brazil, Chile and Mexico– but enjoys some of the greatest mobilisations against neoliberalism. The communiqué is part of the consultations carried out by the SRSG with different stakeholders.

The organisations consider that there is extreme inequality between legal prerogatives and actual respect for HR, which are routinely stomped. The fact that voluntary instruments and business goodwill are the only resources available exposes the fragility of the system. Consequently, they consider that humanity's challenge is to implement development policies that are socially just, sustainable, and anchored on HR. To adequately respond to this situation the role of the UN should be to help promote and adopt a binding normative framework that guarantees the respect of HR of all persons. Therefore, these organisations make a call to adopt the following measures:⁸⁷

- Create and adopt a human rights normative framework which is obligatory for companies;
- Promote an adequate system of justice;
- Exhort States to establish mechanisms to prevent and sanction HR violations;
- Establish mechanisms to monitor the compliance of companies to the HR normative framework;
- Measure the impact of the activity of companies and financial actors;
- Prioritise the participation of civil society, particularly of the directly affected communities;
- Recognise, respect, and enforce the collective rights of indigenous peoples.

◆ **HR organisations and networks.** In an oral intervention with the SRSG-HR, Amnesty International, the Economic, Social and Cultural Rights International Network, the International Commission of Jurists and the

International Federation for HR centred their position on the following three points:⁸⁸

- It is essential that the Council's discussions incorporate the perspective of those affected by corporate HR abuses and are informed by an understanding of the nature and scale of such abuses;
- States either do not fully understand their duty to protect against corporate HR abuses or are not always able or willing to fulfil this duty;
- While voluntary and multi-stakeholder initiatives have a role to play in relation to business and human rights, many lack credibility because they fail to ensure that the principles which they advocate are upheld in practice. Over relying on these initiatives would be both inappropriate and inadequate.

Furthermore, they ask the SRSG how does he intend to analyse the patterns of corporate abuses and their impacts on individuals and communities? He is also asked to integrate the perspective of victims into his programme of work as a basis from which to develop recommendations to the HR Council which address their concerns.

◆ **Ethical investment groups.** A sector increasingly gaining influence is that of organisations of investors with an ethical sense that manage institutional and individual investment portfolios. One of the oldest and more active of such organisations is the Interfaith Centre on Corporate Responsibility (ICCR) in New York. This organisation has engaged Representative Ruggie, meeting with him to address specific issues of his mandate. In a document conveying its opinion on some issues, seeking to influence in Ruggie's recommendations, the ICCR poses the following interesting issues, which illustrate some of the concerns of a sector trying to invest ethically:⁸⁹

- Impact assessments are of utmost importance and should become a standard across the full range of industries based on internationally-recognised HR norms.
- There must be some kind of reporting that is binding and the most transparent possible.
- They deem acceptable a framework combining voluntary and mandatory reporting.
- Solutions must be achieved through a dialogue with appropriate stakeholders.
- Transparent corporate social and environmental reporting should be considered to be a necessary element of a properly functioning capital market.
- Including independent community-based groups for report assessment and verification is critical.
- Indicators of performance should be consistent across companies and industries and developed as part of a multi-stakeholder process – either by government, or in certain cases, by companies in collaboration with key stakeholders.

- Dignified living conditions are of great concern (living wage). A company is not responsible for raising the standard of living in a country. It is responsible for its actions on that country's efforts to improve living conditions for its citizens. Accordingly, we should not allow the complexities of economic development and other societal factors to impede the progress of corporate reporting.

◆ **European Coalition for Corporate Justice (ECCJ).** A contribution to the debate is provided by this European social organisation, which commissioned an assessment study apropos of the creation of the UN HR Council and the appointment of the SRSG, with concrete recommendations and actions to be applied by the UN, the European Union and States, with the objective of harnessing corporations in the realm of human and environmental rights. Following are the most relevant arguments and recommendations:⁹⁰

- Legal rights should be established; remedies should be provided to victims; and those responsible for any violations may be held to account for any actions or omissions, including failure to monitor the supply chain, that directly cause, encourage, or even simply tolerate such abuses.
- An initiative is required at the EU or international level in order to ensure that MNCs may be held to account for violations of human and environmental rights that they commit or in which they are complicit.
- The current situation is unsatisfactory, where host States are unwilling to protect their populations, and home States are reluctant to provide remedies to victims or to impose obligations on parent companies.
- States are not likely to act unless significant mobilisation by civil society organisations is achieved.
- Options under international and European law:
 - Clarify the existing obligation of States to protect HR. This option is unpromising since it would simply reaffirm the present state of international law.
 - Set up a mechanism imposing direct obligations on MNCs under international law, similar to OECD's NCPs but far more comprehensive.
 - Establish an obligation on States to control MNCs beyond their territory, clarifying and extending the obligations of States to protect HR against any violations by MNCs. Just as the 1982 Montego Bay Convention on the Law of the Sea defines the duties of the flag State to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag' and goes on to detail the implications of this responsibility, a new International Convention on Combating HR Violations by MNCs could require State to adopt legislation, applicable to all the activities of any corporation considered to have its nationality, wherever the corporation operates (page 6).

- Regulation Brussels 1, n° 44/2001 of European Law, provides that the national jurisdictions of the Member States of the EU are, in principle, competent to receive civil proceedings against persons, including corporations, domiciled in the EU that are civilly liable for certain acts, wherever these take place, even outside the EU.
- Another option in the longer term is to approximate the criminal legislation of the Member States to adopt it with extraterritorial effect and to impose effective sanctions on legal persons for their abuses. A first step could be controlling private or legal persons by adopting an instrument focused on the Statute of the International Criminal Court (ICC), where international crimes can be committed by private persons –and, in principle, corporations and natural persons alike– (pages 9-11).

“the use of the Montego Bay Convention of the Law of the Sea shows how it is perfectly possible to apply the same logic applied to the jurisdiction of States over ships with their flags to companies with their nationality”

- A legally binding and coercive framework with penalties for culprits and remedies for victims and with the right of victims to submit lawsuits and complaints.
- Broad and direct participation of civil society in the development of the regulating framework, particularly of the victims most affected by business abuses.
- Monitoring and certification mechanisms managed by civil society.
- Impact assessments as a binding norm before the approval of any business activity.
- Standardised norms and indicators applicable to all companies, wherever they have activity.
- Transparent and binding accountability using performance reports regarding respect for HR in their sphere of influence.
- The denunciation that States are not willing to comply with their obligation to protect HR from business abuse.

❖ **Assessment of civil society’s positions.** Societal positions show very strong affinity in the different social sectors with a presence in the debate on HR and business. The strongest affinity is the demand for legally binding and coercive instruments, with all their implications, which is 180 degrees from the position of business and States, given their insistence on good voluntary actions. The social demands most frequently cited are:

“Schutter’s appreciation considering that the status quo will seldom change unless there is ample mobilisation of civil organisations, exhibits governments as agents of corporate welfare and the democratic parody we are confronting”

Worth commenting, given their importance and their reach beyond the frequent demands, are the two scenarios posed by Schutter about the existing laws that can serve as reference to build a legal framework to control business practice. The use of the Montego Bay Convention of the Law of the Sea shows how it is perfectly possible to apply the same logic applied to the jurisdiction of States over ships with their flags to companies with their nationality. It is all a matter of political will, which civil society denounces as non-existing. The other scenario clearly aims, in the longer term, to an extra-territorial legal framework, parting from the legal logic applied in the International Criminal Court to punish legal or natural persons and enterprises. It is also worth highlighting the importance awarded by ICCR investors to the living wage, which is rarely addressed with precision, yet it is the most fundamental element in determining the quality of life and the most relevant in the system of exploitation.

Lastly, Schutter’s appreciation considering that the status quo will seldom change unless there is ample mobilisation of civil organisations, exhibits governments as agents of corporate welfare and the democratic parody we are confronting. Governments not only oppose, to a great degree, fulfilling their obligations by subjecting corporations to the democratic will, but, additionally, they are increasingly repressing the activism and mobilisation of civil organisations, through legislative subterfuge, which they are more than willing to use, as well as through egregious repression. This situation is not exclusively a problem of Southern States with weaker governments. It is also increasingly occurring in Northern States as social mobilisation grows.

Multilateral organisations, and much less governments, can evade global civil society’s central demand to have a legally-binding framework that subordinates the owners of the market to civil society’s will to ensure they fully respect HR. This framework must be built with full social participation and include penalties and remedies commensurate with the damage inflicted. Moreover, as citizens we have the right not just to complain but to sue companies with penalties against the natural persons controlling them, both as managers and as investors.

V.(f) Final assessment of the SRSG-HR

The work of Representative Ruggie is beneficial just for keeping the issue of the abuse and egregious violation of HR by corporations a priority theme in the international agenda. The work of the SRSG is moreover a good and well-intentioned exercise of assessing and clarifying concrete concepts on the matter –such as sphere of influence and complicity– and the diverse legal, operative and citizen positions. It is, furthermore, an excellent opportunity in itself for society to exercise its right to influence, by directly participating in the debate, the

future development of a legal framework ruling over business practices concerning HR. In this way, his work, as a result of citizen participation, should serve to clarify once and for all that the issue is about delimiting the responsibilities of business concerning HR, with the purpose of making companies abide by them, and not about transferring State duties, as has been erroneously argued, including the SRSG himself.

On the other hand, the SRSG is overly naive when he insists on soft-law market mechanisms. This is probably due to his inability to break with the market context and to place true democracy as the only ethos we can aspire to a fair social contract. It is not positive for Ruggie to disdain the draft of the Norms and lean towards non-binding mechanisms. Only the business sector, with the exception of the BLIHR, has opposed the draft. To insist on relying on the Darwinian ethos where the dice are loaded in line with the law of the mightiest, amounts to refusing to see reality. It is not true that globalisation has been successful in abating poverty. That is a fallacy that can easily be proven. It is true, however, that there is no ideal solution, or a sole “silver bullet” as the SRSG euphemistically calls it, that can resolve the challenge of HR and business. Nonetheless, it is rather mistaken, inappropriate and sterile to pursue solutions without changing the current market ethos. Corporations, under the current business culture are not organisations of good, for their purpose is simply to reproduce and accumulate the greatest possible amount of capital regardless of the consequences. In the current culture, corporations are amoral, authoritarian and anti-democratic by nature.

Accordingly, the predatory nature of capitalism lies in direct conflict with human rights and democracy. The SRSG himself has acknowledge the unsustainability of the current system. Consequently, it is of utmost importance to become conscientious that companies will do everything in their hands to impose their interests over people and planet. This is why many companies sought

legal shields before joining the Global Compact. The great majority have no interest in HR nor do they wish to learn about the negative effects of their activity on HR; an activity that, furthermore, is often perpetrated fully aware of its negative consequences. This is why companies frequently use third parties to evade or at least dilute their responsibility. Therefore, it is rather ingenuous to consider that any other alternative –but direct coercion through a HR and a legally-binding business framework, with the power to impose penalties and tough remedies, commensurate with the damage inflicted– can achieve respect for HR in the market ethos.

Ultimately, if we opt for assuming we are living in a democratic ethos, the difficulties of international law or the operative technicalities should not be an issue in making companies fully control their footprint on HR. In any case, these are issues that could easily be resolved with the political will of State governments. It is necessary here to insist once again about the absolute absence of reference to the democratic context in all the SRSG documents, and to remind us all that, ultimately, what must take precedence over any other element is the prevailing opinion of the citizenry. Thus, if we, the great majority of the citizens of the globalised world, demand a strong and effective legally-binding framework to harness business, governments have no other choice but to obey the popular mandate. And if there is any doubt, all they need to do is to call for citizen consultations worldwide, controlled by civil society, to confirm it. This is why – considering that the mandate of Representative Ruggie has been extended to a total of six years (2011), and regardless of *realpolitik*– it is his duty to advocate for a legal framework as the only form to reconcile the business interest with HR. It is, as well, the only right thing to do from a rational perspective. For non-binding instruments will only prolong a bit more the status quo, letting business pretend they are changing so that everything remains the same. Should that remain the case, polarisation will only grow further.

⁷⁸ HUMAN RIGHTS COUNCIL. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*. A/HRC/4/35. 19 February 2007

⁷⁹ OECD Watch. Press Release. New survey finds governments failing to curb corporate abuse. Without improvements OECD Guidelines will be meaningless. 4 October 2007.

⁸⁰ HUMAN RIGHTS COUNCIL. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Addendum 1: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries/A/HRC/4/35/Add.1. 13 February 2007

⁸¹ HUMAN RIGHTS COUNCIL. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Addendum 2: Corporate Responsibility under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops A/HRC/4/35/Add.2. 15 February 2007

⁸² HUMAN RIGHTS COUNCIL. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Addendum 3. Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms A/HRC/4/35/Add.3. 28 February 2007

⁸³ HUMAN RIGHTS COUNCIL. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Addendum 4. Business recognition of human rights: Global patterns, regional and sectorial variations . A/HRC/4/35/Add.4. 8 February 2007

⁸⁴ HUMAN RIGHTS COUNCIL. Report of the 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. A/HRC/4/74. 5 February 2007

⁸⁵ UN Global Compact. Business Leaders Adopt Declaration on Responsible Business Practices. 6 July 2007.

⁸⁶ United Nations Global Compact Leaders Summit. GENEVA DECLARATION. Geneva, Switzerland. 5-6 July 2007

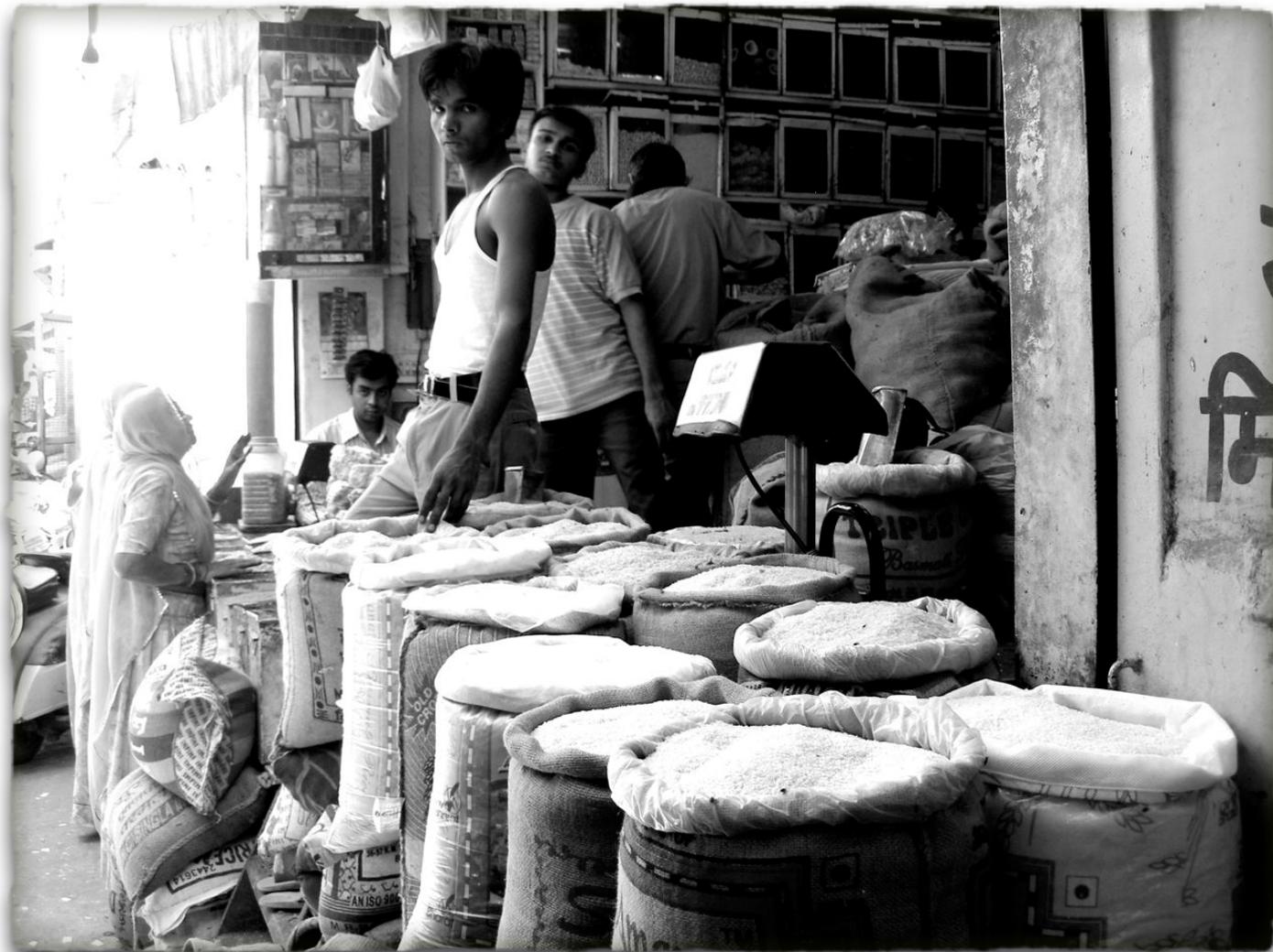
⁸⁷ Declaration of the Social, Non-Governmental and Union Organisations and Indigenous and Affected Communities Convened at The Regional Consultation of the Special Representative of the Secretary General of the UN on the issue of Human Rights and Transnational and other Businesses Enterprises. Bogotá, Colombia, January 18-19, 2007.

⁸⁸ Oral Intervention. Amnesty International, ESCR-Net, Human Rights Watch, International, Commission of Jurists, International Federation for Human Rights. Human Rights Council. Report of the Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises Interactive Dialogue. 4th session, 12 to 30 March 2007

⁸⁹ Interfaith Centre on Corporate Responsibility. Letter to John Ruggie of 10 October 2006.

⁹⁰ Olivier de Schutter. The European Coalition for Corporate Justice (ECCJ). Towards Corporate Accountability for Human Rights and Environmental Rights Abuses. Brussels, April 2007.





VI. The Business Leaders' Initiative on HR (BLIHR) and its test of the Norms

The BLIHR, with Mrs. Mary Robinson –former Prime Minister of Ireland and former UN's High Commissioner for HR– as Honorary President was formed in 2003, as a group of companies, to evaluate the possibility of a HR in business common framework. The member companies as of today are: ABB, Alcan, AREVA, Barclays, Coca-Cola, Ericsson, Gap, General Electric, Hewlett-Packard, MTV Networks Europe, National Grid, Novartis, Novo Nordisk, Statoil and The Body Shop International. The list of companies, originally only seven, has gradually grown, with five companies joining since its last report (#3). Its unique position in the business world and its constructive and proactive position require an assessment apart from the general business position given the effort it is making to find solutions to the permanent controversy on the

matter of business and HR. This should not be interpreted as the group's companies being socially responsible. Some of them have a large record of social denunciations. Simply, these are the companies choosing to integrate themselves in the initiative.

VI.(a) The purpose of the project

The BLIHR members part from the conviction that irresponsible business practices may have a very serious negative impact on HR. The BLIHR's original purpose was to explore how HR norms and principles may be used, based on the Universal Declaration of HR, hoping to inform and inspire other companies to apply them in their business practices. Accordingly, they set as another objective to demonstrate how business leadership could support global efforts to make the fundamental rights of people a reality. Its ultimate goal is to identify the best business practices on HR that can be developed, as a common framework, recognising the need for the full participation of all stakeholders in order to accomplish it. As part of this purpose, in contrast with the negative

attitude and the rejection of the draft of the Norms by the vast majority of businesses and business organisations, the BLIHR has since 2004 devoted efforts to evaluate the Norms, testing them in the actual operations of the member companies.

The exploratory work is the result of ample dialogue with experts on the topic, NGOs, governments and businesses. The predominant conclusion until now, among member companies, is that companies, particularly those active in many countries, will benefit from the development of a common framework composed of principles and norms that clearly articulate the nature and reach of the responsibilities of business on HR. They consider as well that the mere disposition to test the Norms sent a positive important message about facing the HR issues on an international scale.

VI.(b) Main premises of the Third report⁹¹

Report three of the BLIHR drew the following general premises of its exploratory work so far:

- The Norms were a useful benchmark for companies to check and develop their own policies and practices.
- The primacy of Governments as the duty bearers for ensuring the fulfilment for HR must continue to be clear. They will need to look closely at the best way of focusing existing human rights law in ways that best clarify their responsibility. Nonetheless, there is an emerging realisation that business also has an important role to play. However, the international community has yet to agree on the boundaries around what should be required and expected of business.
- There remains the need for much greater clarity on the nature and scope of the HR responsibilities of all businesses.
- The development of a HR common framework is proposed. Such proposal, from a business perspective, is strong and some aspects of its content are becoming clearer whilst others will require more work. A common framework would need to be universal in its application yet specific enough to guide companies. It should be applied in all business sectors and in all countries, with different HR challenges. By the same token, a common framework needs to be clear to establish the legal minimum for business behaviour (the HR level playing field). Lastly, this framework would ideally be made up of three components:
 1. Concepts to clarify the role of business in the area of HR,
 2. The range of relevant standards drawn from international HR law,
 3. Processes for applying the concepts and standards in a business context.
- They consider that mandatory and voluntary approaches are not mutually exclusive but complementary for mandatory ones would start in the

legally-enforceable minimum whilst voluntary ones would raise the HR bar.

- No business should be allowed to exploit particular locations, and all should fulfil the minimum requirements of international human rights law regardless of where they are operating.

VI.(c) Context of the Initiative

The BLIHR is firmly anchored in the current market ethos. Market competition is implicit in the emphasis the BLIHR gives to the level playing field concept, in such a way that governments are expected to act uniformly in the application of laws protecting HR. The idea is that companies should not suffer competitive disadvantages depending on variations in different countries in the application of the instruments protecting HR. Hence the report comments that *the experience of the BLIHR companies is that the commitment of an increasing number of companies to human rights will continue to broaden and deepen, provided that progressive companies do not suffer sustained competitive disadvantage as a result of their commitment* (page 5). Accordingly, they are concerned about the countries incapable or unwilling to enforce existing obligations, for such inconsistencies discourage the progressive approach to business focus. By the same token, the need to make the common framework achieve greater clarity in concepts is also to clarify how business can comply with societal expectations beyond the legal minimum and how it may see HR as a (market) opportunity and not just as a question of compliance.

VI.(d) Concepts to clarify the role of business in HR

The BLIHR addresses a series of concepts it deems necessary to delimit the responsibilities of States and business, to achieve a level playing field and, finally, establish a HR and business common framework. By addressing them, it expects to contribute to clarify the role of business in respecting HR by conceptualising aspects it considers essential:

VI.(d1) Concepts to translate HR to a business context

The BLIHR establishes three concepts that should help clarify the respect of HR in business:

- **Sphere of influence.** Should include individuals with whom the company has political, contractual, economic or geographic proximity. The greater the business, the greater the sphere of influence. Each company has a different sphere of influence. It should be taken into consideration that stakeholders often perceive a broader and deeper sphere of influence of a company than what the company itself judges.

- **Complicity.** A company is complicit of HR abuse if it authorises, tolerates, or conscientiously provides practical assistance or encouragement having a substantial effect on the perpetration of HR abuses. A company's role does not have to cause a HR abuse. It is enough with assisting or encouraging to a degree that, without such participation, the abuses most probably would not have occurred to the same extent or in the same way. No clear definition has yet been identified.
- **Rights-aware/Rights-based approach.** The concept means that a company is willing to accept that its stakeholders have universal rights and that any decision taken by the company should strive to respect these. In practice a company would: 1) identify the rights at issue, 2) identify its responsibilities in terms of international HR standards, and 3) determine the

VI.(d2) Minimal and additional practices

The BLIHR deems the minimal and additional business practices on HR to be business management concepts, and it groups them in three categories. According to the vision underpinned on the market context, these are essential, expected and desirable. As we have seen, these categories have been positively welcomed by the SRSG-HR and by the former Advisor to the Global Compact and Chairman of Novartis Foundation, Klaus Leisinger, the philanthropic branch of one of the BLIHR member companies. The BLIHR advocates here for the importance of voluntary practices, arguing that some of the most effective and proactive contributions business can make should not be limited or enforced through laws. Nonetheless, the BLIHR envisions that over the years to come, societal expectations will increase, thus raising the bar. Therefore, "expected" behaviour today could become "essential" tomorrow. It also considers that the greater use of practices that go beyond the legal minimum, the greater competitive advantages companies should expect.

- **Essential.** The minimal norms of business behaviour that all companies need to abide by to guarantee compliance with HR law. The BLIHR does not refer to laws designed for business compliance but to the laws currently obliging States, under international law, to prevent and respond to business abuses to HR (page 11). The BLIHR suggests that there is greater need for clarity and mechanisms to make companies responsible when governments do not intervene, for any company not complying with essential rights must be made responsible for its acts. The BLIHR considers that, with the objective of developing a "level playing field" and offering certainty, it is necessary to clarify what are the minimal universal HR norms across the entire spectrum of civil, political, economic, social and cultural rights. Lastly, it suggests that companies should work with governments on this aspect and does not include civil organisations.

- **Expected.** These are the additional expectations, beyond what is regarded as legally required, generated by "key" stakeholders such as investors, employees, clients, suppliers as well as the communities and NGOs in the extended community. These are defined by some as moral or reputational expectations.
- **Desirable.** All the voluntary actions not contained in the other categories.

VI.(d3) Delimitation of State and business responsibilities

Parting from the premise that States have the primary responsibility in fulfilling the HR of citizens, the BLIHR attributes three concepts to this responsibility:

- **Respect:** Governments must "refrain from interfering directly or indirectly with the rights."
- **Protect:** Governments must "prevent third parties from interfering with or violating these right.";
- **Fulfil** means Governments must "adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of these rights."

The BLIHR considers that to make HR effective, it is implicit that those involved in violations must be made accountable for their actions. The overarching principle is that States are primarily accountable to victims of HR abuses and companies are responsible to States. Yet, there are actions that companies can independently take, particularly monitoring, auditing and reporting about their HR performance.

By proposing the need for a common framework, the BLIHR considers three scenarios in which the division of responsibilities between governments and business may be adequate:

- Not all Governments impose the same laws on businesses and thus there is variation in their HR responsibilities;
- There are countries where governments are clearly incapable or unwilling to comply with their HR obligations;
- Within any business itself, senior management needs to be accountable to its shareholders and to other stakeholder groups such as employees. These internal mechanisms of accountability need to reflect the broader commitments and obligations that a company might have to HR.

In this way, the BLIHR considers that a common framework based on the premise of universal HR needs to be capable of assisting enterprises in navigating the preceding scenarios.

VI.(e) Range of relevant standards drawn from international HR law

The BLIHR argues that a common framework should cover the entire spectrum of international HR standards.

- **Civil and political rights.** The International Covenant of Civil and Political Rights of 1966 –drawn from the HR Universal Declaration of 1948. Among the key rights are the right to life, equality, liberty, a fair trial, privacy, property and participation in public affairs, and freedoms of thought, expression, religion, assembly, association and freedom from torture, inhuman and degrading treatment.
- **Economic, social and cultural rights.** The International Covenant of Economic, Social and Cultural Rights of 1966 (ECOSOC rights) –drawn from the HR Universal Declaration of 1948. Among the key rights are labour rights (dealt with below), the right to family life, to an adequate standard of living, to the highest attainable standard of health, to education, to adequate food, clothing, housing and fair distribution of food. For the BLIHR, it is clear that, by their mere existence, companies influence the right to work, and all companies have to abide by the labour rights subsequently developed by the ILO. The BLIHR considers the ESC rights to be essential.
- **Labour rights.** The BLIHR judges these rights to be the most developed in their application through the ILO's tripartite conventions and recommendations and of an indisputable relevance in the business ethos. It notes that the ILO chose to promote four labour rights as the absolute core labour rights: freedom from child labour, from forced labour, from discrimination and freedom of association. The BLIHR deems as well that the benchmarks for essential behaviour are found in multi-stakeholder frameworks such as the Ethical Trading Initiative.
- **Living wages.** It is worth mentioning the special attention that the BLIHR awards to the topic of living wages. In its opinion this is a topic of the highest interest in which not all sector-specific codes make reference to vis-à-vis minimum wages. The concept of living wages continues to be poorly defined and there is no international consensus about methods of calculation. Thus, the BLIHR deems this issue needs to be researched further, to draw clarity in its concepts and methods for its application.
- **Other rights.** The BLIHR mentions the special group rights for indigenous people, ethnic minorities, refugees, immigrants, children and women. It includes as well the worst crimes against humanity and those of the Rome Statute of the International Criminal Court, particularly in the case of businesses in the security sector in countries incapable or unwilling to fulfil their HR commitments.

The BLIHR believes that the draft of the Norms makes a good job of covering all the rights previously mentioned; albeit many concepts lack clarification and there is need for a better approach in some of them, to be sure. The BLIHR judges the Norms' reference to environmental and consumer rights as probably unnecessary. It deems that their relevance regarding HR is less clear, and although both are undoubtedly relevant in the sphere of business, they should be accurately integrated in a common universal framework in cases where there is concrete relevance regarding HR.

VI.(f) Processes for applying concepts and norms within a market context

The BLIHR considers that, weighing in the diversity of existing tools coming from various initiatives, there is much work to be done before creating the start of what could be a set of tools to integrate HR in business globally. The BLIHR believes that here is where the draft of the Norms is less comprehensive, for it lacks clear explanations on the methodologies to apply best business practices for HR. This assessment is valid both for the specific business tools to use as well as for the mechanisms governments could use to make companies responsible. Nonetheless, the BLIHR thinks that it is not possible to prescribe a specific model to be followed. Relative to accountability, the BLIHR declares itself to be initially against the possibility of using UN organisms to monitor business and specific companies, despite the importance the BLIHR awards to accountability.

The BLIHR has opted for now, with the goal of closing the existing gap in the integration between HR and management systems, to develop a guide for integrating HR in business. For this purpose, the BLIHR chose to

apply the Global Compact's performance method to the entire HR spectrum, incorporated in a single common framework, as it proposes. The result is the Guide for Integrating HR into Business Management⁹², developed in collaboration with the Global Compact's Office and the Office of the UN High Commissioner for HR.

VI.(g) Conclusions and Expectations of the BLIHR:

- The Norms were a useful first step towards establishing minimum standards in business and HR. Yet they are not apt to allow businesses to implement them fully into their business operations. Nor do they deal adequately with the underpinning concepts that would delimit the HR responsibilities of business.
- HR are not just an essential tool for business but also for the sustainability of societies in which Governments must continue to play the primary role to respect, protect, fulfil and promote HR.
- The BLIHR members hope that in their next three years, HR will be a part of mainstream business consciousness and a natural component of business practice.

- They express much interest in extending the reach of their Guide to cover three areas:
 - How to best integrate HR effectively into general risk assessments and what works best for business in this area,
 - How to best integrate all the indicators and tools under development into monitoring and reporting systems,
 - How to develop standards in business training in the arena of HR, to share best practices across sectors and through other branches of HR education and promotion.

VI.(h) Assessment of the BLIHR

The work of the BLIHR is commendable for acknowledging some of the most basic common sense principles and for imagining scenarios that really reduce the gap in a meaningful way between societal demands and the predominant reluctance among corporations to acknowledge any degree of responsibility in the realm of HR.

I will now approach the main themes covered by the BLIHR's third report broadly following the same order.

VI.(h1) Market context

The fact that the BLIHR's vision is inevitably a market-driven vision, given its origin, does not temper its inherent incompatibility with a comprehensive respect for human rights. This initiative's positions are explicitly laid out from an angle that places the market above people and planet. In this way, there is great insistence on the need to make the future framework regulating the impact of business activity on HR maintain a "level playing field". The purpose of this demand is to ensure that companies do not find themselves under competitive disadvantage vis-à-vis the evident diversity of criteria and political wills with which governments address HR. Hence, report #3 explicitly conveys *the perception that the commitment of an increasing number of companies to human rights will continue to broaden and deepen, provided that progressive companies do not suffer sustained competitive disadvantage as a result of their commitment.* To be sure, this does not dim the merit of the BLIHR's vision in pursuit of a common and universal business and HR framework. It is quite right that the same body of rules be applicable to all companies in all sectors and in all countries regardless of the disposition of the governments in turn. Yet the motivation should not be to ensure that there is certainty for the most committed companies that they will not lose competitive advantages by complying with regulations vis-à-vis possible competitors that will not comply.

Such posture subjects the cooperation of the "most committed companies" to guaranteeing a level playing field. From inception, this is an erroneous way of approaching the topic of business and HR. The reason why business should commit to human rights must be solely and exclusively because this is the moral expectation of the civil society it belongs to, in which it interacts and from which it profits, regardless of the current lack of laws making enterprises directly responsible and demanding from them unconditional respect for HR. The right to reproduce and accumulate capital cannot be above unconditional respect for HR under any circumstances, particularly when an important portion of profits are made by premeditatedly violating HR. Human rights cannot be a competitiveness element, an added value in the merchants' product or service offer. To insist on market guarantees is a serious mistake of appreciation and enunciation of the HR and business subject matter. Thus, the universal common framework for respecting HR in business must have as its sole *raison d'être* the very respect of the same.

"a right is not a concept where companies have the option of being willing or not to become aware about it and to recognise it... Either we have rights endorsed by concrete laws that include penalties against violators, commensurate with the damage inflicted, or these are not rights"

VI.(h2) Legal or voluntary

Three BLIHR positions are worthy of highlighting and positively assessing. These are the disposition in favour of a universal common framework, the inclusion of both binding and voluntary standards, as well as envisioning, by gazing at the not-too-distant future, an ethos in which many of the norms that companies may consider not essential become essential, and thus, become legally binding. In spite of a defence of voluntarism across the entire report, arguing that the best contribution business can make would occur through this route, which is very debatable, the BLIHR leaves the issue open. Such posture singularly stands out amongst the business sector. This factor notwithstanding, society must make clear from the start that the final goal must always be a legal-universal-common framework, complemented with voluntary practices that strengthen it. Good business practice concerning HR, in its broadest spectrum, and the planet's environmental rights, must be replaced by laws incorporated into international law and into the business and civil laws of States. If a right is not endorsed with a law requiring its strict compliance by all actors, including preponderantly the State in itself and enterprises, it is not a right but only an altruist option relegated to philanthropy. Accordingly, voluntarism may only refer to actions that further contribute to reinforce the HR already framed in the legal codes.

VI.(h3) HR Assessment Framework

The BLIHR contributes to clarifying the responsibilities of business by advancing concept definitions such as “sphere of influence, complicity and business recognition for HR”, which it regards as important in contributing to translating HR into a business context. Although articulating such concepts will require greater depth and explicit definitions of elements such as political, contractual, economic or geographic proximity, in the case of sphere of influence, or of practical assistance or substantial effect, in the case of complicity, BLIHR’s articulation of these two concepts conveys a holistic intention embracing all circumstances instead of limiting them, which is rather positive.

The third concept concerning a “rights-aware/rights-based approach” acknowledging that stakeholders have universal rights and that any business decision should strive to respect them, implicitly carries a voluntary approach. Accordingly, the BLIHR’s definition explains that, in practice, this concept would mean that business must identify the rights in question, identify its responsibilities according to international HR standards and determine the appropriate action (page 11, report #3). Although the BLIHR explains that this approach is being adopted by increasingly more public organisms, particularly at the UN, such as in the case of the right to development, it is evident that the trend in these organisms is towards voluntarism. A right is not a concept where companies have the option of being willing or not to become aware about it and to recognise it. In addressing a right, all actors are obliged to become conscientious and respect it. Once again, rights can never be options.

“assuming we aspire to build a truly democratic ethos in which, by definition, the will of the majority bears precedence over all others, the prevailing vision in global civil society is that HR must be endorsed by laws. These laws must make business responsible for its own acts violating such laws.”

On the other hand, in sync with the prevailing view in the UN, expressed by people such as SRSG-HR Ruggie, as well as former Advisor to the Global Compact Leisinger, the BLIHR proposes a classification of essential, expected and desirable HR. Such characterisation, previously described, is erroneous because, once again, there cannot be optional rights. Either we have rights endorsed by concrete laws that include penalties against violators, commensurate with the damage inflicted, or these are not rights. Considering the current ethos of savage capitalism and of customary and daily violations of rights, such as the living wage, it is reasonable that full compliance with some rights be framed in a gradual process until their comprehensive completion is fulfilled. Yet there cannot be essential and expected rights. Except for the rights

protecting against the worst crimes against humanity, almost all other rights enduring a negative impact in the business ethos do not enjoy the protection of laws to be observed by business, but only by States. Other HR –once again, a wage worthy of human dignity– are not even contained in any code or convention of international law. Nonetheless, current societal expectations demand to make these concepts rights fully endorsed by laws to be observed today by business in lieu of endorsed by voluntary practices. To be sure, there is ample discrepancy between what is essential and what is desirable. Yet it is very positive that the BLIHR considers all economic, social and cultural rights as essential (page 13).

Nevertheless, assuming we aspire to build a truly democratic ethos in which, by definition, the will of the majority bears precedence over all others, the prevailing vision in global civil society is that HR must be endorsed by laws. These laws must make business responsible for its own acts violating such laws. The prevailing vision is that all rights framed in the Universal Declaration of HR must become rights to be compulsorily observed by business.

Relative to the desirable category, there cannot be rights in this group but only voluntary actions, as the BLIHR rightly regards them, contributing to the enjoyment of the HR already incorporated in the legal framework. This is the only category susceptible of being used as a competitive element adding value to businesses.

“in the same way governments receive their mandate from society and, thus, they are responsible before it, individuals and enterprises are as well responsible before the institution of society, ergo: the autonomous, ever-evolving, imaginary self-institution of society. Accordingly, the governments’ evasion from their own responsibilities as guardians of the law does not release corporations and individuals from the violation of a right –especially when dealing with a human right– anchored on the most elemental common sense for the pacific coexistence of humanity”

VI.(h4) Delimitation of the responsibilities of States and enterprises

Undoubtedly, there is broad consensus that the State is the entity responsible for protecting, enforcing and promoting HR. The BLIHR correctly adjudicates this responsibility. However, the initiative falls into the same mistake, previously emphasised in the case of the UN and business organisations, of focusing on the responsibilities of States and seriously forgetting about making companies responsible for their own acts.

The initiative argues that the primeval principle continues making States responsible to victims of HR abuse and that

businesses are responsible to States. Irrespective of the fact that such postulate fits perfectly with the business posture, in an ethos where governments predominantly act as their agents, the responsibility for respecting HR must lie above all in the legal, moral or natural person that violates them, and, subsequently, in States to respect them and enforce respect for them. A government's failure to comply with its responsibilities does not release HR violators from their responsibility. In the same way governments receive their mandate from society and, thus, they are responsible before it, individuals and enterprises are as well responsible before the institution of society, ergo: the autonomous, ever-evolving, imaginary self-institution of society, as Castoriadis described it. Accordingly, the governments' evasion from their own responsibilities as guardians of the law does not release corporations and individuals from the violation of a right –especially when dealing with a human right– anchored on the most elemental common sense for the pacific coexistence of humanity. Given that governments have abjured from their obligations, companies act in full impunity, protected by outright omissions or by rules that give precedence to the market over people. This must change radically. For to talk about HR without making business responsible for its own acts amounts to exulting in rhetoric so that everything remains the same.

Hence, it is positive that despite the fact that the BLIHR does not propose making businesses responsible for their own actions, it does ask itself how should they act when there are no laws implementing basic responsibilities and mechanisms to enforce HR. Accordingly, one of its considerations is that business' internal accountability mechanisms need to reflect their broader commitments and obligations with HR. Thus, top executives must be accountable to their shareholders and other key stakeholders (page 17). The concept makes evident the societal expectation that companies must be responsible for their own acts, regardless of the legal and political ethos in which they interact. And executives bearing responsibility will surely have to pay the consequences for their actions concerning HR.

VI.(h5) Human Rights Standards

The BLIHR makes an adequate classification of HR parting from the instruments contained in the International Bill of Human Rights, conformed by the Universal Declaration of Human Rights and the International Covenants of Civil and Political Rights and of Economic, Social and Cultural Rights. The special section the BLIHR devoted to labour rights should be pointed out, given the strong link with business' sphere of influence. Its mention of the living wage issue should be further commended, albeit it should be amended to say that such right, framed in the Universal Declaration of HR and in the International Covenant of ECOSOC Rights, is absent from virtually all voluntary codes and not only

from some, as the BLIHR reckons. With the exception of the rather ambiguous inclusion in the base code of the Ethical Trading Initiative, this right is starkly lacking or is barely obliquely insinuated without directly addressing it. The BLIHR's assessment in itself mentions the concept's poor definition and the lack of consensus on the methods of calculation. Thus, it is very positive the BLIHR asks for greater clarity on the topic and proposes exploring it further.

The BLIHR needs clarity in some of its own enunciations to be sure. While the HR matrix included in its Guide designates adequate remuneration as Right #8,⁹³ which regards as an "expected" right *to pay at least a living wage in all countries of operation*, it is startling that the same Guide describes Right #7 of the ECOSOC Covenant as *the right to a minimum wage and equal pay* (page 39), when Right #7 of the ECOSOC Covenant refers to *equal remuneration for work of equal value*, and in the next paragraph of the same right it refers to the right to *decent living for themselves and their families*.⁹⁴

VI.(h6) Vision of the Norms

Putting into practice the draft of the Norms denotes a good effort of objectivity from the initiative's corporations. It is evident the Norms lack sufficient depth, clarity and detail, as well as processes for its implementation. Yet, little more could be expected from a first effort to frame the responsibilities of business concerning human rights. The team that developed the draft intended its adoption as an initial document for subsequent development by the Commission, with the participation of all actors, and it did not pretend to articulate all concepts, elements and variables in a single exercise. Yet, the mere fact of putting into practice the Norms within the BLIHR sent a message of objectivity and credibility about the validity of the Norms as a first framework of reference, even when regarded as a business option.

VI.(h7) Vision of the processes

We found ourselves in an initial stage in the debate about a business and HR normative framework and far from arriving at a consensus. Thus, evidently, as the initiative conveys, we are quite far from arriving at a consensus about the processes for its implementations. First, it is necessary to establish the precedence of any human right over the market, and then, within that context, clearly delimit the responsibilities of business and governments before formulating processes for its application, monitoring, reporting and verification.

Even considering the leaning of the UN organisms in favour of the market, the opposition of the BLIHR to the UN's monitoring of business is at the very least premature. The initiative does favour in contrast the development of internal systems. In this way, it proposes to include risk and impact-assessment processes, and the execution of

verifications, audits and reports within best business practices. Yet there is no mention of the need to make impact assessments, verifications and certifications managed in a fully-independent fashion. All references to this respect are relative to systems developed by business or leaning in favour of business, such as the case of the Global Compact's Development Model. In fact, one of the goals of the "Guide for Integrating HR into Business Management" is to address these processes as part of the components of HR business management (page 11). Such posture, which excludes the direct participation of stakeholders in the assessment of corporate performance in complying with its responsibility for fully respecting HR in its sphere of influence, is an egregious mistake that exhibits, once more, the vision centred on the pre-eminence of the market over society.

VI.(h8) Democracy, sustainability and pre-eminence for determining criteria

Consistent with the vast majority of documents reviewed for this study, with the exception of Theodor Rathgeber's evaluation of the draft of the Norms, previously covered, the mention of democracy, as a fundamental criterion in the assessment of business and HR is starkly absent. In all certainty it is not mentioned for it is taken for granted and it is assumed to be implicit. However, it is a serious mistake to send democracy to oblivion. By not addressing it, the BLIHR automatically awards pre-eminence to the market in the development of its postulates.

"it is not considered that the dialogue should occur predominantly with the different segments of civil society regarding themselves as stakeholders, especially when the BLIHR itself admits that many governments are incapable or unwilling to fulfil their responsibilities"

This is how, throughout report #3, one can notice how it is presumed that business should have pre-eminence about how to address HR in the business ethos. This is precisely how classifying HR in the essential, expected and desirable categories is unilaterally chosen. Who decides that HR should be classified according to arbitrary levels of importance? Who decides what rights correspond to each of the categories, as expressed in the matrix presented in the Guide? Evidently, the nomenclature and classification in themselves are not the result of a consensus with all stakeholders. The BLIHR considers these criteria part of the voluntary contributions that business can make on the subject matter (page 6).

Surely, it can be argued that these objectives represent the vision of the BLIHR's companies. Yet it is precisely because of the exclusion of democracy from its assessment that the BLIHR does not conceive civil society as the institution that must have pre-eminence at all times as to how to approach not just HR but the economic,

social and environmental dimensions in their broadest terms. It is for this very omission that the BLIHR often refers to voluntary contributions to HR, when the issue is not about contributions but about concrete duties to fully respect HR in its entire sphere of influence. Accordingly, the entire analysis parts from the market context when it should take place from the context of democracy, despite it comes from a group of corporations. Thus, the entire analysis awards pre-eminence to the business vision. Hence, when referring to the need to clarify concepts and minimal universal HR norms for business, it is declared that *business should work with Governments in the development of these essential standards* (report #3, page 12). It is not considered that the dialogue should occur predominantly with the different segments of civil society regarding themselves as stakeholders, especially when the BLIHR itself admits that many governments are incapable or unwilling to fulfil their responsibilities.

Whilst the BLIHR makes no reference of democracy, it does award clear importance to the need to create sustainable business environments. This position is due not only because the BLIHR regards HR as essential for business sustainability, but also because HR are essential underpinnings of sustainable societies. In fact, it considers that the irresponsible attitude of many governments discourages the sustainable focus of business. Thus, it would be highly desirable that this group of companies becomes conscientious of the fact that democracy is a *sine qua non* for sustainable societies and, subsequently, for sustainable businesses.

VI.(i) Conclusions on the assessment of the BLIHR's project

The work and contribution of this initiative is certainly valuable alone for not insisting on regarding the responsibilities of business as strictly voluntary, as well as for its disposition to test the draft of the Norms. To be sure, its position could be considered broadly as a middle ground between the purely mercantilist position of most companies and the prevailing vision in civil society on a global scale. It is undoubtedly worthy of praise for this sole reason.

This reason notwithstanding, the initiative persists on placing the interests of the owners of the market and their corporations above people and planet. This is how the Guide for Integrating HR in Business is a unilateral exercise that, despite of its development in conjunction with the Office of the HR High Commissioner and the Office of the Global Compact, remains a vision completely biased in favour of business. Indeed, whilst one can find in report #3 some consideration for accepting civil society as a direct interlocutor, the Guide conveys the same mercantilist vision given that it is positioned as an instrument to be used by business without external input. Not in vain we have already seen

that the UN organisms clearly share the same market vision and clearly favour its demands, particularly the Global Compact. Therefore, the BLIHR is still very distant from adequately responding to social demands. Assuming that it is interested in reconciling positions, the only way of getting closer to society's position is by getting rid of its mercantilist approach and by clearly placing society above the market. Human rights cannot be a factor for competing, nor can they be conditioned to market guarantees, nor addressed as elements adding value to business. In sync with the UN and its guild's vision, the question of HR in business continues to be a question in which the State is responsible for HR protection, while concurrently the true question –about making companies

responsible for their own actions through tough laws– is evaded. In this way, it is important to make emphasis of the absolute absence of the democratic context in its entire assessment.

Accordingly, the first thing society should demand from the BLIHR member corporations as well as from the entire business community and the UN, is that they do their work from the context of true democracy. For, otherwise, their positions will hardly be reconciled with civil society's demands, which require a stop to the systematic, premeditated and perverse violation of HR across the entire business ethos.

⁹¹ Business Leaders Initiative on Human Rights. Report 3: Towards a 'Common Framework' on Business and Human Rights: Identifying Components. London, June 2006.

⁹² BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS. A Guide for Integrating Human Rights into Business Management. May 2006.

⁹³ BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS. A Guide for Integrating Human Rights into Business Management. May 2006, page 14.

⁹⁴ Office of the UN High Commissioner for HR. International Covenant on Economic, Social and Cultural Rights 16 December 1966.





VII. Towards a new human rights paradigm concerning the social responsibilities of business

To the assessment of the work of the main actors in the controversy on the human rights responsibilities of business, corresponds a proposal vis-à-vis the analysis carried out, which sets forth a new HR paradigm as part of a new paradigm of true democracy anchored on people and planet. The new HR paradigm, framed in a new specific universal common framework, should be in turn integrated into a new universal common framework of sustainability that guarantees the good performance –or the good social and environmental footprint– of business.

“there is no possibility whatsoever of establishing an ethos of full respect for HR as long as people and planet are not

awarded complete and absolute pre-eminence both in international law and in national constitutions”

VII.(a) Context

I need to insist that there is no possibility whatsoever of establishing an ethos of full respect for HR as long as people and planet are not awarded complete and absolute pre-eminence both in international law and in national constitutions. Attempting to establish a HR universal common framework without first establishing unequivocally that the only purpose of the social contract, in real democracy, is to procure the sustainable welfare of every rank of society and the protection and sustainability of the planet, is to deceive and constrain ourselves to rhetorical hyperbole lacking substance. Refusing to do it clearly conveys the lack of will to face the core of the problem. It implies opposing building an ethos of true democracy, pretending to change so that everything remains the same.

The nature of capitalism is completely incompatible with the respect for human rights, for its purpose pursues the maximisation of economic gain at the expense of all other participants and the planet. Its voracious and predatory nature, intrinsically unstable and lacking any moral structure, is so insatiable that, in pursuit of its goal, it has never stopped, throughout history, before any consideration, including war, and it has succeeded in corrupting so-called democratic governments to place the market above everything as the ultimate goal of human societies.

By the same token, beneath its incompatibility with human rights lies capitalism's incompatibility with constructing a new sustainable global ethos. Its nature demands the unconditional and permanent growth of consumption, regardless of the planet's decay. Yet, in spite of its obstinate evasion of reality, the very degradation of the planet, in a grand scale, is forcing us to face the sombre truth. In this way, in an increasingly explicit and dramatic manner, our planet is showing us unambiguously that capitalism is inherently unsustainable. Thus it is irremediably doomed to succumb, dragging with it humanity and Mother Nature.

Accordingly, it is useless to talk about HR without first building a new paradigm that submits the market to the new democratic regulating structures required to make it strictly a sustainable vehicle for welfare and not an end. The market must be strictly harnessed, so that wealth ceases to be the exclusive hunting reserve of the global elite and becomes the generator of balanced welfare, within the new true democracy for the sustainability of people and planet paradigm (TDSPP paradigm). A *sine qua non* of this paradigm is the elimination of capitalism's traditional cultural patterns, such as consumerism, and exacerbated individualism, alienation and hedonism, so to enable mankind to build a new long-term sustainable global ethos, anchored in true democracy, for future generations.

Rejecting this radical change, sketched above, to build the new TDSPP paradigm is to convey the worst human instincts and to pretend to deceive humanity. I am not talking about utopia or the apocalypses but of hard truths, except for those refusing to make an act of honesty and face reality. The current Darwinian and perverse capitalist paradigm is absolutely unsustainable and incompatible with true democracy, and, thus, with HR; and it will take us, without exception, to a sombre end in the not-too-distant future.

VII.(b) The indispensable HR premises

The new paradigm required for fully respecting HR contains two indispensable premises, premises *sine qua non* for HR: true democracy and true sustainability.

“this is about, as in the old Greek agora, of establishing an ethos that truly reconciles the public with the private interest, always with the common good –the welfare of people and planet– with pre-eminence over the individual and private good. This is about establishing permanent communicating vessels between communities and governments at all levels, so that the latter truly command by obeying the people’s will”

VII.(b1) True democracy

The ethos for the comprehensive respect of HR demands a truly democratic ethos. This does not mean popular democracy or social democracy or any pseudo-democracy condoning mankind's systematic exploitation by the owners of the capitalist system. It is an ethos exercising the systematic participation of society in the entire public arena, so that all meaningful government decisions are reached by direct consensus with the citizenry and not just approved by the different branches of government. This government by consensus should include preponderantly the periodic ratification, in short intervals, of all popular elective posts in all levels of government, through referenda, with the purpose of making those governing, as public servants, truly responsible before those who they govern.

Accordingly, this is about making proposals and initiatives emerge primarily from the social fabric towards the branches of government. This is about, as in the old Greek agora, of establishing an ethos that truly reconciles the public with the private interest, always with the common good –the welfare of people and planet– with pre-eminence over the individual and private good. This is about establishing permanent communicating vessels between communities and governments at all levels, so that the latter truly command by obeying the people's will.

In consequence, this is about processing all public matter decisions of significance (laws, trade treaties, budgets, economic, social, environmental, foreign, security policies...) through citizen consultations via referendums. Yet these referendums or plebiscites must not be carried out as political propaganda campaigns, deprived of objectivity and filled with manipulation, in which interests with the greatest power of manipulation generally win. Consultations should be carried out simply presenting the options objectively without campaigns for or against them. Obviously, this is about regulating elections in the same fashion. Thus, instead of propaganda, concrete and objective proposals for governance are presented. This is about proscribing all propaganda and all private financing of the candidates' efforts to make their government plans reach the citizenry.

“this is about establishing a “level playing field” of democratic practice, capable of guaranteeing the full enjoyment of HR for all members of society”

This is about preventing factual powers (extra-parliamentary political powers) from tipping the scale in their favour, proscribing in this way mercantilism’s corrupting power over politics. This is about ejecting the corrosive power of capital and private interests from public matter. This is about, lastly, establishing a “level playing field” of democratic practice, capable of guaranteeing the full enjoyment of HR for all members of society.

Without a direct, comprehensive, and participatory democracy it would be impossible to award pre-eminence to people and planet, establishing an ethos guaranteeing full respect for HR. It is rather easy to sketch a paradigmatic change. Yet to pretend to enforce respect for HR in the current paradigm of *marketocracy* is to border on prestidigitation and prevarication. Therefore, committing to gradually building an ethos of true democracy is an essential premise to go in pursuit of an ethos where HR are enjoyed.

“we will have to stop being consumer societies par excellence and become societies anchored in the culture of true sustainability of people and planet. We will have to move from irrational to rational and sustainable consumption –diminishing in the North and increasing in the South– to leave an inferior global consumption footprint”

VII.(b2) True holistic sustainability

Given the predatory nature of capitalism, full enjoyment of HR requires building a holistic sustainable ethos in all aspects of human life and the planet. This is the other essential premise for the enjoyment of HR. In this way, for example, for the full enjoyment of an economic life worthy of human dignity, the bar for companies active in regions of systemic labour exploitation must be lifted considerably. This not only guarantees their workers and those of their supply chains an existence above the poverty line, but it also guarantees equitable terms of labour and trade offering an equivalent quality of life to all stakeholders in the business activity, both North and South. Yet this quality of life worthy of human dignity must be framed in the context of consumption and comfort indicators holistically sustainable. This is, such quality of life must take into account all factors in the economic, social and environmental dimensions; so that we achieve sustainability based on the equilibrium of all natural resources and of all species, which allows for the sustainable recovery of renewable sources of energy and of resources vital for life, such as water, which are threatened with privatisation.

As I expressed at the beginning of this study, this implies developing a balanced ethos with a long-term future in the consumption of all energy sources, giving precedence to the less polluting ones. Accordingly, we will have to change our consumption habits profoundly. We will have to stop being consumer societies par excellence and become societies anchored in the culture of true sustainability of people and planet. We will have to move from irrational to rational and sustainable consumption – diminishing in the North and increasing in the South– to leave an inferior global consumption footprint. This will empower people not to consume equitably more at the current unsustainable level but to develop their capacities to contribute to build communities worthy of human dignity with consumption levels that protect the environment with long-term sustainability. Instead of a culture of competition and exacerbated individualism, we will move to a culture where our vital centre of integration and membership will be the worthy and sustainable community, from which we will obtain adequate and worthy levels of individual well-being while we concurrently contribute to long-term sustainability.

In this way, the limit of human rights –for equilibrium imposes limits– should be true long-term sustainability, the rational and balanced consumption of resources, within a new culture, for business and for all organs of society. Thus, in the new TDSP paradigm, the purpose of business will inevitably have to be amended, as I will address ahead.

“the HR compendium to be recognised and respected by business should include all HR contained in the International Bill of Human Rights, and not just the ones enduring the greatest impact.”

VII.(c) Human rights concepts in the business ethos

Human rights were identified and enunciated more than half a century ago in the UN Universal Declaration of Human Rights of 1948. Subsequently, concrete covenants and conventions were established to address specific areas of human life, which emanate to a great degree from the 1948 Declaration. As we know, many rights have not been incorporated into conventions, and even in the case of those that have, not all States have incorporated them into their legal frameworks. Yet the fact many of them have not been incorporated into national constitutions, given the *realpolitik*, does not diminish whatsoever their full moral force.

It should be acknowledged that the impact of business activity on the life of today’s societies is so pervasive that virtually all HR are influenced by it. To be sure, rights such as labour rights endure a permanent and systematic impact given their direct relationship with business activity, whilst, for example, rights protecting people

against worst crimes against humanity, as in the case of torture, suffer a sporadic and not systematic negative impact. Nonetheless, the HR compendium to be recognised and respected by business should include all HR contained in the International Bill of Human Rights, and not just the ones enduring the greatest impact. If they are recognised as human rights, all members of society, including enterprises, are obliged to respect them. As previously mentioned, this Bill consists of the Universal Declaration of Human Rights and the International Covenants of Civil and Political Rights, and of Economic, Social and Cultural Rights. To be sure, labour rights, partially upheld in the ILO Conventions, receive the greatest influence. However, all HR must constitute the normative framework of HR in business, and this in turn must be incorporated into the broader universal common normative framework governing the performance of the footprint of companies in the economic, social and environmental dimensions, in the context of true democracy and long-term sustainability.

“the new raison d'être of enterprises must be to generate social welfare in a sustainable manner”

VII.(c1) Sustainable purpose of business – a new concept

Building the new TDSPP paradigm inevitably requires conceptually redefining the purpose of business to make it congruent with an ethos of true democracy and to transform the market into one of various vehicles for generating the adequate level of sustainable social welfare. This is to place people and planet over the

market. In this way, the new *raison d'être* of enterprises must be to generate social welfare in a sustainable manner. Shareholder value, as the only purpose of business, has to be eradicated given its absolute incongruence with the common good and its proven capacity to generate ever greater levels of inequality, exclusion, poverty and depredation of the planet, which are absolutely intolerable in real democracy.

Full respect for HR and authentic sustainability requires an equilibrium between the financial and social responsibilities of business. As organs of society, corporations cannot continue denying their inherent social responsibility for the impact of their activity. Although I am sure many people will consider these postulates outlandish due to the lethargy with which they live in the capitalist logic, there are increasingly more voices advancing a new nature for business. As I have described already, researcher Theodor Rathgeber points out the need for a coherent regulatory system for business ensuring a minimum of democratic, transparent and participative procedures. And it aims at the idea of business practice becoming humanitarian and democratic in lieu of completely autocratic, where decision making becomes participative among all stakeholders.⁹⁵ Other arguments coming from the heart of capitalism consider it necessary to redefine the purpose of business with the objective of moving the social good from the periphery to the core of business culture. To this endeavour, this argument has developed six principles to be followed for corporate redesign:⁹⁶

- ✓ *The purpose of the corporation is to harness private interest to serve the public interest.*
- ✓ *Corporations shall distribute their wealth equitably among those who contribute to its creation.*
- ✓ *Corporations shall accrue fair returns for shareholders, but not at the expense of the legitimate interests of other stakeholders.*
- ✓ *Corporations shall be governed in a manner that is participatory, transparent, ethical, and accountable.*
- ✓ *Corporations shall operate sustainably, meeting the needs of the present generation without compromising the ability of future generations to meet their needs.*
- ✓ *Corporations shall not infringe on the right of natural persons to govern themselves, nor infringe on other universal human rights.*

Further elaborating on the matter, the Tellus Institute and Corporation 20/20 have just published a new essay in which they explore different routes for redesigning the purpose of business, describing the roles that different stakeholders may adopt with this intention.⁹⁷

Another collection of similar ideas is advanced by the Great Transition Initiative, proposing a new program away from neoliberal globalisation and centred on people and planet.⁹⁸ The same thing occurs with the assessments of French researchers Serge La Touche⁹⁹ and Jean Marie Haribey.¹⁰⁰ They openly question the current concept of development, given its unsustainability and unfairness, and argue in favour of a paradigm based on the rational

and sustainable use of resources and of the efficient distribution of the wealth generated, without needing greater growth anchored on greater consumption per se. This is just a microcosm of the ample and growing social perceptions converging on the egregious unfeasibility of the current system, given its unsustainable and anti-democratic nature. Accordingly, despite the unrelenting push of mercantilist propaganda attempting to convince about the goodness of a subhuman system, the truth is emerging on its own strength. Not in vain, social mobilisation for an alternative world in all continents and, preponderantly, in some countries in South America, is acquiring an increasingly greater presence. These are tens of millions of citizens from many countries of the world,

in a growing trend, who are mobilising and organising in various ways to demand a sustainable world opposing the capitalist dogma.

“instead of pursuing the maximisation of profit with a predatory demeanour, at the expense of everything else, corporations will be bound to finding a balance between their responsibility for respecting concrete HR and sustainability rules and their responsibility with investors, so that they can fulfil their new purpose, which is to contribute to generate welfare holistically”

This is why it is essential for the construction of the new TDSPP paradigm to radically redefine the purpose of business. Accordingly, the stringent obligation for respecting HR must become a key part of the new nature of business. Investors and corporations, despite their right to enjoy their private property, will not impose their private interest on the social welfare, ergo, the public interest. Consequently, their right to profit must be tempered by their obligation to respect HR and generate holistic sustainability. Instead of pursuing the maximisation of profit with a predatory demeanour, at the expense of everything else, corporations will be bound to finding a balance between their responsibility for respecting concrete HR and sustainability rules and their responsibility with investors, so that they can fulfil their new purpose, which is to contribute to generate welfare holistically. Moreover, the common good, people and planet, must always have precedence over profit in their decisions. Once again, the purpose of business will no longer be the reproduction and accumulation of capital, but to act as a vehicle that contributes to generating a sustainable level of welfare for society through the goods, services and the income to be generated.

VII.(c2) Human rights concepts in the new business concept

As an essential part of business' new nature, stringent respect for HR must be a mandatory non-negotiable element. Respect for any human activity regarded as a human right must be binding on all or it is not a right. Thus, corporations must observe each and every right contained in the International Bill of HR. Accordingly, it is critical that a core element in the construction of real democracy be to force governments to protect HR with clear and specific laws, within their national legal frameworks, parting from the universal HR normative legal framework, in turn incorporated prominently in the universal common framework regulating the entire business footprint.

◆ **Responsibilities of business.** It is the responsibility of governments to respond to civil society's demands by duly protecting HR. By the same token, companies are bound to respect HR and be responsible for how their own actions influence respect for HR, in such a way

that they guarantee their enjoyment in their entire sphere of influence.

“governments with the direct and democratic participation of civil society must define the sphere of influence of each company and maintain it up to date periodically... any person located in a company's sphere of influence is a stakeholder. In this way, corporations do not choose their stakeholders as they deem convenient, but it is the sphere of influence which defines who are all its stakeholders”

◆ **Sphere of influence.** The sphere of influence is delimited by the boundary reached by the impact of a company's entire activity, irrespective of having no direct control over it. This is all the more relevant in business' new nature, for companies are bound to ensure that all entities they engage, as part of their business activity, respect HR in their own sphere of influence vis-à-vis their relationship with the engaging company. As the BLIHR rightly argues, the greater the company, the greater its sphere of influence. Moreover, it should be recognised beforehand that each company has a distinctive sphere unlike all others. Nonetheless, companies cannot be judges of their own activity, self-delimiting their own sphere of influence. Thus, governments with the direct and democratic participation of civil society must define the sphere of influence of each company and maintain it up to date periodically.

◆ **Complicity.** Although this topic will never stop being somewhat subjective, and thus, susceptible to controversies, in my opinion I find two clear scenarios of complicity in business activity:

- **when a violation would not have occurred without a company's action:** a corporation is complicit of any HR violation by a third party, be it a private or public entity or a natural person, if it participates in such violation by material or moral action or omission (tolerating or encouraging), knowing that such violation would have not taken place if the company would have not engaged the violating party.
- **when the company takes advantage of a violation that is occurring or will occur:** a corporation is complicit of any HR violation by a third party, be it a private or public entity or a natural person, if it benefits directly or indirectly from the violation, regardless of whether such violation is already occurring or would occur any way, even if the company would not have decided to gain from it originally.

◆ **Stakeholders.** In the new TDSPP paradigm, corporations have direct and indirect stakeholders. The impact of their activity, particularly in the case of global businesses, may significantly upset the lives of

people, even thousands of miles away from their direct radius of activity. Accordingly, any person influenced by a company's activity belongs to its sphere of influence. Thus, any person located in a company's sphere of influence is a stakeholder. In this way, corporations do not choose their stakeholders as they deem convenient, but it is the sphere of influence which defines who are all its stakeholders.

“in a truly democratic ethos it is civil society who freely – objectively informed with no propagandistic influence– must define all the concepts and elements of the HR and business regulating framework”

VII.(c3) Criteria in defining HR in the new TDSPP paradigm

In the new paradigm in pursuit of long-term sustainability for people and planet, there cannot be several levels of HR. As I have already argued, every right must be fully respected or it is not a right. Among other actors, the BLIHR and the SRSG-HR Ruggie have advocated a three-tier ranking of essential, expected and desirable HR. In the new paradigm, all HR contained in the International Bill of HR must be fully respected at the same level. One thing is the enormous gap between rights endorsed today by international law –mainly civil and political rights– and all the rest, and another quite different is to assign to some HR a binding nature and to others a voluntary nature, even if they are later considered essential. To build the new TDSPP paradigm it is necessary to demand that all HR be considered as such from inception. Accordingly, a new commitment should be established so that all rights with no current backing in international law receive it within a reasonably short term, so that we progressively acquire a legal framework protecting all HR contained in the International Bill of HR, in a specific and precise manner.

This proposal considers initiating the development of a HR universal common framework, parting directly from the International Bill of HR, incorporating all HR in the universal common framework, premeditatedly ignoring which suffer the greatest impact. Another possible scenario could be to part from the draft of the UN HR Norms, incorporating all other rights not included in the draft but appearing in the International Bill of HR. In this way, all HR will have a binding character for corporations in their entire sphere of influence. Subsequently, it would be the responsibility of each country's civil society to force their governments to incorporate all HR in their Magna Carta. The only cases where a voluntary nature may exist is in the so-called desirable rights, which are mere business practices that may contribute to further strengthen some specific rights and to increase a company's intangible assets by enhancing its public and consumer image.

One of the more persistent features in the business ethos, and among those favouring placing the market above democracy and sustainable welfare, is self-regulation, arrogating the right to decide, for example, what is essential and expected or who are their relevant stakeholders. In a truly democratic ethos it is civil society who freely –objectively informed with no propagandistic influence– must define all the concepts and elements of the HR and business regulating framework. In this sense, I am certain that if we, in civil society, succeed in bringing this issue to a direct and democratic debate, to then carry out democratic consultations in each country, the great majority will elect that all rights contained in the International Bill of HR –inalienable rights– be binding on all actors, including prominently governments and corporations, through referendum, incorporating them in the Magna Carta and establishing ad hoc regulating frameworks and mechanisms.

“in the South, quasi-slavery wages, modern slave work of servitude, albeit not specifically typified as a “worst crime against humanity,” has become the norm”

VII.(d) Right to a living wage – the HR with the most impact in the business ethos

It would be desirable to consider it a moot point to argue in favour of the living wage as the right of the most fundamental importance in the sphere of influence of business, given it seems to be emphatically obvious and of the most basic common sense. Unfortunately, it is necessary to insist about it as many times as necessary due to the rather conscientious, premeditated and perverse refusal on the part of companies and the vast majority of governments to acknowledge it.

VII.(d1) For the end of slave work

In the capitalist system, the owners of the means of production have always arrogated the right to retain most of the surplus value of the labour factor. Human exploitation in the market economy is not a hallucination from madmen but a constant, insultingly evident throughout history. Today, such exploitation can be daily verified just by standing in front of a factory's exit gate in the South and observing the deplorable physical conditions of workers; and then visiting the *favelas*, misery villages, lost cities and *chabolas*, among other names used to describe the shanty towns they live in, to see the overcrowded and miserable conditions in which tens of millions of human beings survive. Such conditions have been decried throughout history by an array of literary authors and scholars, particularly in the heart of capitalism. Dickens, Owen, Stuart Mill in the British Industrial Revolution, Galbraith, Emmanuel, and Hoogvelt in the twentieth century, among many others, have considered human exploitation –through the share

awarded to the labour factor of the revenue generated— inherent to the market system.

Such exploitation is so evident and elementary that the need to pay living wages as a basic factor to energise the economy has often been recognised. Fordism clearly perceived the need to put money into workers' pockets to trigger consumption and create markets, by generating aggregate demand. After the atrocious Gilded Age of the "robber barons," of the big trusts, at the end of the nineteenth century, and of the Great Depression, the owners of the market in the U.S. lent importance to the need to maintain a balance among dividends, prices and wages. The National Recovery Administration (NRA) during F.D. Roosevelt's era, pursued establishing fair dealing codes, including prices and wages, for each industrial sector. The aim was to guarantee a fair share for capital and labour. There was talk about eliminating from market dynamics the right to cut prices at a level where the U.S. standard of living would become unsustainable. It was argued that prices should be set to allow manufacturers to pay fair prices for raw materials, pay fair wages to their workers and earn a fair dividend for their investment.¹⁰¹

We have already been through more than three decades in which the whole world has endured the supply paradigm dogma. The only logic now is to maximise shareholder value, setting goals for corporations on a quarterly basis, according to the autocratic command of institutional investors. Accordingly, real wages have dropped substantially in both the North and the South. In the U.S., families have been forced to work far more hours at the expense of their quality of life, and yet inequality has grown, as we have seen in the analysis of the Economic Policy Institute. In the South, quasi-slavery wages, modern slave work of servitude, albeit not specifically typified as a "worst crime against humanity," has become the norm. In Mexico, sardonically called an *emerging country*, real wages have collapsed to less than half in the term of thirty years.¹⁰² This trend occurs across all countries in the South. It is the systemic stigma of capitalism, which appropriates the share legitimately belonging to the labour factor. This not-legally-typified theft constitutes a clear act of appropriation of others' wealth from a moral perspective. It occurs worldwide. Yet this is the condition systematically demanded in the South by global corporations, so they decide to invest in these countries. It is imperative to banish slave work from the face of the earth.

"this right is clearly expressed in the Universal Declaration of HR of 1948 and similarly in the International Covenant of Economic, Social and Cultural Rights of 1966"

VII.(d2) Living wage as a human right

This theft appropriating others' property prevents directly and actively the enjoyment of the human right to a quality of life worthy of human dignity. This right is clearly expressed in the Universal Declaration of HR of 1948 and similarly in the International Covenant of Economic, Social and Cultural Rights of 1966. Article 23 of the Universal Declaration states:¹⁰³

- ✓ *Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.*
- ✓ *Everyone, without any discrimination, has the right to equal pay for equal work.*
- ✓ *Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.*
- ✓ *Everyone has the right to form and to join trade unions for the protection of his interests.*

The first point opens to free interpretation what may be just and favourable conditions of work. Yet the third point clearly establishes that a just and favourable remuneration must ensure for the worker and his family an existence worthy of human dignity, including other means of social protection.

The International Covenant of ECOSOC Rights establishes in article 7, among other things, the following:¹⁰⁴

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) *Remuneration which provides all workers, as a minimum, with:*
 - (i) *Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*
 - (ii) *A decent living for themselves and their families in accordance with the provisions of the present Covenant;*

"since there is no convention upholding the right to a living wage, Convention 100 only protects women from being exploited more than men. Convention 100 is a complete anachronism because it does not address the issue of labour exploitation in the global context that prevails today and it evades explicitly enunciating it in a context of living wages"

VII.(d3) Institutional evasion of the right to a living wage

The ECOSOC Covenant is less specific than the Universal Declaration, but leaves no doubts by qualifying living conditions as of “decent living” kind. It is odd, however, that a covenant is less clear in its enunciation eighteen years after the Universal Declaration. In practice, despite its clear enunciation in the Declaration and the Covenant, worthy-of-human-dignity-remunerations have never been translated into a specific ILO labour convention, due to the open lack of political will of governments both North and South. Thus, the ILO completely evades the right to a living wage. As I have exposed, only the minimum wage is addressed in Convention 131, which, moreover, is not even regarded as a core or priority convention, but only as one among many others. This clearly exhibits the little importance that States award to the topic of wage remunerations.

Relative to the concept of just and favourable conditions without any discrimination, of the Declaration and the Covenant, it refers to the right to equal wage for equal work between men and women. This right is upheld in ILO Convention 100 of 1951, on equal remuneration, which additionally is regarded as a core convention, one of eight in total. It would be ironic, if this were not a question of a wretched human spirit, that the logic used in this convention is under the context of domestic economies, when a context of global markets, with thousands of global corporations, has been imposed over us. Convention 100 suggests ending gender discrimination in labour practices. Nonetheless, following this logic of domestic markets, if men are being exploited in a given country, ILO Convention 100 asks for equal treatment for women. Thus, if men are exploited, women could also be exploited at the same level, but not more. Obviously, the convention assumes that men are receiving a living wage. Yet this only occurs in northern economies. Since there is no convention upholding the right to a living wage, Convention 100 only protects women from being exploited more than men. Convention 100 is a complete anachronism because it does not address the issue of labour exploitation in the global context that prevails today and it evades explicitly enunciating it in a context of living wages.

This premeditated avoidance of the right to a living wage occurs in all governments and multilateral organisms. As we have seen, even norm eight of the Norms’ draft makes a vague reference to adequate remunerations, which also uses the context of “national conditions.” Accordingly, if conditions are exploitative this will be the standard. In the same way, the vast majority of voluntary tools follows exactly the same course, avoiding the right to living remunerations and constraining themselves to deferring to the ILO conventions. Only the Ethical Trading Initiative, labels code 5 as a living wage, but it falls once again into ambiguity by making reference to meeting, *at a minimum*,

*national legal standards or industry benchmark standards, whichever is higher.*¹⁰⁵ This is why it is unexpected that the BLIHR at least considers living wages as a possible expected right that should be further explored.

“a North-South labour endowments system should be established applicable both for men and women, defined using the concept of equal pay for equal work of equal value of ILO Convention 100, using the North as benchmark and not men in a domestic context”

VII.(d4) TLWNSI’s proposal towards a living wage

TLWNSI’s proposal is to first clearly establish the right to a living wage as a core right. Concurrently, this right must be established within the context of a global economy. In other words, a North-South labour endowments system should be established applicable both for men and women, defined using the concept of equal pay for equal work of equal value of ILO Convention 100, using the North as benchmark and not men in a domestic context. In this way, southern workers must have the right to earn equal pay for work of equal value in universal real wage terms. The mechanism TLWNSI proposes to determine real wages is the purchasing power parities (PPPs) published annually by the World Bank, applying them to determine the wages of a country in question for comparable work. The other benchmark is the U.S. wages annually reported by this country’s Department of Labour.

In this way, if the average U.S. hourly manufacturing wage in 2004 is of \$23 dollars, and PPPs for Argentina, for example, for that year indicate a 28 percent cost of living, the average equivalent living wage should be of \$6,57. The U.S. Department of Labour publishes annually average wages for all manufacturing, agricultural and mining categories. Thus, comparisons can be far more specific. In practice, the responsibility of an MNC is to pay equal real wages for work of equal value in PPP terms. Accordingly, if a corporation opens operations in Argentina, it must set its wages using as a benchmark the wages it pays for equivalent jobs in its home country. If a company considers transferring, for example, a customer-service call centre from Omaha to India or an assembly operation from Arizona to Costa Rica, the wages that it must pay are the same wages in purchasing power terms using PPPs. Wages paid in the home country should always be its benchmark, assuming it pays living wages to all its workers in its home country.

PPPs are not an exact system, to be sure, for both prices and wages are dynamic. Thus, PPPs are approximate assessments of the costs of living based on price behaviour for a country using the U.S. As their benchmark of reference.¹⁰⁶ Nonetheless, if PPPs are profusely used in the analysis of important indicators, such as gross national income (GNI) and exchange rates, it is perfectly possible

to use them to establish the corresponding living wages, provided we force governments to have the political will. The gap between the real wages currently paid in the South and those that should be paid in order to be equivalent living wages is so huge that possible discrepancies between an estimate and a real wage become trifle.

“the right to a living remuneration is a human right that we must demand with full assertiveness due to the direct impact it bears on the quality of life of workers and their families. It must be made clear to enterprises that it is impossible to pretend to be a responsible business if they do not fully comply with the right to a living wage, even if they respect all other HR.”

◆ **Progressive right in thirty years.** Nevertheless, precisely because the gap is so enormous, this is a right in which it is necessary to set a goal, so that corporations commit to closing the gap progressively, from year one, until the gap is closed and there is full compliance with respect for this human right in the long term. In the case of TLWNSI, it is proposed that corporations commit to closing the gap in the term of not more than thirty years, with yearly increments from year one. The gap is so wide that, in TLWNSI’s analysis, in the case of Mexico, for example, it would take thirty years to close the manufacturing wage gap if real wages are increased an average of 6,5 percent annually. In practice, considering the natural dynamism of PPPs, the rate of wage gradual equalisation, through small increments, to real wages requires periodic adjustments. Yet the gap is so huge that it is impossible that the gradual process of equalisation through PPPs would not be very effective in reaching its goal in a maximum of thirty years.

The thirty-year term is a far more political than technical consideration. The payment of living wages is at the core of the change from the market paradigm to the TDSPP paradigm. Considering human nature, it is impossible to envision a paradigmatic change in the short term. Simply, there are many opposing interests to succeed in reaching an agreement among all nations, particularly those with the greatest number of MNCs. Technically, if a global company has operations in its home country –where it pays living wages nominally ten or more times the misery wages it pays for the same work in the southern countries where it has similar operations— it could then perfectly increase wages 500 percent in one single increment, to equalise them and convert them into living wages. If it makes a profit in its home country with living wages, then it can perfectly do the same in the South, with southern living wages, which would be lower in any case for a long period. Yet human nature does not work this way, and we cannot expect that a company, its Board, and institutional stockbrokers agree to close the gap in a single step. A very illustrative case was the recent suspension of Levi

Strauss as a full member of the Ethical Trading Initiative, for refusing to adopt code #5 from its Base Code, regarding living wages.¹⁰⁷

The right to a living remuneration is a human right that we must demand with full assertiveness due to the direct impact it bears on the quality of life of workers and their families. It must be made clear to enterprises that it is impossible to pretend to be a responsible business if they do not fully comply with the right to a living wage, even if they respect all other HR. It is evident that this right is avoided by the main actors because it is a right that crashes directly with the current paradigm. Thus, because it is intrinsically inalienable and because it bears the greatest weight –by establishing how the daily relationship between labour and capital should take place, the most frequent of all relationships and with the greatest implications for both sides– this right must go at the front of all other rights in the business ethos. Therefore, because civil society here faces the heart of capitalism, this right must be achieved progressively. Changing the current paradigm is a goal to be offered to future generations, and fulfilling it will take at least one generation.

“all mechanisms must be firmly backed by the universal HR common framework. Hence, accountability mechanisms must be universal as well, so that corporations apply the same practices everywhere and are evaluated with the same criteria”

VII.(e) Accountability mechanisms

In the new true democracy and sustainability of people and planet paradigm (TDSPP), there must be a corporate responsibility monitoring, auditing and certification regulating framework. The new context transforms the social good into the new purpose of business, in its role as a contributing agent to the generation of welfare. Accordingly, corporations will be bound to account for the quality of their social and environmental footprint. This responsibility must incorporate at the forefront their performance in respecting HR in their sphere of influence. In this way, companies must be monitored periodically and audited once they have delivered their social and environmental performance annual report. The purpose is ensuring the veracity of their report, so that they can be certified or not depending on the results of the audits. All mechanisms must be firmly backed by the universal HR common framework. Hence, accountability mechanisms must be universal as well, so that corporations apply the same practices everywhere and are evaluated with the same criteria.

◆ **Public-citizen check and balances system.** The organ responsible for managing the accountability mechanisms should be a government entity. We part from the assumption that we have already succeeded in forcing

governments to fully comply with their responsibilities and that we have replaced capitalism with the new TDSPP paradigm. In this new paradigm civil society's participation in the public matter is already an inherent feature of the new paradigm, with participation across the entire array of public issues proper of true democracy. Accordingly, the entity responsible for assessing the corporate social and environmental footprint must incorporate, both administratively as operatively, members of civil society, through fully transparent mechanisms previously jointly designed and approved. These are hybrid public-citizen entities.

The evident goal is to make social participation in the public matter act as a check and balances system – guaranteeing that public servants' management practices are performed according to law and following established standards– by directly participating in all relevant functions. Concurrently, the transparency mechanisms used in selecting the individual citizens participating in the corporate social and environmental function must guarantee their probity at all times, ensuring that they perform their task ethically and independently and that they are fully committed to fulfil their responsibility before society. These members must act independently from the existing hierarchy in the government entity, and must be accountable to one or several organs of organised civil society, based on what democratically is deemed necessary to establish a system of checks and balances that effectively guarantees the probity of the entire process. With a little dose of cynicism one may think that there will always be the need for someone else to overlook that last line of defence, given human nature. Yet, if we are capable of establishing a truly democratic ethos, we will be capable of establishing management structures that remain faithful to the goals of the new ethos, never perfect yet effective in preventing deviations.

◆ **Ex-ante impact assessment of new projects.** The impact assessment on HR for all new investment projects must occur prior to their execution. Such assessment must be performed by all stakeholders to determine the approval or rejection of the project and must be outside of the companies' influence and control. In the new TDSPP paradigm the HR normative framework is common for all businesses and universal for all countries. Even if a generation from today there are still countries refusing to adopt the common framework, companies will remain responsible for all their actions holistically and ubiquitously. When there are no new projects involved, performance assessments will be executed by the public-citizen entities for each company annually.

◆ **Performance report.** Businesses must report annually on their performance in contributing to social and environmental sustainability, according to the universal common normative framework, in which HR must enjoy

maximum priority. Such reports must include accurately all indicators in the normative framework and follow a homogeneous format, so that assessments are consistent, measurable and comparable globally in an objective manner.

◆ **Monitoring, verification and certification.** In the new paradigm these functions close the process for complying with the sustainability standards. All of them must be managed by the corresponding public-citizen entity – according to the universal common framework– using both internal resources as well as external ad hoc services, always independent and outside the control of business. Verification must confirm what companies report and evaluate how close this is to applicable norms. A positive or corrective assessment must be the direct end result of the evaluation. Anything that cannot be confirmed must be corrected by the company within a reasonable term in line with what the norm has established. Certifying a business as a responsible entity must be awarded only when it fully complies with all required norms.

“the power of imposing penalties, commensurate with the damage incurred, is another basic sine qua non element to build an ethos of true sustainability and respect for HR in the business arena”

◆ **Corrective penalties.** The normative, endorsed by law, must have the legal resources for applying penalties to companies violating the norms. The power of imposing penalties, commensurate with the damage incurred, is another basic *sine qua non* element to build an ethos of true sustainability and respect for HR in the business arena. Such penalties must be established to induce companies to favour complying with the norms by imposing greater costs than the benefits obtained by not complying with them. It is imperative to eradicate all mercantilist instincts by imposing tough penalties, including at the forefront penalising natural persons in control of the companies. Such penalties must not be subject to litigation but must be automatic. If a company violates a clearly and fully established norm, it must suffer the corresponding penalty, without the need to take it to trial. Regulatory entities must be empowered to act directly, materialising the penalty with no recourse for the violating company to appeal. In the new paradigm, the private interest and the market are no longer above people and planet, and the nature of business has been modified accordingly. Hence, in principle, the imposition of penalties should be sporadic.

VII.(f) Realistic in the long term

A new true democracy for the sustainability of people and planet paradigm, as a prerequisite for the full enjoyment of HR, is a generational goal that we can only set realistically in the long term, taking us at least a

generation or thirty years. Consequently, the pathway to this goal must focus from now on on social mobilisation, so that it can be built by breaking the dikes of the political class of the so-called representative democracy that currently keep the public sphere as their private hunting ground.

◆ **First-generation democratic demands.** To build the new paradigm the first step is to focus on establishing first-generation democratic demands, without which we will not have any possibility whatsoever of initiating any significant change in HR or in any other area. Those with the greatest significance are:

- **Public consultation.** The first step should be to eliminate the governments' virtual monopoly on decision making. Hence, the sporadic public consultations of today should become customary practice in true democracy. Such public consultations must be organised without the manipulation of propaganda for the approval of each public matter of significance and as one way of creating transparency across the entire public spectrum without constraints. Moreover, civil society must be fully entitled to call for a public consultation on any issue by gathering a reasonable minimum of citizen endorsement of the consultation. In this way, the HR normative in the business sphere of influence must be taken to a full debate in the public sphere and be subject to a referendum or plebiscite in all States. A normative without full citizen participation will never be a democratic instrument.

- **End of corporate lobbying.** A favourite business strategy to control the public agenda, beyond financing electoral campaigns, is to lobby parliaments to introduce proposals favouring their business and blocking those reducing their competitiveness. Lobbying against the establishment of any kind of universal health system, by U.S. insurance companies, or against draft bills intending to increase the development of hybrid vehicles and the average efficiency in fuel combustion, by the U.S. auto industry, are emblematic cases of corporate lobbying. Corporations invariably press against the social good and in favour of their shareholder values. This must change radically. In the new paradigm, companies, as social-good generating vehicles, must not have access whatsoever, through their armies of lobbyists and "opinion experts", to Members of Parliaments. Only the citizenry and their communities should enjoy full access, including their direct participation, in the public-matter decision-making process as a core element of the new RDSPP paradigm.

- **Untrammelled transparency.** Despite societal efforts, transparency in the public matter has progressed in a very limited way and it has a long way to go. On a daily basis, one can find dozens of instances in which the lack of transparency prevents due democratic process. Although

transparency in the debate for HR and business is currently open, and we can say that there is access to anyone who wishes to participate, there are many areas with little transparency that, unless addressed, will prevent building the new paradigm. A simple check in any newspaper easily exhibits concrete questions of significance, with great implications for HR, lacking transparency.

A quick look in today's dailies offers us a clear example of the lack of transparency and of citizen acquiescence. This is the case of the Mexican and U.S. Governments' announcement of their agreement of the Merida Initiative, an euphemism for establishing a very similar plan to Plan Colombia, in which supposedly billions of dollars will be spent against drug-trafficking and bilateral security, in which Mexico will receive all sorts of technical advice on these issues. In Mexico it is argued, using the Colombian case as reference, that sovereignty will be violated and that there is very little transparency about how it will be managed. Although the agreement will be sent to both congresses for approval, many MCs complain about not being consulted about the plan's development.¹⁰⁸ Accordingly, the executive branches have launched campaigns to convince MCs and the citizenry about the plan's great benefits. Yet there is no intention whatsoever of subjecting this agreement among the executive branches to a public debate with the citizenry and much less of submitting it to a public referendum. Discretion and lack of transparency are rather evident. In true democracy such an agreement would simply be impossible. For initiatives will predominantly emerge from the citizenry and because, in either case, they would be subject to full public scrutiny, without propaganda campaigns, and to due public consultations.

- **Independent candidacies.** The right to postulate independent candidates, in countries in which laws currently prohibit them, favouring the monopoly of parties over the access to publicly-elected positions.

- **Proscription of private funds and propaganda in electoral processes.** Real democracy requires the proscription of private funding in electoral processes. Furthermore, it is necessary to transform electoral campaigns, even when using public funds, into processes deprived of propaganda and as close as possible to the presentation of government proposals submitted for public scrutiny and discussion in a climate of full transparency. Although some countries, especially in Europe, prohibit the private financing of campaigns, in many more, including the U.S., it is still the norm. This has to be eradicated from the face of the earth, for it is a cesspool of all sorts of corruption that cancels all due democratic processes. The case of Mexico's last elections exhibits obscene and clear actions sequestering the election. In such election, mass media blatantly played a

strategic key role in which they subsequently had the power to change electoral law as they best deemed convenient for their very private interests. The connivance between the government, the electoral college and the media to commit electoral fraud was so blatant that civil society reacted by building a huge network of alternative media to denounce the truth about the electoral process and to oppose what it considers a fraudulent government. In a truly democratic paradigm neither private financing nor propaganda should be allowed. Campaigns must be limited to the accurate presentation and discussion of the proposed plans of government and nothing more.

• **Revoking power.** In the same way, societies must create mechanisms that commit candidates to accurately comply with their political offers, so that deception in rhetoric is eliminated and proposals become realistic government plans. The same mechanism must include the right to exert civil society's revoking power over all popular-election positions, through public consultations that periodically confirm or revoke all elected officials in their positions during their terms.

I must insist on emphasising the need for the immediate mobilisation of civil society to focus on the construction of a truly democratic ethos as a sine qua non element in pursuit of the full respect of human rights, both in the business arena and generally speaking. As I have already expressed, this will surely take us at least a generation. Evidently, if we do not succeed, the entire vision that I outline above would become a completely utopian ethos, and reality would increasingly become an unsustainable subhuman ethos of self-annihilation.

⁹⁵ Theodor Rathgeber. UN Norms on the Responsibilities of Transnational Corporations. Dialogue Globalization. OCCASIONAL PAPERS. N° 22. Friedrich-Ebert-Stiftung. Geneva April 2006. Geneva, page 12.

⁹⁶ Corporation 20/20. Principles of Corporate Redesign. <http://www.corporation2020.org/> November 2007.

⁹⁷ Marjorie Kelly y Allan White. Corporate Redesign. The Missing Business and Public Policy Issue of Our Time. Tellus Institute and Corporation 20/20, November 2007.

⁹⁸ Why a Great Transition? Great Transition Initiative: <http://www.gtinitiative.org/>. November 2007

⁹⁹ Ver Serge Latouche, Degrowth economics. Why less should be so much more?, Le Monde Diplomatique, November 2004

¹⁰⁰ DO WE REALLY WANT DEVELOPMENT? Growth, the world's hard drug, Le Monde Diplomatique, August, 2004.

¹⁰¹ Robert B. Reich. Supercapitalism. The Transformation of Business, Democracy, and Everyday Life. Alfred A. Knopf. 2007. Page 26.

¹⁰² The Jus Semper Global Alliance. Wage gap charts for Mexico vis-à-vis developed and "emerging" selected economies and other selected economies, with available wage and PPP data (1975-2004). TJSKA 2006.

¹⁰³ Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

¹⁰⁴ Office of the UN High Commissioner for HR. International Covenant on Economic, Social and Cultural Rights. 16 December 1966.

¹⁰⁵ Ethical Trading Initiative. Base Code. 2007. <http://www.ethicaltrade.org/>

¹⁰⁶ Purchasing power parities reflect the amount in dollars required in a given country to have the same purchasing power that \$1 U.S. Dollar has in the United States; e.g.: if the PPP index in one country is 69, then \$0,69 dollars are required in that country to buy the same that \$1 dollar buys in the U.S.; thus, the cost of living is lower.

¹⁰⁷ ETI Statement. Suspension of Levi Strauss & Co. from ETI membership. 20 December 2006

¹⁰⁸ David Brooks. "Nuevo paradigma", dicen funcionarios de la Casa Blanca; "no se nos consultó": legisladores. Surgen en EU dudas sobre la efectividad de la Iniciativa Mérida. La Jornada, 24 de octubre de 2007.





VIII. Implementation of the New HR Paradigm

The implementation of the new paradigm is formulated to advance progressively across a generation, defined as thirty years, and to be completed at the end of this period. Through organised social mobilisation worldwide, we must demand that all HR contained in the three Declarations and Covenants that give form to the International Bill of HR are incorporated into the Universal Common Framework of HR in the Sphere of Influence of Business. It is vital that the right to a living wage be added without constraints for it is the element with the greatest direct impact and social implications in the relationship between human beings and business. In the same way, it will be necessary to assign deadlines so that some of these rights be fulfilled progressively until

their full enjoyment in a set date to be not greater than thirty years, as is the case of living wages.

In principle, two HR groups should be established:

◆ *rapid compliance:*

- All civil, political, economic, social and cultural rights that are already part of conventions. This is the case, for example, of all the ILO conventions addressing a specific human right. All ILO conventions addressing a HR must be included and not only the Core Conventions, as many actors tend to do (EU, businesses, Office of the High Commissioner for HR and others).
- All human rights not already incorporated in a convention but explicitly enunciated in the International Bill of HR and where current conditions do not justify a progressive compliance.
- Any human right submitted by civil society that is not considered in the International Bill of HR and where current conditions do not justify a progressive compliance.

◆ **progressive compliance:**

- Right to a living wage. The most prominent, to be sure, applicable both to a company's own employees as well as across their entire global supply chain.
- All human rights not already incorporated in a convention but explicitly enunciated in the International Bill of HR and requiring, due to current conditions, progressive compliance.
- Any human right submitted by civil society that is not considered in the International Bill of HR and requiring, due to current conditions, progressive compliance.

“social mobilisations must be widespread, parting from grassroots communities, to inform, educate, and build awareness about the need for social mobilisation in a variety of citizen roles”

VIII.(a) Routes of implementation

Dealing with the very powerful opposition of business and of most governments and their multilateral organisms against ceding control of the HR agenda to the citizenry, as part of our construction of the new TDSPP paradigm, will require very strong conviction, commitment and persistence in our social mobilisations worldwide. This is indispensable in order to achieve framing HR within international law and in the constitutions of States within a universal common framework that regulates the impact that HR endures in the business environment. Social mobilisations must be widespread, parting from grassroots communities, to inform, educate, and build awareness about the need for social mobilisation in a variety of citizen roles. To this endeavour there are two courses of action, one slow paced and the other with much faster results:

“it is vitally important to centre our efforts in pressing to raise our participation through social consultations”

VIII.(a1) Slow route

This is the public sphere in which organised civil society must directly approach governments and multilateral organisms to pressure them in favour of the new HR paradigm. This is a field in which civil society already has a long track record and where progress is attained very slowly. The current debate, direct pressure on the UN, the European Union and on some governments is part of this work, which little by little gains some ground in our quest. Nonetheless, it is indispensable to speed up the pressure. Accordingly, as pressure grows as the level of awareness in communities grow and more citizens join, it is vitally important to centre our efforts in pressing to raise our participation through social consultations. National civil societies must mobilise to make referendums a citizen instrument that can be invoked for any issue of

relevance in the public matter. Needless to say that HR in the sphere of business fully constitutes an issue of the utmost relevance.

Achieving this goal constitutes a pivotal strategy catapulting the rate of progress in the establishment and defence of HR in international law and the laws of each State. The field of public advocacy is a mined one due to the rather unequal terrain where it is played –given the economic power that capital exerts on States and on immobilising many social organisations. Yet, this is the field of action, the public sphere, the Greek agora, where we should act to build the new TDSPP paradigm. Accordingly, increasing pressure to raise the level of social participation in the public matter is the most effective way of speeding up the rate of progress through this route in the new paradigm.

“nothing will make corporations and governments react more to the demands of arguably democratic societies than the logic of the market, when this logic hits directly in the bottom line of corporations and, consequently, of financial market investors”

VIII.(a2) Fast route

This is the private sphere of market mechanisms. As part of the process to provide full pre-eminence to people and planet, subordinating the market to the will of the citizenry, we must use its current mechanisms to effectively and directly influence business behaviour and even influence governments, by taking advantage of the very logic of the market. This route has two paths that we must go through.

◆ **Consumer power.** Nothing will make corporations and governments react more to the demands of arguably democratic societies than the logic of the market, when this logic hits directly in the bottom line of corporations and, consequently, of financial market investors. Our power as consumers can make it very difficult for companies to refuse to change their ways. To gradually build the TDSPP paradigm, consumer power has to be leveraged from the start to challenge the current system. As corporations compete to gain consumer goodwill through their business practices, hoping to turn it into intangible market benefits, consumer power can make respecting HR and becoming a truly sustainable business a question of survival.

• **Consumer boycotts.** The role of consumers is essential in building the new paradigm.¹⁰⁹ As the systematic violation of HR reaches significant levels of awareness among consumers, our power and our growing demands for practices of HR respect and sustainability are turning into a force that companies, whether they like it or not, have to deal with. A consumer boycott can turn into a real nightmare even for the most

powerful corporations as can be attested in the testimonies left by companies such as Wal-Mart, when trying to clean up their image. In the face of human exploitation, a consumer boycott is the most politically correct and peaceful action that society can take to challenge the system. Using our social consciousness, based on our moral values, to curve our consumer behaviour to align it with our values is the only direct contribution that we can make to vote with our consumer power in the direction we want governments and corporations to go. There is not a more effective way of doing it.

- ***Becoming conscientious.*** In this path there is already growing mobilisation, from fair trade to specific boycotts, which is generating concrete and tangible well-documented results in favour of demands that have successfully modified corporate decision making. A very recent case is Starbucks' decision –one of the companies not joining the Global Compact until they were not boiler plated by the agreement between the UN and the U.S. Bar Association– of accepting the trademark registration of the coffees produced by Ethiopian farmers after the mobilisation of little more than one hundred thousand North American consumers.¹¹⁰ Moreover, there are increasingly more surveys that consistently show the degree of concern for corporate social responsibility among consumers. This is becoming very significant and continues to grow, particularly amongst the younger generations. Consumers are increasingly becoming aware about the deeds and misdeeds of corporations and how they impact the sustainability of people and planet, and subsequently are developing a new value scale they are using in their consumer decisions. They are not only becoming aware about the responsibilities of business but also about their own responsibilities as citizens of so-called democratic societies in a globalised ethos. In the past seven years, surveys increasingly attest to this shift to a higher moral ground.¹¹¹ In this way, the implications about this higher level of social consciousness go far beyond concrete mobilisations to pressure a company, and are moving towards the establishment of a new socially-responsible consumer culture, anchored on the sustainability of people and planet, with respect for HR at the forefront.
- ***Organised mobilisation.*** To be sure, this is the course in which all the world's citizens with a little purchasing power and a social conscience can participate and expect concrete results at a far faster speed than through the public sphere. A consumer company's most valuable asset is its brand, and, when facing a boycott, it reacts immediately. For the cost of a boycott hits a company's bottom line in a very meaningful manner by just mobilising a miniscule portion of its market to vote against it with our pocket. This is why there are

increasingly more consumer organisations, from organisations with a global reach to small grassroots organisations, addressing a wide array of issues, from respect for human and labour rights to fair-trade projects among others. In this way, large international and national organisations, such as Consumers International, with more than 220 consumer organisations in 115 countries, and Co-op America, with more than 60 thousand members in the U.S., have HR and corporate social responsibility prominently incorporated in their working agendas.

- ***Leveraging consumer power in pursuit of HR from inception.*** Consumer mobilisations to demand from specific companies their disposition in favour of HR and to amend their current practices directly violating HR in their sphere of influence can draw meaningful results. This is true both for immediate changes in the operations of specific companies, modifying their corporate culture, as well as for contributing to a favourable climate for HR in the public arena of governments and multilateral organisations. As these very slowly give in to societal pressure –to establish a universal binding framework for HR in the sphere of business– consumers can demand from corporations immediate actions to change their practices to fully incorporate a future universal framework, or face consumer rejection if they refuse. This is why it is indispensable for the citizenry to join consumer organisations as part of our individual social responsibility.
- ◆ ***The power of ethical investors.*** The other route that may generate results in the short term is the route followed by investment organisations with a social conscience. As I exposed in the assessment on the position of the ICCR investment group in the work of the SRSG-HR, there are increasingly more ethical investment groups concerned by the way the activity of companies in which they invest or consider investing influences HR and the sustainability of societies and the planet. The concept of socially-responsible investments (SRI) has grown quite significantly in the last decade. A European survey with a sample of 300 investment professionals drew that one-third offer ethical investment portfolios to their clients and another 15 percent planned on doing it. As for the U.S., its growth is similar and there are already more than 200 mutual investment funds. Both in Europe and in the United States growth of these portfolios is increasing at a faster pace than in the rest of the industry.¹¹² Certainly, there is no standardised criteria to evaluate companies, and they may differ from just including the environmental dimension to including the entire array of issues, with special emphasis on HR, as in the case of the ICCR.

What is certain is that, contrary to what was forecast ten years ago, responsible investing has become a significant investment segment, which, furthermore, exerts growing pressure on business practice in the direction of truly sustainable practices. This is forcing many companies to take into account their demands, which increasingly hold a greater voice, for these investors, which include many non-profits, are fully entitled to participate in the investor meetings. The power their investments may bear over business practices, nonetheless, cannot compare with the pressure we can wield as consumers, to be sure. Every

consumer has pressure leverage and almost all citizens have some consumer power, whilst comparatively few can invest in stock markets. This fact notwithstanding, this miniscule social segment is having enough investment power to modify business practices in the short term. Hence it is one additional element that positively contributes to establishing a mandatory universal common framework of corporate social and environmental responsibility.

¹⁰⁹ Álvaro J. Regil. Consumer Power in the Logic of the Market: Real and Direct Democracy in Pursuit of CSR. TLWNSI Issue Essay. December 2004.

¹¹⁰ Oxfam Celebrates Win-Win Outcome for Ethiopian Coffee Farmers and Starbucks. 20 June 2007.

¹¹¹ Álvaro de Regil. How Sustainable is Our Latte? An Assessment of Trends and Standards in Fair-Trade From the Perspective of a New Truly Sustainable People and Planet-Centred Paradigm. TLWNSI Issue Essay. May 2007, page 84.

¹¹² Business and Sustainable Investment. Sustainable Investment, 2007. www.bsdfglobal.com





CONCLUSIONS

◆ **Subhuman paradigm.** The current Darwinian capitalist paradigm, subhuman, predatory, alienator, manipulator and degrader of the human condition, is intolerable for all those –the great majority– who wish to build a decent and promising future for humanity and the planet. It is intolerable because this paradigm is in the antipodes of human essence, for it directly and systematically violates our most basic human rights: to life, to work, to have social sensibility, to our sense of belonging –living in harmony with our community– and to live in solidarity with all the world’s cultures and ethnic groups. The power of the current paradigm has been achieved by corrupting our main social structures and institutions, undermining the State structures and sequestering the main pillars of democracy.

◆ **Unsustainable paradigm.** At the centre of the system the market reigns, with money exalted as our ultimate *raison d’être* at the expense of systematically violating HR

and creating a wretched ethos for the vast majority of humanity. This has created an environment with no possibility whatsoever of sustainability, given its own intrinsically predatory nature.

“before we can aspire to build an ethos for the full respect of HR in business, it is essential to first build, with no delay, an ethos of true democracy”

◆ **Holistic paradigm.** The only way of reverting the current situation is through a radical change, building a new paradigm fully committed with the construction of a promissory future for humanity and the planet, anchoring it in the structures of authentic democracy, of equilibrium, through effective checks and balances that harness our lowest instincts. Hence it is necessary to become conscientious that, before we can aspire to build an ethos for the full respect of HR in business, it is essential to first build, with no delay, an ethos of true democracy: a real and direct democracy where we all permanently participate in the public matter and where all initiatives

emerge from the communities and not from the elite. Only then can we aspire to establish the sustainability of all human beings and the planet as the only purpose of the State, and as its pre-eminent responsibility in the social contract. This is the new paradigm of true democracy and sustainability of people and planet (TDSPP paradigm); a holistic paradigm and with long-term viability.

◆ ***New raison d'être of the market.*** As we progress in the construction of true democracy, we will transform the market to turn it into a vehicle to generate welfare instead of leaving it as an end to itself. At the heart of this transformation lies the transformation of the purpose and nature of business entities. This must change from shareholder value, incompatible with the enjoyment of HR, to make it prominently the social good, with companies as agents of sustainable welfare. In this way, as we transform the *raison d'être* of business, we will then be capable of establishing an ethos guaranteeing the full enjoyment of HR in the sphere of influence of business.

◆ ***Pressing construction through a two-track course.*** The commitment to real change, constituting a commitment to life, urgently needs to start immediately, for it will be quite difficult and laborious; it will take at least a generation, and time is running out. Accordingly, to incorporate this commitment to life into our daily lives, it is necessary that we undertake such transformation inside all societal communities that we belong to, both through the public path, advocating with governments and

multilateral institutions, as well as through the private path, leveraging the market's mechanisms, using the very same logic used in the management of companies.

◆ ***Real change or ominous future.*** Envisaging the achievement of full respect for HR without completely transforming the current ethos can only entail two things: either we are indulging in sheer naiveté, for the owners of the current paradigm will not allow such a change, or even worse, despite acknowledging the total impossibility of sustaining the current ethos in the long term, we have no commitment with respect for HR nor with the future of generations to come –including our own descendants– nor with the viability of the planet. This would surely guarantee an ominous future for mankind's existence. Therefore, if only for our most basic instinct of survival, we need to seriously commit to real change, and send the rhetoric that pretends to change –so that every remains the same– to oblivion.

◆ ***End of democratic parody.*** This assessment seeks, at a minimum, to contribute to the creation of the necessary level of awareness, so that people realise that no one else but us –mobilising rationally– will be capable of establishing a sustainable ethos, centred exclusively on peace and on the welfare of people and planet. It attempts as well to contribute to make those who wield the power realise that their simulations and manipulations, with which they make a parody of democracy, will increasingly deceive fewer citizens of this undemocratically globalised world.

Bibliography

- ActionAid. Who Pays? ActionAid 2007.
- Jem Bendell. Barricades and Boardrooms. A Contemporary History of the Corporate Accountability Movement. UN. Research Institute for Social Development. June 2004.
- Jem Bendell, John Manoochehri and Shilpa Shah. *Serving systemic transformations*. The Lifeworth Review of 2005.
- Pierre Bourdieu, "The Essence of Neoliberalism," *Le Monde Diplomatique*, December 1998.
- Myriam Cardozo Brum and Álvaro de Regil Castilla. Non-Governmental Organisations and Corporate Social Responsibility in Iberian America. In *Corporate Social Responsibility Volume 2. Performances and Stakeholders*. Edited by José Allouche. Palgrave MacMillan, 2006.
- Bernard Cassen. THE DOHA ROUND. The great trade fair. *Le Monde Diplomatique*, December 2005.
- Noam Chomsky. Profit over People. Neoliberalism and Global Order. Seven Stories Press, 1999.
- Corporation 20/20. Creating the vision and charting the course of the Future Corporation. 2006 Brochure.
- CSR Worldwide Week Network. Netherlands. November 2004 Conference.
- Deborah Doane. The Myth of CSR. *Stanford Social Innovation Review*. Fall 2005.
- Economic, Social and Cultural Rights Network. Letter to John Ruggie of 25 October 2007.
- Marco Haan. The Competitive Effects of a Consumer Boycott. University of Groningen. The Netherlands. May 2007.
- International Labour Rights Fund. 2005 Annual Report.
- Joshua Karliner. The Corporate Planet. Sierra Club. 1997.
- Jean Marie Krier. Fair Trade Europe 2005. FLO, IFAT, NEWS, EFTA.
- Frédéric Lasserre and Philippe Rekecewicz. The water dossier. Blue gold rush. *Le Monde Diplomatique*, March 2005.
- Ted Nace. Gangs of America. The Rise of Corporate Power and the Disabling of Democracy. Berret-Koheler, 2003.
- OECD Watch. Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure 2006.
- Joris Oldenzien & Myriam Vander Stichele. Trade and the need to apply international Corporate Social Responsibility (CSR) standards. SOMO Discussion paper 2 November 2005.
- Álvaro J. de Regil. The Future of CSR will Mirror the Health of Society: Pondering the Evolution of CSR. TLWNSI Issue Essay. The Jus Semper Global Alliance. November 2005.
- Álvaro J. de Regil. Corporate Social Responsibility without Living Wages is Irresponsible and Unsustainable TLWNSI Issue Essay. The Jus Semper Global Alliance. July 2003.
- Philippe Rivière. Drug deals in Europe. *Le Monde Diplomatique*, February 2002.
- Bernard Sanders. Waking Up the Global Elite: Activism in the Streets Has Led to an Outpouring of Platitudes in the Suites. *The Nation*. 2 October 2000.
- Starbucks Coffee. Beyond the cup. CORPORATE SOCIAL RESPONSIBILITY FISCAL 2005 ANNUAL REPORT.
- Myriam Vander Stichele and Sander van Bennekom. Investment agreements and Corporate Social Responsibility (CSR): contradictions, incentives and policy options. SOMO Discussion paper 1 November 2005.
- Anne Tallontire and Bill Vorley. Achieving fairness in trading between supermarkets and their agrifood supply chains, pg. 12. UK Food Group Briefing, September 2005.
- Allen L White. Business Brief: Intangibles and CSR. *Business for Social Responsibility*. February 2006.
- Allen L. White, Fade, Integrate or Transform? The Future of CSR, *Business for Social Responsibility*, August 2005.

Suggested key additional references:

- Samir Amin. *El Capitalismo en la Era de la Globalización*. Paidós, 1999.
- Zygmunt Bauman. *En Busca de la Política*. Fondo de Cultura Económica, 2001.
- Cornelius Castoriadis. *The Imaginary Institution of Society*. The MIT Press, 1998.
- *Corporate Social Responsibility Volume 1. Concepts, Accountability and Reporting*. Edited by José Allouche. Palgrave MacMillan, 2006.
- *Corporate Social Responsibility Volume 2. Performances and Stakeholders*. Edited by José Allouche. Palgrave MacMillan, 2006.
- Corporation 20/20 and Tellus Institute. Paper Series on Corporate Design. November 2007.
- Gerard Fonteneau. *Corporate Social Responsibility: Envisioning its Social Implications* TLWNSI Issue Essay. The Jus Semper Global Alliance. October 2003.
- Víctor Flores Olea y Abelardo Mariñana Flores. *Crítica de la Globalidad*. Fondo de Cultura Económica, 2004.
- John Kenneth Galbraith. *The Affluent Society*. Houghton Mifflin Company, 1998.
- John Kenneth Galbraith. *The Good Society*. Houghton Mifflin Company, 1996.
- David Held. *La Democracia y el Orden Global*. Paidós, 1997.
- John Maynard Keynes. *The General Theory of Employment, Interest and Money*, Prometheus Books, 1997.
- John Stuart Mill. *On Liberty and Utilitarianism*. Alfred A. Knopf, 1992.
- Monica Prasad, Howard Kimeldorf, Rachel Meyer, and Ian Robinson. Consumers of the World Unite. *LABOR STUDIES JOURNAL*, Vol. 29, No. 3 (Fall 2004).
- Adam Smith. *The Wealth of Nations*. Random House, 1994.

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