

On Corporate Responsibility for Human Rights

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The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Preamble Universal Declaration
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1. ACCEPTING A CONCEPTUAL CHALLENGE

The debate on “business and human rights” has become a central theme on the international corporate responsibility agenda. Two processes in particular have contributed to this: the discourse on the practical consequences of the two UN Global Compact principles that are specific to human rights and the work of a sub-commission of the Human Rights Commission under the chairmanship of American law professor David Weissbrodt. The result of this work, a set of *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*, was considered to contain “useful elements and ideas” but was not accepted by the Human Rights Commission as a document with legal standing. One factor that evoked concern and disapproval for some observers was a generally negative undertone regarding the impact of corporate activities on human rights as well as impractical monitoring and verification mechanisms “already in existence or to be created”.¹

To overcome the deadlock that evolved from incompatible positions of different stakeholders vis à vis the draft norms, on April 20, 2005, the UN Commission on Human Rights adopted a resolution on “Human Rights and Transnational Corporations and Other Businesses”, which requested the Secretary-General to appoint a *Special Representative on the Issue of Human Rights and Transnational Corporations and Other Businesses*. On July 28, 2005, Secretary-General Kofi Annan appointed Professor John Ruggie as the special representative and asked him to submit a report in 2007 that would identify corporate responsibilities with regard to human rights and elaborate the role of the States in regulating and adjudicating business on such issues, to clarify ambiguous concepts such as “complicity” and “sphere of influence”, to develop materials and methodologies for undertaking human rights impact assessments of business activities, and to compile a compendium of best practices.

In his first “Draft Interim Report”, John Ruggie notes that “some companies have made themselves and even their entire industries targets by committing serious harm in relation to human rights, labour standards, environmental protection, and other social concerns”. And he cites this as one of three distinct drivers behind the increased attention focused on transnational corporations and their nonfinancial performance.² The fact is that 8 out of 10 people in an opinion poll conducted among 21,000 respondents in 20 industrial countries and emerging markets assign to large companies at least part of the duty to reduce the number of human rights abuses in the world.³ While this public opinion—at least in the short run—will not have legal consequences for companies, it is a strong indicator of the perceived legitimacy of corporate activities.

In view of the complexity of the matter under debate here, a few fundamental preliminary remarks are necessary.

¹ See ECOSOC E/CN.4/2005/91 (15.2.2005) pp. 9–11. Despite that, a group of enlightened companies took the material content of the “Draft Norms” as a basis for a Business Leaders Initiative on Human Rights and looked for practical ways to implement *minima moralia*; see www.blihr.org.

² Draft Interim Report of the Secretary-General’s Special Representative on the issue of human rights and transnational corporations and other business enterprises. February 2006, available at www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.97.pdf, p.4.

³ *GlobeScan: 2005 CSR Monitor*, at www.EnvironmentalInternational.com/sp-csr.asp.

1.1. Bearers of rights need corresponding bearers of obligations

Since all human beings are born free and equal in dignity and rights, everyone—simply by virtue of being human—is entitled to all the rights and freedoms enshrined in the Universal Declaration of Human Rights. This entitlement applies without discrimination, whether by race, skin colour, sex, language, religion, political or other views, national or social origin, property, birth, or any other criteria. The almost universal recognition of the idea that all people have inalienable rights that are not conferred or granted by the state, a party, or an organization but that are non-negotiable principles is one of the greatest achievements of civilization.

However, it is also implicit in the very first article of the Declaration of Human Rights that freedoms and rights may not be exercised and realized without corresponding responsibilities and obligations: human beings are not only born free and equal in dignity and rights but are also endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Rights and responsibilities are to be seen as a package, and whenever we talk of rights, it ought to be clear on whom the relevant obligations fall. Otherwise the discourse remains what Max Weber described as “sterile excitation”, “romanticism of the intellectually interesting, running into emptiness devoid of all sense of objective responsibility”.⁴ A notable approach to the assignment of responsibilities in line with human rights is the Universal Declaration of Human Responsibilities proposed by the InterAction Council under the chairmanship of former German Chancellor Helmut Schmidt.⁵

Without a doubt, the state and its institutions bear primary responsibility for ensuring that human rights are respected, protected, and fulfilled: not only must they refrain from subjecting citizens to tyranny and inhumane treatment; they also have a number of legal obligations towards them. The fact that these obligations are not met in the real world is illustrated by the annual reports of Amnesty International—even in the twenty-first century, many countries show terrible human rights deficits.⁶ Again, civil societies agree that tolerance and openness to other cultures have their limits in those instances where human rights abuses are excused with (misunderstood) ethical relativism. Governments bear at least three distinct human rights-related duties:

- ◆ to create a clear and reliable legal framework and hence a level playing field for the respect and support of human rights,
- ◆ to enforce existing law, and
- ◆ to sanction violations consistently and coherently.

These duties cannot be delegated to any other organ of society. The reference to the state and its institutions as primary bearers of responsibility does, however, not mean that other actors have no obligations. The preamble to the Universal Declaration of Human Rights of the UN General Assembly in 1948 states that “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance” (emphasis added).

Increasingly, human rights groups draw on this statement as a basis for numerous far-reaching demands on companies. This often arises from a view of things in which globalization critics tar all the usual suspects—that is, transnational companies—with the same brush: namely, that they are generally driven by pure greed for profits and do not care one bit about human rights. Some groups go so far as to present companies that operate on the international stage as “major violators of human rights” and as the principal rogues in a *chronique*

⁴ M. Weber, *Politik als Beruf*. In: *Gesammelte Politische Schriften*. J.C.B. Mohr (Paul Siebeck) (Tübingen, 4th ed., 1980), p. 545 et seq.

⁵ InterAction Council, Universal Declaration of Human Responsibilities. September 1997, at www.interactioncouncil.org/udhr/declaration/udhr.pdf.

⁶ See www.amnesty.org.uk.

scandaleuse showing nothing but contempt for humanity.⁷ In doing so, they usually point to the worst-case examples from the extractive sector, which—regardless of the specifics of the individual cases—present unique human rights issues that do not always apply to other sectors (such as textiles, leather processing, the construction and electricity generating sector, or pharmaceuticals).

Accusations based on such crude generalizations can quickly and readily be disproved through serious empirical analysis. The intellectual challenge therefore does not lie in pointing to the selective nature of the generalizations on which these accusations are based. The challenge—both intellectually and politically—lies in working out a meaningful and broadly accepted package of corporate human rights responsibilities and implementing them in the day-to-day business of different sectors through appropriate management processes.

1.2. Different generations of human rights

To cope realistically with the task of assigning human rights obligations to companies, it is important also to distinguish between different “generations” of human rights. The differentiation of human rights according to their generational status helps to focus on corporate human rights obligations that are in line with a fair societal distribution of responsibilities. This distinction does not call into question the fact that all human rights together represent an indivisible whole and an integral, indissoluble unity.

The first generation: rights of defence against state tyranny

Civil and political rights (such as the protection of life and freedom from bodily harm, nondiscrimination, personal freedom, and legal and political rights) form the first-generation rights. They are defensive rights that are intended to protect individuals from infringements by the state—and they are matters of course that typically require little in the way of financial resources beyond simply good governance and responsible public servants. It is therefore to be expected of even the poorest countries that the prohibition of torture, slavery, and even genocide be fully implemented without any need for a transitional period. Where this is not done, political officials place their country outside the community of civilized nations. Today, governments or government-supported actors are unequivocally responsible for the overwhelming majority of violations of human rights—particularly the most basic rights, such as the right to life and freedom from bodily harm.⁸ As we will see later, the overriding obligation for companies with regard to the first generation of human rights is to respect and support them in their sphere of influence and make sure that the company is not benefiting from violations of third parties.

The second generation: rights of entitlement to a life of dignity

Economic, social, and cultural rights (such as the right to an appropriate standard of living that guarantees health and well-being for a family, including food, clothing, accommodation, and medical care) form the second generation. These are positive rights that usually require resources in order for them to be fulfilled—resources, for example, to ensure nondiscriminatory access to basic medical care and to guarantee a living standard that allows all people to fulfil these rights. Sometimes, of course, they merely require refraining from interference with the enjoyment of such rights.

Since poor countries cannot immediately guarantee these rights in view of a shortage of resources, it is expected that governments make measurable progress with the increasing availability of resources—or, in the words of the International Covenant on Economic, Social and Cultural Rights, “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view *to achieving progressively the full realization of the rights* recognized in the present by all

⁷ For example in *New Academy Review*, vol. 2, no. 1 (spring 2003): “Business interests...have been antagonistic to human rights” (p. 50) or “MNCs can now pose a significant threat to human rights, and also undermine the ability of individual states to protect people from human rights abuses” (p. 92).

⁸ See the detailed reports at www.state.gov/g/drl/hr/c1470.htm.

appropriate means, including particularly the adoption of legislative measures” (emphasis added).

In view of such shameful realities as 2.5 billion or so people facing a daily struggle for survival on \$2 a day or less, more than 10 million children dying every year before they reach their fifth birthday, and 500,000 women dying annually due to pregnancy and birth complications, it is obvious that not only the State and the international community have a legal duty to do all in their power to promote human development but also that other organs of society have a moral obligation to support such endeavours.⁹ Corporate contributions to respect, promote, protect, and fulfil human rights of this generation become reality mainly through doing business with good management principles.

The third generation: rights to development in peace and justice

The third generation of human rights encompasses collective rights, such as the right to peace, to development, or to a social and international order in which the rights and freedoms proclaimed in the Universal Declaration can be fully realized. This generation of rights remains the most debated one and is least covered by legal or political means.

2. CORPORATE HUMAN RIGHTS COMMITMENT AS VALUES MANAGEMENT

A company is a social (sub-)system that has a specific mission and purpose and that is committed to achieving specific results. Where the corporate purpose is not focused solely on the level of the next quarterly financial result but is also concerned with attaining the highest possible social and ecological quality in the pursuit of its economic interests, the managers of that company have to engage in “values management”, defined as the use of “company-specific instruments designed to define the moral constitution of a team or organisation and its guiding values and to live them in all day-to-day practices”.¹⁰ A value management system embraces all the process variables that a company has at its disposal in this respect.

With regard to corporate human rights achievements, this means defining what the company considers to be in keeping with its values in terms of human rights. For statements of practical relevance on normative requirements, a distinction should be drawn in the context of human rights between:

- ◆ non-negotiable “*must*” norms—these demand compliance with relevant national laws and regulations in all cases as an *ethical minimum*;
- ◆ “*ought to*” norms—these are not stipulated by law but are *morally expected* of a company competing with integrity¹¹ (for instance, living up to reasonable social or environmental standards even if local law would allow a “race to the bottom”); and
- ◆ “*can*” norms—these allow the assumption of additional responsibilities not covered by the first two dimensions and let companies that conform to them focus particular attention on their role as excellent corporate citizens (for example, through corporate philanthropy programs, pro bono research, community programs, and other not-for-profit endeavours).¹² The assumption of “can”-norms is *desirable* from a human development point of view.

Responsibility for the implementation of these norms in corporate activities may be direct or indirect in nature.

According to these distinctions (not corresponding with the three generations of human rights), corporate instructions are formulated on what to do and what not to do (codes of conduct and corporate guidelines) to put the basic value-specific decisions into practice in day-to-day business operations. Apart from serving as a catalogue of what not to do, these “moral

⁹ U.N. Development Programme (UNDP), *Human Development Report 2005. International Cooperation at a Crossroads* (New York: Oxford University Press, 2005), p. 24.

¹⁰ See J. Wieland (ed.), *Handbuch Wertemanagement* (Hamburg: Murmann Verlag, 2004).

¹¹ See R.T. De George, *Competing with Integrity in International Business* (New York: Oxford University Press, 1993).

¹² For this distinction according to different degrees of obligation for social norms, see R. Dahrendorf, *Homo Sociologicus* (Cologne: Opladen, 1959), p. 24 et seq.

guidelines” also have the function of providing employees with a positive reference framework that they can invoke when they are confronted in their work environment with unreasonable demands that violate the spirit of the principles and guidelines for action.

With numerous methods and instruments—corporate communications programs, agreements on individual business objectives and performance targets, performance dialogues and appraisals of achieved results, compliance monitoring, ombuds institutions, and auditing—the implementation phase encompasses all the other components of the management processes used in the company for the achievement of financial, technical, or other objectives.

By acting in this informed and structured way and by being able to justify the portfolio of corporate responsibility-related activities in a coherent and consistent manner, a company avoids the pitfall of making opportunistic concessions to the most vociferous demands and finding itself at the mercy of variable external interests and constantly increasing demands from, for example, nongovernmental organizations (NGOs).

2.1. The human rights principles of the UN Global Compact as a reference framework

Many people in modern societies are afraid that globalization of the economy will result in an erosion of social and ecological standards and of standards relevant to human rights. At the same time, there is no doubt that responsible corporate activities can make a substantial contribution to the achievement of development policy goals and social objectives. With this in mind, and based on the conviction that weaving universal values into the fabric of global markets and corporate practices would help advance broad societal goals while securing open markets, in an address to the World Economic Forum on 31 January 1999 Secretary-General Annan challenged business leaders to join an international initiative—the Global Compact—that would bring companies together with UN agencies, labour representatives, and civil society to support universal environmental and social principles.¹³ The Global Compact is not a regulatory instrument but a voluntary initiative with two objectives:

- ◆ mainstream its 10 principles into business activities around the world and
- ◆ catalyse actions in support of UN goals.

The Global Compact relies on public accountability, transparency, and the enlightened self-interest of companies, labour, and civil society to initiate and share substantive action in pursuing its principles. The idea was and still is that international companies in particular should commit themselves not only to observe and exceed certain *minima moralia* in terms of employment conditions, environmental protection, and the fight against corruption, but also to comply in their sphere of influence with two important principles:

- ◆ to support and respect the protection of international human rights and
- ◆ to ensure that they do not become complicit in the human rights abuses of others.

What sounds completely unproblematic on the surface acquires a complexity on closer inspection that should not be underestimated. On the one hand, ambiguous terms are used that are given a variety of meanings by society’s different stakeholders (such as the “sphere of influence” of the company or “complicity”, the clarification of which is part of the terms of reference of John Ruggie). On the other hand, there is huge scope for interpretation, especially with regard to the positive statutory obligations that result for companies from economic, social, and cultural human rights. A company therefore has to engage in a values management process specific to human rights to decide which of these second-generation rights and obligations are relevant and the extent to which they are responsible for them. For companies with integrity, this is about far more than a purely legalistic obligation to comply with relevant laws and regulations – one reason for this being the sometimes inadequate quality of national law in less developed countries.

¹³ See www.unglobalcompact.org.

2.2. The decision-making process on corporate commitment to human rights

As with all decisions on complex issues, in the case of issues touching on human rights it is necessary to do one's "homework" first in terms of both fact-based and value-based knowledge. Part of this homework is to identify the stakeholders essential to the company and to address their concerns and demands. For this purpose, it is also useful to enter into dialogue with competent human rights institutions and to take part in "learning forums" such as those offered by of the UN Global Compact and the Novartis Foundation for Sustainable Development¹⁴ because they inspire ideas that go beyond one's "own backyard" and help ensure that, as far as possible, all relevant aspects of a complex issue have been identified.

It is on the basis of the potential for reason and the knowledge that exists within a company and in society that the internal corporate decision is made with regard to the nature and scope of human rights obligations accepted by the company, thus setting itself apart from others. A landmark decision of this kind should, for example, be that the company is not only committed to the relevant national principle of legality but that it goes beyond this and, through a voluntary commitment to higher standards, ensures as far as possible that it does not profit from any gaps in the law or "freedom of interpretation".

The "midwife function" of internal and external dialogue

Socrates pointed out that "truth" lies in all people, they simply need help in seeing it. In view of what in most cases is a huge knowledge potential within companies and the ability of companies to mobilize resources to buy in any knowledge that is lacking, there is no doubt that the "truth" about company-specific human rights obligations is also present in every company—they simply need help in seeing it. The points of intersection between human rights and corporate responsibilities are regarded as "chaotic and contested": on the one hand, there are those who regard companies (especially multinationals) as the "source of all evil"; on the other hand, there are those who have a touching faith in the ability of companies, economic growth, and the laws of the market to solve all human rights problems.¹⁵ Yet reality is more complex and indeterminate than these extreme views: the expectations directed at companies remain unclear.¹⁶

"Obstetric help" for the birth of "truth" is provided in the first instance by the self-critical study of materials produced by competent institutions, such as Amnesty International UK Business Group, the Business & Human Rights Resource Centre, or the Business Leaders Initiative on Human Rights.¹⁷ Debates with constructive lateral thinkers, such as Mary Robinson, Irene Khan, or Sir Geoffrey Chandler, help in the identification of risks that normally lie beyond the boundaries of corporate perception. Although by far not all demands put forward in such discussions are to be understood as "corporate obligations," anyone who wants to be successful on product markets in the long term has to be familiar with the most important "opinion markets". A midwife function for deeper insights in terms of corporate responsibility for human rights is thus served by management engaging in an informed discussion of critical questions such as:

- ◆ What are the human rights-related risks of our business operations? If there are any, in what priority should we approach them? Are there human rights-related opportunities?
- ◆ Is there, to the best of our knowledge and belief, any reason to change our business practices in the context of the human rights principles laid down in the UN Global Compact?

¹⁴ See the symposium reports www.novartisfoundation.com/de/symposium/2003/index.htm and www.novartisfoundation.com/de/symposium/2004/index.htm.

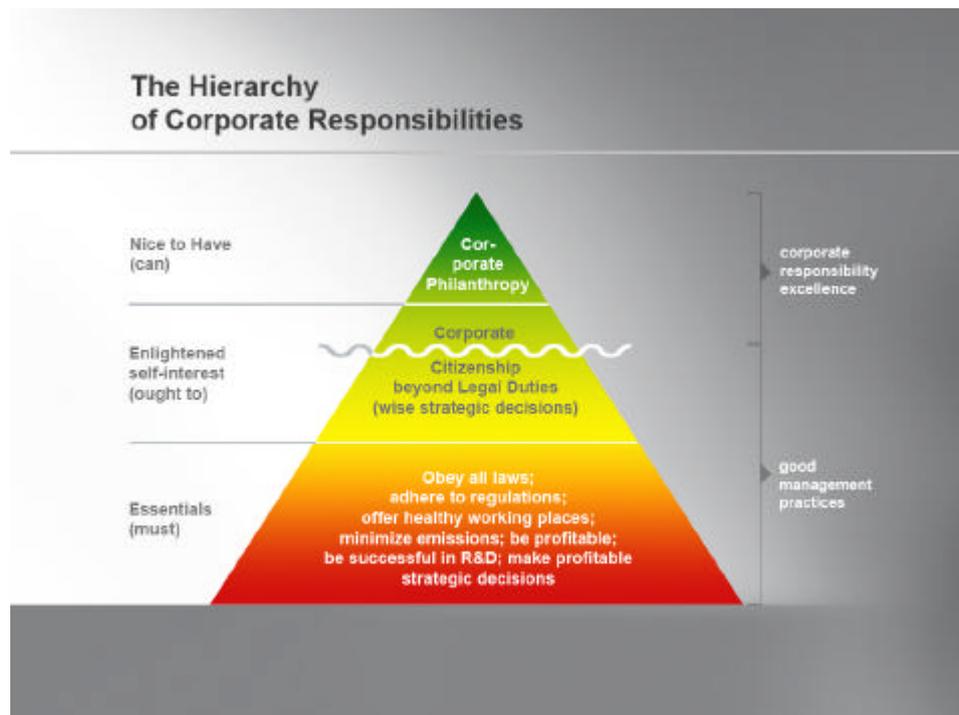
¹⁵ R. Sullivan (ed.), *Business and Human Rights. Dilemmas and Solutions* (Sheffield: 2003).

¹⁶ A notion that also shines clearly through the Draft Interim Report of the Secretary-General's Special representative on the issue of human rights and transnational corporations and other businesses, Boston, February 2006.

¹⁷ For example, Amnesty International UK/Prince of Wales International Business Leaders Forum, *Business & Human Rights. A Geography of Corporate Risks* (London: 2002); see also the excellent Web sites www.business-humanrights.org/Home and www.blihr.org.

- ◆ In what areas of activity do those things we consider morally imperative and reasonable differ from what influential human rights groups demand of companies?
- ◆ Where and on the basis of what special circumstances (such as market failures or failing states¹⁸) do we recognize particular demands for the fulfilment of economic or social human rights (such as the offer of life-saving medicines at special conditions), and what concrete deliverables result from this?
- ◆ In what areas of activity and in which countries does a corporate policy aimed only at meeting basic legal requirements create vulnerabilities, such as not meeting the expectations of civil society?
- ◆ Are there priority arrangements in place for overcoming such conflicts?
- ◆ Which actors of civil society (NGOs, media, churches, etc.) do we want to include in our internal analysis of the problem to ensure that the information (fact-based and value-based knowledge) on which we base our decision is appropriate to the complexity and the many-layered context of the issue under debate?
- ◆ Where do we draw the limits of our responsibility for the respect, support, and fulfilment of human rights—in other words, how do we define our sphere of influence?
- ◆ What do we understand by “complicity”?

Such questions need to be discussed to uncover the “truth” about corporate responsibilities for human rights and allow for informed decisions on the nature, scope, and depth of the sustainable corporate contributions in this regard. The distinction between “must”, “ought to”, and “can norms helps to distinguish what is essentially *good management practice* and what constitutes *corporate responsibility excellence*, partly having a “nice to have” character.



All responsibilities in the context of first-generation human rights are an integral part of the “must” dimension and hence an essential ingredient of good management practices. Although one could find evidence that illegitimate practices have a positive impact on doing

¹⁸ On the special problem of “failing states” and “failing markets”, see K.M. Leisinger, The Right to Health: A Multi-Stakeholder Task, in Novartis Foundation for Sustainable Development, *The Right to Health: A Duty for Whom? International Symposium Report 2004* (Basel: 2005) (available at www.novartisfoundation.com). With its voluntary commitments to action, Novartis far exceeds the obligations stipulated by law.

business in a country with deficits in good governance, companies competing with integrity will not put first generation rights in the negotiation basket with economic goods. On the contrary, as far as these rights are concerned, a company must do all in its power to ensure that there are no violations within its own sphere of influence and that it also does not benefit from human rights abuses by other parties. This implies the obligation to strive for all relevant knowledge in this respect as far as is reasonably possible.

As far as *second-generation* human rights are concerned, the normal business operations of a company form the main corporate contribution to the preservation of these rights: 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. Companies purchase goods and services, pay market prices for them, and thereby engender economic linkage effects. Last but not least, companies make a financial contribution towards the community through taxes and duty. This enables the state to fulfil its tasks.

All activities subject to the criterion of “legality” are part of the “must” dimension. Activities that go beyond what is legally required fall under the “ought to” dimension. Most of them are moral obligations but nevertheless constitute good management practice. This includes, for example, activities in the context of a remuneration system that ensures that basic needs can be met even for those people at the lowest levels of qualification in developing countries (a “living wage”), affirmative efforts for greater gender justice, training beyond a person’s immediate needs (improvement of “employability”), corporate pension funds, and more.

Delivering on moral obligations is to be seen in terms of corporate responsibility excellence—that is, accepting ambitious challenges that are mainly located in the “can” dimension. Companies—seeing themselves as good corporate citizens—may provide additional services of their own volition. They may, for example, offer products in special cases at special conditions (such as differential pricing of medicines for poverty-related and tropical diseases or product donation programs), finance philanthropic foundations, do pro bono research, make donations, and, on a case-by-case basis, contribute to the fulfilment of economic, social, and cultural rights in other ways.¹⁹

With regard to third generation human rights, it is too early to apply the “must”, “ought to”, and “can” grid. As essential questions—such as who exactly is entitled and who is under obligation? on the basis of what criteria and to what extent?—remain for the time being unanswered, these are treated by companies as aspirations, albeit aspirations whose fulfilment is in the interest both of the international community and of the companies themselves. The UN Global Compact, which serves here as a platform for clarification efforts and provides with its 10 principles a reference framework, explicitly is on record that one of its objectives is to help meet the UN millennium goals with “fair globalization”.

While the rational justification of normative maxims of behaviour is an essential step in values management, the justification and formulation alone do not inevitably lead to their implementation. For this reason, appropriate management processes and standard operating procedures must be put in place.

Implementation through management processes

While it is true that no further-reaching process can be set in motion without value-based management decisions, such decisions are only the first step. Once they have been made, then principles of action and behaviour resulting from these decisions, as well as corporate guidelines for dealing with human rights, have to be formulated and communicated both inside and outside the company. They often have to be “practised” as well, by using e-learning modules, for example, or case studies. Personal model behaviour and visible commitment at

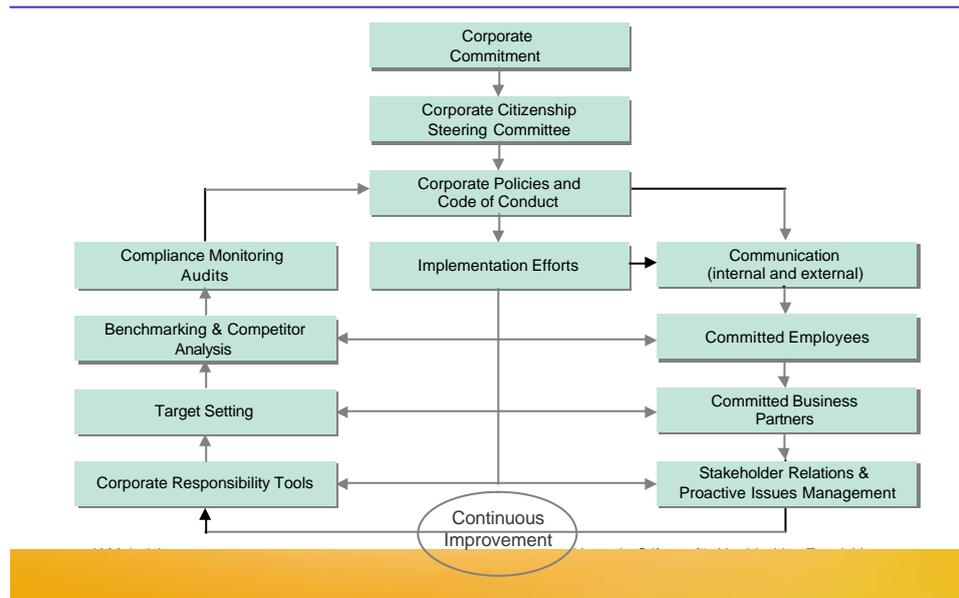
¹⁹ See, e.g., www.novartisfoundation.com and www.nitd.novartis.com

management level, as well as an attractive launch campaign addressing imperative and prohibited modes of behaviour, are the first important steps.

Further management elements are the appointment of someone at management level with responsibility for human rights issues, the development of measurable benchmarks, and the setting of concrete, bonus-relevant goals and corresponding performance appraisals. Finally, compliance with self-declared commitments must be monitored in a manner similar to the way in which compliance with legal requirements is checked.²⁰ A useful support for internal learning and cognitive processes is the Human Rights Compliance Assessment tool developed by the Danish Institute for Human Rights.²¹

There are different approaches to measuring and reporting on corporate human rights performance.²² It is hoped that the new set of Global Reporting Initiative indicators provides a widely accepted basis so that corporate performances become comparable between companies and over time. Since both the legal state of the art and the sense of what constitutes legitimate action changes with time, the corporate guidelines and recommendations for action derived from these guidelines have to be reviewed from time to time and adjusted, if necessary. As there are “good practices” available, companies willing to make a difference but not knowing how to can refer to what has been done so far by others.²³

Corporate Human Rights Management Cycle



However, not all challenges can be satisfactorily met in the long term by means of “standard operating procedures”. To face up to unexpected or structurally new problems in the spirit of the same sense of responsibility, a corporate culture has to be developed in which moral insights mature into self-stabilizing convictions that are invested with life out of an inherent motivation and not adhered to “as specified” because of some compliance monitoring procedure. Especially in the context of human rights issues, sensitivity and keen intuition are

²⁰ See also BLIHR/UN Global Compact, *A Guide for Integrating Human Rights into Business Management* (New York: 2006) and UN Global Compact / Office of the United Nations High Commissioner for Human Rights (UNHCHR), *Embedding Human Rights in Business Practice* (New York: November 2004).

²¹ See www.humanrightsbusiness.org/040_hrca.htm.

²² CSR Europe / Business for Social Responsibility, *Measuring and Reporting Corporate Performance on Human Rights* (San Francisco: 2001).

²³ For diverse corporate experiences, see the excellent Web site of Christopher Avery and his colleagues at www.business-humanrights.org, as well as BP’s “position on difficult issues involving human rights”, at www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/H/Human_rights_guidance.pdf.

needed to recognize ambivalent situations and to assess them critically in the light of the existing guidelines. Help desks, clearinghouses, and ombuds institutions can provide further assistance if requested.

When designing appropriate management processes and standard operating procedures, it is important to understand the corporate human rights engagement not a “project” that on command is started and then finishes once the objective has been achieved. It is more of an open-ended process that, once launched, may provoke changes in basic corporate practices. Companies—especially large multinational conglomerates—are increasingly faced with questions of responsibility that lie beyond the conservatively defined “normal” day-to-day business routine. Examples include particular claims related to the economic, social, and cultural human rights realm, such as the “right to health” claim against the pharmaceutical industry.²⁴ Against the background of persistent mass poverty and the associated diseases, successful companies will see themselves increasingly confronted with new demands that amount to an ever-growing substitution of the obligations of the state and the international community.

It will be one of the great tasks of values management in the future to adopt a credible approach in finding the right balance between the extremes of a basic refusal to accede to such demands, citing the obligations of the primary bearer of responsibility (the state), and a general acceptance of obligations attributed by pressure groups. Both “fundamentalisms” would lead in the long term to competitive disadvantages that would be detrimental to business as well as society. In this context, it might be useful to refer to Peter Drucker’s statement many years ago: successful companies are those that focus on responsibility rather than power, on long-term success and societal reputation rather than piling short-term results one on top of the other.²⁵

Credible verification

Although the verification of corporate responsibility achievements is an integral part of the management process in the context of human rights, this issue is examined separately here because of its enormous political sensitivity. Credible corporate activity calls for independent jurors—this is also, if not especially, the case in the context of corporate human rights commitments. But who can be considered an independent juror? Most companies prefer verification processes they are familiar with from other business areas—financial auditors or consultants, such as PriceWaterhouseCoopers or KPMG, for example. Although those firms have the professional skills and tools to assess the human rights performance of companies, they do not enjoy the same credibility as, for example, Amnesty International or Human Rights Watch. Nor would institutions such as these latter ones necessarily recognize the results of commercial auditor firms. At the same time, however, no human rights defence group is available to provide such verification services. This is commonly explained by a fear of becoming “involved” and thereby—at least in the perception of critical human rights stakeholders—losing their critical distance and thus their most important asset, their own credibility.

Since there is little hope that such fears might be allayed in the short term, innovative solutions are called for. This could entail, for example, multistakeholder projects in which several actors with different competencies and experience collaborate. A project of this kind would undoubtedly show the development of the “human rights impact assessment” that is currently under way. Its country-specific results could be discussed with human rights experts and the auditors and then published in the company’s annual report. The outcome of such work and the use of human rights indicators of the Global Reporting Initiative would have the advantage of providing a basis for comparing results between companies as well as measuring progress over time.²⁶ Finally, a human rights-specific “Richter scale” (like the scale used to

²⁴ See www.novartisstiftung.com.

²⁵ P. Drucker, *Post Capitalist Society* (New York: Harper Business, 1993), pp. 57f.

²⁶ See www.globalreporting.org.

measure earthquakes) would help give the broader public a better idea of how to weigh reports on human rights abuses.²⁷

3. EMERGING CORE CONCEPTS AND REMAINING DILEMMAS

The human rights set out in the Universal Declaration encompass different categories of entitlements opening a broad variety of conceptual issues to be settled by corporate decision. As outlined above, remarkable first steps have been taken to clarify concepts and practices that help companies deal with practical issues and dilemma situations that arise in the context of a corporate human rights commitment. But dealing with the issues debated here means committing to a political and ongoing process. Three of the most important recurring questions are discussed here briefly. What is a fair definition of a company's "sphere of influence"? How should a company competing with integrity define "complicity"? And, last but not least, what corporate deliverables can be reasonably expected in the context of the economic, social and cultural human rights?

3.1. What is a company's sphere of influence?

The Declaration of Human Rights and its subsequent covenants represent the greatest normative consensus of the international community. Therefore there is no need for a sophisticated explanation to the effect that any respectable company must ensure that its legitimate pursuit of profits does not lead to "collateral damage" in terms of human rights. For this reason, companies of integrity will in their own interest provide for transparency wherever they can exert a direct influence.

As a rough guide, political, contractual, economic, or geographic proximity to human rights abuses is an important criterion for determining the sphere of influence.²⁸ Nicolas Howen (International Commission of Jurists) recommends that companies "look for the warning signs. The closer you are to victims, the more you have a responsibility to watch out for the impact of your actions. The closer you are to those who commit the violations, the greater the danger. And the more systematic the nature and scale of the violations, the more dangerous they are." He continues: "Do not be limited by the law. The law is a vital test of accountability and will give clarity to what is acceptable and unacceptable behaviour. But we're all forced to swim in a much rougher and more profound sea of morality and public policy, and that's how it should be."²⁹

But where exactly a company's "sphere of influence" begins and where it ends remains a subject of controversy. Does it refer "only" to the areas behind the factory fence, as this is the area where a company is fully able to apply its corporate rules and regulations? Do the company's business partners and suppliers also fall within this sphere? And what about the communities in which the company operates or from which it recruits its employees? Does even the entire host country fall within this sphere, because one could argue that those who pay taxes in a country where human rights are abused are providing support to those directly responsible? It is also obvious that "influence" also has something to do with "size", so the bigger and more strategically significant a company becomes, the larger its sphere of influence is likely to be.

Ultimately such questions have to be answered by the company itself. For a better understanding of the corporate sphere of influence, the UN Global Compact recommends "mapping the stakeholder groups affected by your business operations" and concludes "a key

²⁷ K.M. Leisinger, Business and Human Rights, in M. McIntosh, S. Waddock, and G. Kell (eds.), *Learning To Talk: Corporate Citizenship and the Development of the UN Global Compact* (London: Greenleaf Publications, July 2004), pp. 72-100.

²⁸ See BLIHR /UN Global Compact, op. cit. note 20, p. 8.

²⁹ See *The 2005 Business & Human Rights Seminar Report: Exploring Responsibilities and Complicity* (London: December 2005), p. 15.

stakeholder group that will normally lie at the centre of any company's Sphere of Influence will be employees. Other groups, such as business partners, suppliers, local communities, and customers will follow. The final group will usually be government and the wider society."³⁰

For most of the companies that have signed on to the UN Global Compact, the sphere of influence extends beyond the factory site and includes immediate business partners and suppliers—it usually does not cover “government and the wider society”. John Ruggie's Interim Report sees an emerging consensus view among leading companies that there is a gradually declining direct corporate responsibility outward from employees to suppliers, contractors, distributors, and others in their value chain but also including communities.³¹

In view of the pluralism of interests and the intensity of political ambitions such a definition might be criticized as too restrictive—but a company has to be able to live with such dissent. Not all stakeholder demands constitute a moral corporate obligation. The decision by a company to include immediate “third parties” in its own area of responsibility should be a feasible one to take, because it is widely known that no respectable company today can hide behind a supplier with low standards. It is almost never the “small” local supplier company from the poor country that will be criticized but the “big multinational” that will be seen as benefiting from the unacceptably low standards. Long gone are the days where companies can get away with unacceptable standards by saying “we are only obeying the law”.

3.2. What is complicity?

The key problem with “complicity” is what Paul Watchman once called “definitional anarchy”: “In the common law world alone, offences of complicity come in a kaleidoscope of different shapes and titles: aiding, abetting, counselling, procuring, inciting, facilitating, conspiring, assisting, encouraging, authorising, tolerating, acting as accessory, acting as accessory after the fact, failure to control, relieving, comforting, handling...the list is endless and mind-boggling.”³² On this background, in what cases does a company become “complicit” in human rights abuses through its normal business activities? What kind of proximity to abuses by the state, by terrorists, by individuals, or by other companies would justify the negative judgment of being complicit in human rights violations? These questions are answered in many ways by different stakeholders—again, the basic set of corporate values will determine the kind of definition used by a company.³³ The UN High Commission for Human Rights points out in this regard that a company is guilty of complicity if it “authorises, tolerates or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse”.³⁴ The Global Compact Web site adds that “the participation of a company need not actually cause the abuse. Rather the company's assistance or encouragement has to be to a degree that, without such participation, the abuse most probably would not have occurred to the same extent or in the same way”.

Today the resulting corporate responsibilities are not laid down in international law—different national views and instruments of law (such as the Alien Tort Act in the United States) apply different standards. The judgment that is ultimately passed regarding the legitimacy of corporate acts committed or omitted in this respect is reached less in courtrooms than in the domain of public opinion. This should prompt companies to make the best use of the expertise of their legal counsels and corporate lawyers but not leave such decisions exclusively to those lawyers.³⁵

³⁰ BLIHR /UN Global Compact, op. cit. note 20, p. 8.

³¹ Draft Interim Report, op. cit. note 2, p. 8.

³² P. Watchman, *Complicity: Charting a Path Through the Conceptual Minefield*. See *The 2005 Business & Human Rights Seminar Report*, op. cit. note 29.

³³ See *The 2005 Business & Human Rights Seminar Report*, op. cit. note 29.

³⁴ See OHCHR Briefing Paper, *The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity*, in UN Global Compact/UNHCHR, op. cit. note 20, p. 19.

³⁵ See in this context Lawyers, Corporations and the International Human Rights Law, *The Corporate Lawyer*, vol. 25, no. 10 (2004), pp. 298–302.

The definition of the UN High Commission for Human Rights poses the same challenge as that seen in the two principles of the Global Compact: superficially, the definition seems completely in order—however, since different actors in civil society interpret ambiguous terms in different ways, the company needs to decide on the definitions to be applied here as well: what is to be understood by “encouragement”, and how are “knowingly” and “substantial” to be defined? There are some obvious recommendations. Corporations are better off if they put managers in charge of the complicity issue that approach their job in a holistic rather than legalistic way. They ought to be managers who watch out and are willing to look at “grey areas” with high sensitivity, managers who care about human rights.

It is also obvious that direct responsibilities (for example, under no circumstances use forced or child labour) can be identified more easily in the direct sphere of corporate influence than indirect ones (such as improvements in the human rights policy of a host country) in institutionally separate spheres of influence (say, government).

Last but not least, it is evident that first-generation rights normally present fewer problems of implementation than second-generation rights—not to mention the third generation. Exceptions to this can probably be found among companies in the extractive sector (oil, gold, or diamonds). Since the geographic presence of a company in this sector depends on the local availability of the raw materials in question, human rights commitments have limited room for manoeuvre in countries with structural governance deficits (such as despotic dictatorships or lawless areas in civil war zones). Under such conditions, a company that does not wish on any account to operate in close proximity to human rights abuses is faced with little choice but to withdraw completely from the country. This is also a demand that is often made by human rights groups. Yet such demands can at least be countered by the following arguments:

- ◆ Although the presence of a company can imply indirect and unintentional support for a government that allows or commits human rights violations, presence should not be judged unconditionally as negative. Enlightened presence can certainly lead to processes being initiated that also bring about concrete improvements in terms of safeguarding human rights.³⁶ Anyone, individual or company, that leaves a country abandons any possibility of exerting an influence.
- ◆ Demands for sanctions or the withdrawal of companies that are committed to compliance with local laws even if their compatibility with human rights is questionable often fail to take into account the consequences of withdrawal for the people who would then become unemployed. While this argument undoubtedly can be misused as an excuse for inactivity in cases where corporate action would be reasonable, it is also of human rights relevance to take into account the resulting damage of a withdrawal that would most hurt the very people who are least responsible for the prevailing deficits. A legitimate commitment to the defence of human rights focuses on the interests of those people one seeks to support with human rights engagements. An attitude that “it must get worse before it can get any better” is cynical at best. Finally, it must be borne in mind that the withdrawal of a company in most cases would not improve the basic political problems and would lead to considerable material sacrifices being made by individual companies without any guarantee that the situation would not be made worse by successor companies from countries for which human rights-specific demands are not an issue.
- ◆ Focusing on public criticism of companies has another undesirable consequence, namely that the actual culprits—the primary duty bearer for political responsibility—

³⁶ The fact that there remains a “metaphysical” guilt, which lies beyond criminal, political, or moral guilt, is discussed by Karl Jaspers in *Die Schuldfrage* (Heidelberg: 1949). Jaspers sees the existence of a solidarity among men as human beings that makes each co-responsible for every wrong and every injustice in the world, especially for crimes committed in his presence or with his knowledge. “If I fail to do whatever I can to prevent them, I too am guilty. If I was present at the murder of others without risking my life to prevent it, I feel guilty in a way not adequately conceivable either legally, politically or morally.... jurisdiction rests with God alone” (p. 63). On a somewhat lower scale, but nonetheless “guilt”, is what human rights advocates define as “silent complicity”—that is, the failure by a company to raise the question of systematic or continuous human rights violations in its interactions.

often fade into the background of the debate. But without fundamental improvements in the governance of a state, anything else is just bungling repair work. Companies that are complicit in human rights violations do not compete with integrity—hence it is the right thing to do all that is necessary to avoid complicity. But as the corporate complicity issue is one of the fastest evolving ones on the human rights and business agenda, there is also a “business case” to clarify grey areas of uncertainty and in doubt err on the “safe” side. The appropriate professional corporate response is to use due diligence to identify risks—and then eliminate them.

3.3. What corporate activities can be reasonably expected in order to appropriately address economic, social, and cultural human rights issues?

As mentioned earlier, companies mainly contribute to the safeguarding and fulfilment of second-generation human rights in the course of their usual business activities. But renowned human rights champions demand substantially more—and the expectations of society in some cases also go far beyond what managers regard as business duty. A survey carried out in Germany shows among other things that a large majority of people expect pharmaceutical companies, for example, to distribute medicines free of charge or at massively reduced prices if patients cannot afford them because they lack the necessary purchasing power.³⁷ John Ruggie mentions in his Interim Report that major pharmaceutical companies are “widely perceived to abuse their power” and quotes as examples “overpricing and patents of AIDS treatment drugs in Africa”.³⁸

Most managers of pharmaceutical companies would be astonished to hear that patent rights are equated with abuse of power—they would probably quote Article 17 of the Universal Declaration of Human Rights, which states that “everybody has the right to own property” and “no one shall be arbitrarily deprived of his property”. Some of them would also put forward the argument that it is completely clear that governments are the primary bearers of responsibility and have a duty to give priority to ensuring that their resources are used to satisfy basic needs—and that the international community should be assisting those countries whose lack of resources renders them vulnerable despite having “good governance” in place. And yet, even business schools debate answers to such questions as whether there is a “morally right price” for drugs in the developing world.³⁹

But then, issues like this bring in the differentiation between what is a “legal” entitlement and what is perceived to be a legitimate handling of an extraordinary social catastrophe. In view of persistent mass poverty and the human suffering that goes with it, and also as a reaction to what in many cases are evident shortcomings in the engagement of the primary bearers of responsibility, many concerned people turn to the private sector for help. How are companies—especially profitable ones—to cope with the fact that the expectations of society are growing on a scale that is incompatible with a reasonable definition of a fair societal distribution of responsibility?

The only possibility for establishing a credible corporate standpoint on this issue is through informed decisions based on the “homework” and dialogue with stakeholders described earlier. There will never be complete agreement in society on the breadth and depth of the activities under discussion here. But the uncompromising rejection or opportunistic acceptance of demands in this regard is always a worse solution than the self-confident presentation of the scale and limits of economic, social, and cultural human rights engagements that are felt by corporate management to be reasonable. It is obvious that, while

³⁷ See Y. Lunau and F. Wettstein, *Die Soziale Verantwortung der Wirtschaft. Was Bürger von Unternehmen erwarten* (Bern: Haupt Verlag, 2004), p. 140.

³⁸ Draft Interim Report of the Secretary-General’s Special Representative on the issue of human rights and transnational corporations and other business enterprises. February 2006, available at www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.97.pdf, p.4.

³⁹ R. Brennan and P. Baines, Is There a Morally Right Price for Anti-retroviral Drugs in the Developing World? *Business Ethics: A European Review*, vol. 15, no. 1 (2006), pp. 29–43. The authors answer the question affirmatively by advocating for enlightened self-interest.

all companies must avoid direct or indirect involvement with human rights abuses, large profitable companies in the upper section of the “corporate responsibility pyramid” can, and should, do more to exceed the minimum standard than small to medium-size enterprises or those with fewer resources. Companies that strive to show leadership in corporate responsibility are also prepared to do more in this regard—and not only to provide resources but also to offer potential innovation and knowledge, as well as management processes, for new and better solutions. Avoiding human rights problems is one thing. Affirmative action with benefits for the safeguarding of human rights is another—namely, the more positive and constructive alternative.

4. CONCLUSION: THE BUSINESS CASE FOR CORPORATE HUMAN RIGHTS ENGAGEMENT

Those who are in breach of the most important consensus of the international community place themselves outside the corridor of legitimate activities. For companies of integrity, there can therefore be no rational justification for sacrificing other people’s human rights to achieve corporate profits. This observation applies in the first place to all obligations enshrined in law. Hence, all efforts have to be undertaken nationally—if necessary, with international support—so that national laws with regard to human rights-specific items are compatible with what most governments have ascribed to by explicitly recognizing the International Bill of Human Rights.⁴⁰ But where national laws are not in harmony with what is defined by enlightened consensus of the international community, moral obligations come into play, the scope of which is subject to considerable differences of opinion.

However, there are a number of good reasons for assuming corporate responsibility in order to support and respect human rights if national law either is not state of the art or is only a “paper tiger” that is not consistently implemented:

- ◆ Companies that critically reflect on the quality of standards relating to human rights, that feel the pulse of society’s expectations through dialogue with stakeholders, and that are prepared to be measured by criteria of legitimacy and not just those of legality reduce their legal, financial, and reputational risks.⁴¹ Any increased costs that may be incurred as a result of responsible human rights commitment must be seen as an “insurance premium” against such risks becoming reality.
- ◆ Companies that reduce the potential for friction with society on human rights issues by taking a proactive approach informed by their sense of integrity tend to be seen as “part of the solution” rather than as “part of the problem”. This provides a company with its “social licence to operate” and safeguards it from calls for a boycott or from “shaming” campaigns.⁴²
- ◆ Companies with a reputation for integrity tend to have better motivated employees because they look at their company with pride and identify with its objectives; this kind of company is also more attractive to highly qualified talents. And both trends tend to increase productivity.
- ◆ Companies whose performance is regarded as exemplary in terms of human rights tend to be preferred by ethical investment funds and ethically sensitive customers (provided other performance conditions remain unchanged). And this ethical distinction can lead

⁴⁰ See www.ohchr.org/english/law/index.htm.

⁴¹ For a discussion of these risks see K.M. Leisinger and K.M. Schmitt, *Corporate Ethics in a Time of Globalization* (Colombo, Sri Lanka: Sarvodaya Vishva Lekha Publication, 2003), pp.154 ff. Given that for companies listed on the stock exchange, reputation accounts for at least 50 percent of total value, the scale of potential damage inherent in such risks becomes clear; see *Business Week*, 2 August 2004. For new developments of consequences in the context of failure to comply with human rights minima moralia, see I. Schwenzer and B. Leisinger, *Ethical Values and International Sales Contracts*. In Jan Ramberg et al., *Commercial Law Challenges in the 21st Century*, Jan Hellner in Memoriam (Stockholm: forthcoming).

⁴² According to figures published by the Prince of Wales International Business Leaders Forum, calls for boycotts alone cause economic damage of almost 4 billion euros; see IBLF, *Human Rights: It is Your Business* (London: 2005), p. 4.

to advantages in the valuation of the company and in the competitive environment of established markets (especially with products that are subject to high competitive pressures).

- ◆ Sustainable responsible corporate performance creates a greater reliability and thus better co-operation opportunities for all potential co-operation partners (business partners, joint ventures, and mergers and acquisitions).
- ◆ Finally, the acceptance of responsibility that is credible by virtue of the fact that it is verifiable is the best argument against political demands for additional regulation: freedom, including corporate freedom, is always tied to responsibility for the common good—and here human rights have absolute priority.

Companies are increasingly being assigned moral responsibility. While the dimension and complexity of these expectations often makes it difficult to satisfy all stakeholders, the human rights-related expectations should be dealt with in a constructive and positive way. No company competing with integrity can justify “collateral human rights damage” in its endeavours to achieve its profit targets. Enlightened companies will therefore take a “rights-aware approach”—that is, be willing to accept that its stakeholders have universally accepted human rights and take appropriate action to strive to respect these.

While many of the deliverables that result from a “rights-based approach” can be seen as part of good management practices—and thus make management a “force for good”⁴³—the corporate human rights commitment (for instance, in the context of economic, social, and cultural human rights) could be extended if and when judgments by civil society actors (NGOs, media, political parties) were more differentiating. Today, companies that behave in an exemplary way in terms of their human rights commitment (but also in social and ecological terms and in efforts to combat corruption) are tossed into the same discussion basket with the worst cases of aberrant behaviour. The moral reputation capital that would confer upon a company by differentiating it from those that chose not to take an appropriate approach towards human rights would reward additional efforts. Through this, the discretionary freedom of management could be guided into the acceptance of doing more—in the best of all cases, a new level of corporate competition could be established. This would be in the interest of everyone who is concerned about human rights.

As Secretary-General Annan expressed it: “Wherever we lift one soul from a life of poverty, we are defending human rights”.⁴⁴ Economic deprivation is a standard feature of most definitions of poverty, and no social phenomenon is as comprehensive in its assault on human rights as poverty. Economic development is the single most important element to alleviate poverty. The private sector contributes to poverty alleviation by contributing to economic growth, job creation, and poor people’s income. Thus, encouraging corporate activities and unleashing entrepreneurship is so important.⁴⁵

Sustainable responses to the many facets of poverty do not violate human rights in the pursuit of economic growth. On the contrary, sustainable responses to poverty alleviation involve securing⁴⁶ and enlarging freedom,⁴⁷ increasing choices, and enabling empowerment. The promotion of human development and the fulfilment of human rights share, in many ways, a common motivation and reflect a fundamental commitment to promoting the freedom, well-being, and dignity of individuals in all societies.⁴⁸ Good companies are part of the solution of filling these aspirations with living content.

⁴³ See J. Birkinshaw and G. Piramal (eds.), *Sumanthra Goshal on Management. A Force for Good* (London: Prentice Hall/Financial Times, 2005).

⁴⁴ www.unhcr.ch/development/poverty-01.html

⁴⁵ Commission on the Private Sector & Development: *Unleashing Entrepreneurship. Making Business Work for the Poor* (New York: 2004).

⁴⁶ UNDP, *Human Development Report 2000: Human Rights and Development* (New York: Oxford University Press, 2000).

⁴⁷ Report of the Secretary-General of the United Nations for Decision by Heads of State and Governments, In *Larger Freedom. Towards Security, Development and Human Rights for All* (New York: September 2005), see www.un.org/largerfreedom.

⁴⁸ UNDP, op. cit. note 46, p. 19.