

May 27, 2010

**Corporate Social Responsibility: Essential Considerations
for the United Nations Efforts to Promote Human Rights**

The United Nations continues to devote significant attention to corporations' role in protecting human rights in the conduct of global business. Recently, we attended a meeting of corporate counsel, convened by the Special Representative to the U.N. Secretary-General, to explore the possible operationalization of a framework of principles for corporate responsibility in this arena. The thoughtful and productive discussion confirmed some of our concerns about the U.N. framework in its current form, but also revealed opportunities for clarification that would help to achieve its laudable objectives.

Leading the U.N. effort as Special Representative is John Ruggie, a brilliant professor from Harvard's Kennedy School of Government who broke years of conceptual logjam in 2008 by proposing a framework conceiving of the distinct responsibilities of States and corporations in the prevention of human rights abuses. In our previous memorandum describing the framework, which can be found [here](#), we expressed substantial concerns about the nascent proposal and its implications on the ground. The U.N. Human Rights Council generally welcomed the framework but called for elaboration on implementation of its principles. In the past two years, the Special Representative has engaged in an ambitious process of consultation concerning the proposed duties of States and corporations. Earlier this year, in a memorandum which can be found [here](#), we called attention to significant issues raised by some of the proposals for States to reform corporate law to promote human rights.

Based on our participation in the most recent consultation, we are sending a letter to the Special Representative (reprinted in full on the next page) identifying two critical issues concerning the corporation and its board of directors. First, to the extent the U.N. promotes implementation of the Special Representative's framework, which appears highly likely, we believe it is vital that the U.N. call on *every* corporation around the world — regardless of size, location, or line of business, and whether public or private — to declare its business interest in preventing violation of human rights by the corporation. Given the nature of competition in today's global economy, the U.N. must use its unique position to assure a level playing field by calling on all corporations to undertake this responsibility.

Second, the role of the corporation's board of directors, or other corporate governance organization, warrants particular consideration. We propose that expectations of the board of directors should draw on the well-established duty set forth in the famous Delaware decisions of *In re Caremark* (1996) and *Stone v. Ritter* (2006). In a straightforward extension of the board's existing duty to monitor corporate compliance with criminal, financial, environmental, employee, and health and safety legal obligations, the board of directors further would be expected to periodically review that the corporation establishes and implements procedures reasonably designed to prevent human rights abuses by the corporation and to take appropriate action to cause the corporation to remedy any material violations that come to its attention, but beyond this duty the board and its individual directors would have no responsibility or liability, such responsibility being solely that of the corporation and its employees or agents committing a violation.

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May 27, 2010

Dear Professor Ruggie,

Thank you again for welcoming our participation in your recent meeting on corporations' responsibility to respect human rights. The discussion was interesting and enlightening. The "Protect, Respect, and Remedy" framework endorsed by the United Nations valuably identifies shared opportunities for States and corporations to achieve the goal of preventing human rights abuses. We do, however, continue to harbor significant concerns about some proposed corporate law reforms as well as interpretive challenges corporations would face in accepting the proposed measure of responsibility for an array of broad-textured international human rights covenants and treaties. We sincerely applaud your consultation efforts and, in the spirit of continued dialogue, we would like to share some thoughts about how corporations can play the most constructive role in fulfilling the objectives of this laudable U.N. endeavor.

First, to the extent the U.N. promotes implementation of this framework, we believe it is vital that the U.N. leverage its unique position to call on *every* corporation — regardless of its size, location, or line of business, and whether public or private — to declare its business interest in preventing violations of human rights by the corporation. The global scope of such a corporate commitment is indispensable to assure a level playing field, the only fertile ground for meaningful corporate cooperation. On that foundation, we agree, it is an achievable goal for the U.N. to promote every corporation's implementation of procedures reasonably designed to prevent abuses of human rights by the corporation. Importantly, the U.N. would underscore that corporations must continue to fulfill their obligations to comply with the laws of each jurisdiction in which they operate around the world.

Second, a significant matter warranting special attention is how a corporation's board of directors — or other corporate governance organization — can contribute to fulfillment of the corporation's responsibility to respect human rights. It seems there is a ready, straightforward way in which to conceive of this role: The board should periodically review that the corporation establishes and implements procedures reasonably designed to prevent human rights abuses by the corporation. It should be expected that the board will exercise a good faith judgment that the corporation's reporting system is adequate to assure appropriate information will come to its attention in a timely manner as a matter of ordinary operations. To the extent the board becomes aware of human rights abuses by the corporation, or of material deficiencies in the procedures, it should be expected that the board will take appropriate action to cause the corporation to prevent or remedy such violations, but that beyond this duty the board and its individual directors would have no responsibility or liability, such responsibility being solely that of the corporation and its employees or agents committing a violation.

This proposed role for the board of directors comports precisely with the expectations of corporate governance organizations set forth in the famous Delaware decisions of *In re Caremark* (1996) and *Stone v. Ritter* (2006). Drawing on the board's duty to monitor corporate compliance with criminal, financial, environmental, employee, and health and safety legal obligations, courts have firmly established that the board must "exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations" and to allow the board to take reasonable steps to prevent or remedy any material violations by the corporation that come to its attention.

Very truly yours,
Martin Lipton
Kevin S. Schwartz