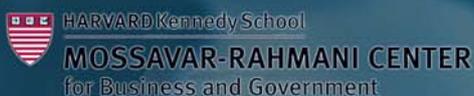


# HUMAN RIGHTS CORPORATE ACCOUNTABILITY GUIDE:

from law to norms to values

John F. Sherman & Chip Pitts



**BLIHR**  
BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS

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## BLIHR

The Business Leaders Initiative on Human Rights (BLIHR) is a programme to help lead and develop the corporate response to human rights. It is a business-led programme with 14 corporate members listed at [www.blihr.org](http://www.blihr.org) BLIHR is chaired by Mary Robinson, President of Realizing Rights: The Ethical Globalization Initiative, former President of Ireland and former UN High Commissioner for Human Rights. The programme was created in 2003 and will end in March 2009. BLIHR’s principal purpose is to find “practical ways of applying the aspirations of the Universal Declaration of Human Rights within a business context and to inspire other businesses to do likewise”. BLIHR is committed to sharing its tools and experiences not only within the group but with all interested companies.

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# EXECUTIVE SUMMARY

In order to be held to account for its impact on human rights, a company must internalize human rights principles into the shared values - embraced at all of its levels - that drive its businesses on a day to day basis. Shared values comprise a company's culture, which may or may not always align with its stated goals. Ensuring a robust corporate culture that supports and respects human rights is critical to preventing business-related human rights abuses.

To achieve this culture, a company should take an integrated approach. First, the company must understand what the law forbids (e.g., directly abusing human rights and being complicit in human rights abuses by others) and what the law requires (e.g., identifying, mitigating, and reporting upon risk).

Second, the company must take into account so-called soft law arising from the growing international web of multi-stakeholder initiatives and public and private codes and norms. Although these norms are technically voluntary, they have significant bite in practice, as a result of the absence of a centralized command-and-control system of international law. This has been characterized as a new "law merchant," so named for self-regulatory rules and principles based on usages and customs that medieval European merchants followed in order to fill in the gaps created by what was, at the time, an unresponsive civil law.

Finally, the company must internalize these internal and external standards by living up to their letter and spirit. This requires sound management and authentic leadership, resulting in the adoption of human rights values as core corporate values that manifest themselves in day-to-day actions. The adoption of such values requires a company to take the following steps, at minimum:

## ● DEVELOPING A HUMAN RIGHTS VISION AND STRATEGY

A company must develop a human rights vision and strategy that is rooted in the company's business; otherwise it will not get beyond the wall-poster or wallet-card stage. As a result, the vision and strategy should not be a bolted-on addition, but integrated into the company's core values. Those values must be consistent with generally accepted ethical principles, which include such values as trustworthiness, respect, responsibility, fairness, caring, and citizenship. The International Bill of Human Rights resonates with these principles.

## ● LEADING WITH THE RIGHT INCENTIVES

A soundly managed company rewards desired behavior. It does not reward undesired behavior, and may discipline those who engage in it. It is the responsibility of top leadership to define the conduct that the company expects of its employees and to design an incentive system to produce that conduct. There is nothing remarkable about this concept. It can be used to promote ethical conduct and discourage unethical conduct, including conduct that impacts human rights.

Such incentives require compensating executives not only for achieving budget, profit, and operational goals (the "what") but also for achieving them in a manner that recognizes and respects human rights (the "how"). Executives who meet their "what" goals, but fail to meet their "how" goals, should not be rewarded; where appropriate, they should be disciplined. By the same token, in setting "what" goals, leaders should recognize, and attempt to mitigate, pressure points that make ethical conduct difficult; e.g., sending mixed messages on safety, budget, and operational objectives.

## ● DISTRIBUTING OWNERSHIP OF HUMAN RIGHTS

Ultimate corporate responsibility for recognizing and respecting human rights resides with the board and senior management. But in order to embed this value into the organization, ownership must spread from the top throughout the organization in an integrated fashion. Too often, operational responsibility for human rights resides in a relatively small group, such as those who manage the company's external relations and defend it from legal claims. A culture that truly respects human rights recognizes that its core business owns the problem and is responsible for delivering the solution. This is not to say that company-wide

functions - such as legal, human resources, supply chain, internal audit, finance, and others - have no role to play. On the contrary, their participation is vital, but they should not operate in self-contained silos with respect to human rights.

## ● **CARING ABOUT AND RESPECTING THE HUMAN RIGHTS OF OTHERS**

A shrunken sense of corporate responsibility leads to the belief that potential human rights victims are so distant – due to remote geography, indirect causation, unclear legal duty, absence of intent to harm, etc - that the company need not concern itself with human rights too much. The need for greater awareness by companies of their impact on human rights translates at the individual level to two fundamental ethical principles – a sense of caring (including avoiding unnecessary harm to others) and respect for the rights of others (including their human rights). This requires companies to identify and engage the stakeholders impacted by their actions, and become aware of the many sources of their rights and expectations – such as law, contracts, industry standards, professional codes, organizational policies and norms, personal moral values, accepted ethical principles – that can generate human rights issues.

Before this can be done, individual executives, managers, and employees must be sensitized to see the impact of their actions from the perspective of those stakeholders whom the company affects. Human rights training and communications can help managers, employees and contractors understand their expanded moral space in a global economy. This requires paying attention to the inner lives of leaders, and not relying solely upon money to motivate behavior. Theatre, stories, literature, multimedia techniques, scenario-planning, and role playing can all help expand the moral space of a company to include those to whom the company may have been indifferent.

## ● **APPRECIATING THE POWER OF ASKING QUESTIONS**

Companies often rely too much on detailed codes of conduct to enforce compliance with ethical principles. While such rules and codes are valuable, they don't provide guidance in gray areas. Worse, they may deaden individual discretion and discourage asking tough questions. To create a culture in which respect for human rights is a core value, companies need to require their executives and managers to ask key questions to identify the hidden ethical issues in a business decision. These questions include: Who will be affected by our actions? What are their rights and interests, and expectations? Can we take alternative actions that might better serve the interests of all of our stakeholders?

## ● **LISTENING TO HUMAN RIGHTS PROBLEMS AND FIXING THEM**

Healthy companies learn from their mistakes and fix problems. This applies to a company's impact on human rights; it must have an open and trusting culture in which messengers are not shot for reporting bad news. This places a premium on transparency and systemic study of failures. The company must recognize the barriers that reinforce the natural reluctance of employees to be the bearers of bad tidings, such as the size and geographic dispersal of large global companies, in which leaders may be remote from operations and from each other. Confidential hotlines for anonymous reporting of ethical concerns can be useful, and are mandated by such statutes as the US Sarbanes Oxley Act. But they are problematic where police states have historically encouraged anonymous reporting to create a social culture of fear.

One approach, which holds great promise, is the proactive use by companies of alternative dispute resolution (ADR) processes and techniques to resolve human rights grievances with external stakeholders. As companies have learned, particularly in the employment arena, use of ADR avoids costly litigation and negative publicity, enables companies to identify and fix problems early on, before they accumulate and become intractable, and improves relationships with key stakeholders. The same logic applies to human rights issues.

## ● **USING EFFECTIVE ASSURANCE MECHANISMS**

In order to embed respect for human rights as a shared value that drives behavior, a company must know whether its actions align with its goals. That is, a company must have rigorous, system-wide assurance mechanisms to ensure that it is complying

with its own policies, and where it is not, to take corrective action. Properly designed assurance mechanisms reinforce respect for human rights by letting everyone in the company - from senior executives to those on the factory floor - know how the company is doing. They include such mechanisms as auditing (internal and external), the development of appropriate metrics (including both leading and lagging indicators), and surveys (since culture can be measured). It is important, however, that hitting the numbers not be seen as the end of the game, but only as a management tool.

## ● APPRECIATING THE LOCAL CULTURE WITHOUT DEROGATING RESPECT FOR HUMAN RIGHTS

Implementing respect for human rights in a transnational organization may be problematic due to local cultural variability. Values can vary within a company and between the countries and markets in which a company operates, and may shift over time. While human rights are universal, it is important to permit sensible variation in the particular steps that companies may use to apply them, in order to avoid an “us v. them” attitude when it comes to human rights. Human rights are not an exclusively Western concept, but have deep roots in non-Western values as well. In practical terms, local culture can be appreciated without derogating human rights where companies focus on the interface between the local and the global parts of the company, stressing that human rights are a problem in all societies, making human rights communications practical and concrete, valuing the contributions of local cultures to human rights, and using local change agents.

## CONCLUSION

The three parts of accountability discussed in this Guide - laws, norms, and values - are part of an interactive system. That is, values that embrace human rights support compliance with law and norms. And knowledge of law and norms reinforces values. Corporate human rights accountability, therefore, depends on a proper understanding of all relevant external standards and upon internalization of those standards, through leadership and sound management, into real values that support human rights and prevent their abuse.

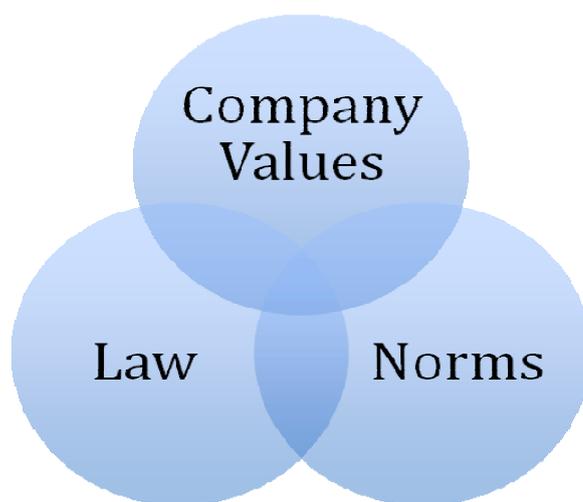
# INTRODUCTION

Recent years have seen a surge of concern about the adverse impact of companies on human rights. Growing awareness of the human rights violations in which companies may be involved or complicit has resulted in increased public scrutiny, litigation, divestiture campaigns, and boycotts. According to John Ruggie, the Special Representative to the U.N. Secretary General on Human Rights and Business (SRSG), the “root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.”<sup>1</sup> The SRSG has also stated that the “Achilles Heel of self-regulatory arrangements to date is their underdeveloped accountability mechanisms.”<sup>2</sup>

In an attempt to fill those governance and accountability gaps, the BLIHR companies have developed several tools for companies wishing to take effective steps to support and respect human rights.<sup>3</sup> They have attempted to distill from international human rights law a set of essential steps that companies must take in order to meet their human rights responsibilities. They have created a guide that outlines a human rights management system for companies. And they have created a matrix to enable companies to conduct a gap analysis of their activities with respect to these steps.

This Accountability Guide supplements these tools with additional guidance as to how a company can align its behavior with human rights goals imposed on it externally or arising from its internal commitments. These tools join a growing body of global literature and analysis demonstrating how and why companies can and should put human rights on the mainstream business agenda.

We start by highlighting illustrative legal standards imposed on companies in various countries. Then we examine the so-called “soft law”<sup>4</sup> arising from the growing international web of multi-stakeholder initiatives and public and private codes and norms. Although in a narrow sense these soft law norms and standards are formally voluntary, in reality they have significant bite, particularly in the absence of a centralized command-and-control system of international law. Finally, based on interviews and discussions with the BLIHR companies, as well as a review of the available literature, we discuss how companies can internalize these standards by living up to their letter and spirit.<sup>5</sup> This requires authentic leadership and sound management, resulting in adoption of human rights as a core corporate value that manifests itself in day-to-day actions.



<sup>1</sup> Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, April 7, 2008, par. 3 (hereinafter “Ruggie, Framework”).

<sup>2</sup> Ruggie, *Business and Human Rights: The Evolving International Agenda*, American Journal of International Law, Vol 101, p. 25 (Ruggie, Evolving Agenda”).

<sup>3</sup> By “human rights”, we mean the Universal Declaration of human rights, the two primary covenants implementing it, and the related treaties, conventions, and customary law that have emerged since World War II.

<sup>4</sup> “Soft law” constitutes “guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding.” Black’s Law Dictionary (8th ed. 2004).

<sup>5</sup> Chip Pitts, BLIHR’s advisor, conducted extensive interviews of executives at General Electric, the Gap and National Grid, and consulted with other BLIHR and non-BLIHR companies.

# I. EXTERNAL STANDARDS - “HARD LAW”

The accountability exercise begins with determining the external legal human rights standards applicable to companies. Law tells companies what they can and cannot do, and what they must and should do, in order to avoid legal sanction. Since this area has received significant attention recently, we will only briefly sketch the key areas.

## A) PROHIBITIONS AGAINST DIRECT VIOLATIONS AND COMPLICITY

A growing number of countries have incorporated international humanitarian law and international criminal law into their domestic law and apply those standards directly to companies; those standards include the three initial crimes (genocide, crimes against humanity, and war crimes) designated in the Rome Statute on the International Criminal Court.<sup>6</sup> Regional human rights systems in the Americas,<sup>7</sup> Europe,<sup>8</sup> and Africa<sup>9</sup> have also considered cases involving corporate human rights abuses. National judicial systems are similarly adjudicating *jus cogens*<sup>10</sup> and other human rights claims against corporations.

- COMPLICITY
- INTERNATIONAL HUMANITARIAN LAW
- INTERNATIONAL CRIMINAL LAW
- DOMESTIC LAW
- REGIONAL HUMAN RIGHTS SYSTEMS
- GENOCIDE, CRIMES AGAINST HUMANITY
- WAR CRIMES, TORT CLAIMS (ATCA)
- STATUTORY/CODE CLAIMS
- ADMINISTRATIVE LAW CLAIMS
- STAKEHOLDER ENGAGEMENT
- FIDUCIARY DUTIES
- CORPORATE LAW
- ENLIGHTENED SHAREHOLDER VALUE
- COMMON LAW
- CONSTITUTIONAL & CIVIL CODES
- CORPORATE GOVERNANCE PRINCIPLES

Other legal theories have been deployed to similar effect under the criminal laws of other countries, including statutory/code claims, administrative law claims, as well as purely domestic tort or other theories that embrace human rights harms such as execution, torture, environmental spills, and inhumane treatment.<sup>11</sup> Companies and their individual managers and employees can be held directly liable for their own actions. More commonly, they can also be held indirectly liable for the actions of others under a theory of derivative, ‘aiding and abetting’ liability; this can arise from complicity in facilitating the human rights crimes committed by third parties, such as governments or security contractors. International criminal liability can be found where the defendant substantially contributed to the commission of an international crime by another, and had knowledge that it did so.<sup>12</sup>

In addition, complicity has been asserted as the basis for civil liability in tort when the company has actual or constructive knowledge that its actions may substantially assist in the commission of a violation of international law.<sup>13</sup> In recent years, the 220-year-old US Alien Tort Claims Act (ATCA) has been invoked increasingly by human rights victims in an effort to impose civil liability on companies in US courts for violation of the “law of nations,” even though those violations may occur outside

<sup>6</sup> Ramasastry and Thompson, *Commerce, Crime, and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Countries*, Fafo Report 536 (2006)(Fafo); Ruggie, *Evolving Agenda*, *supra*, pp. 12-13.

<sup>7</sup> *E.g. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Case No. 79, Inter-Am Ct. H.R., Ser. C. (2001)(logging concessions granted by Nicaragua affected the Awas Tingni Community land in violation of the community’s constitutionally protected status).

<sup>8</sup> See, e.g., Andrew Clapham, *Human Rights Obligations of Non-State Actors*, pp. 349-420 (2006)(extensively discussing European Court jurisprudence).

<sup>9</sup> *E.g. Soc. & Econ. Rts. Action Ctr. for Econ. & Soc. Rts. v. Nigeria*, Comm. No. 155/96 (Oct. 2001), Fifteenth Annual Activity Report of the African Comm’n on Human and Peoples’ Rights, 2001-2002 (regarding Shell Nigeria case as involving breaches of the African Charter of Human and Peoples Rights).

<sup>10</sup> *Jus cogens* claims involve non-derogable peremptory international law norms such as those against torture, slavery, or genocide - binding even in the absence of a treaty.

<sup>11</sup> See e.g. the Legal Accountability Project of the Business and Human Rights Resource Centre, available at [www.business-humanrights.org](http://www.business-humanrights.org)

<sup>12</sup> Ruggie, *Clarifying the Concepts of “Sphere of Influence” and “Complicity”*, A/HRC/8/16, 15 May 2008, par. 35.

<sup>13</sup> This is the standard enunciated by the Ninth Circuit Court of Appeal in the United States case of *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (9<sup>th</sup> Cir. 2002).

the US and do not involve US citizens. ‘Piercing the corporate veil’ theories have also been used to assert civil liability against parent companies not directly involved in the violation, but asserting sufficient control to be liable.<sup>14</sup>

## B) STAKEHOLDER ENGAGEMENT REQUIREMENTS

The laws of common law countries such as the United Kingdom and the United States, increasingly recognize a fiduciary duty by corporate boards to take into account the impact of their actions on an expanding variety of stakeholders, which would include human rights impacts.<sup>15</sup> This resembles the stakeholder approach favored by Asian jurisdictions that informally include stakeholders beyond shareholders in corporate governance,<sup>16</sup> and by the so called “Rhineland Model” of shared corporate governance embedded in the company law of Continental European jurisdictions (e.g., the co-determination systems of Germany and The Netherlands) that formally do the same thing.<sup>17</sup>

In the UK, Section 172 of the 2006 UK Companies Act embraces a concept of enlightened shareholder value by requiring UK companies to “have regard” for the social impact of their decisions on such stakeholders as the company’s employees, the need to foster the company’s business relationships with suppliers, customers, and others, the impact of the company’s operations on the community and the environment, and the desirability of maintaining a reputation for high standards of business conduct. The statute is thus mandatory and not merely permissive. Although it does not specify how a company should “have regard” to these stakeholders, the Act also requires in Section 417 that companies conduct an annual business review to enable shareholders to assess how directors have performed their obligations under Section 172. This subjects the process of considering these factors to public scrutiny.

Unlike the UK, United States federal law generally does not explicitly require companies to take impacts on non-investor stakeholders into account in their decision-making or report on them.<sup>18</sup> However, various forms of stakeholder consultation are required in the environmental area<sup>19</sup> and more than 30 “constituency” state statutes require or (more commonly) allow such consideration of stakeholder impact.<sup>20</sup> Moreover, except in limited circumstances, the largely state-level US corporate laws, like those of Canada and many other nations, generally permit corporations to make responsible ethical decisions that take stakeholder impacts into account, even where shareholder value will not be enhanced.<sup>21</sup> Finally, as a result of the increase in

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<sup>14</sup> See, e.g. *Lubbe v. Cape plc*, 1 W.L.R.1545 (H.L. 2000). See also, e.g., the case of *Connelly v. RTZ Corp plc*, 3 W.L.R. 375 (H.L. 1997), where the court adopted the alternative legal approach of bypassing the corporate form issue to rely on a duty owed by the parent under tort law directly to the asbestos victims. Other cases in which foreign claims were allowed to proceed against the parent company include the claims of mercury poisoning brought by the South African workers of a subsidiary of the UK company Thor Chemicals, which were ultimately settled after years of litigation in the United Kingdom. *Ngcobo v. Thor Chemicals Holdings Ltd.*, [1995] T.L.R. 10 (Eng. C.A.); *Sithole v. Thor Chemicals Holdings Ltd.* [1999] T.L.R. 110 (Eng. C.A).

<sup>15</sup> Cynthia A. Williams and John M. Conley, *Corporate Social Responsibility in the International Context: Is there an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. Cin. L. Rev. 75 (2005)(Conley and Williams). See also, Ira M. Millstein, et al, *Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative’s Report Entitled “Protect, Respect, and Remedy: A Framework for Business and Human Rights*, May 22, 2008, available at <http://www.business-humanrights.org/Links/Repository/566513>

<sup>16</sup> Despite recent provisions shoring up rights of shareholders in China, as a civil law “socialist market economy” China will likely to continue to emphasize stakeholders, and the 2006 amendments to the Chinese Company Law expressly provide that companies shall “bear social responsibilities.” Company Law of People’s Republic of China (promulgated by Presidential Order of the People’s Republic of China, Oct. 27, 2005, effective Jan. 1, 2006) P.R.C. Laws. The Chinese Securities Regulatory Commission’s Corporate Governance Code confirms a stakeholder view instead of succumbing to shareholder primacy, expressly confirming that listed companies must respect the interests of “banks and other creditors, employees, consumers, suppliers, the community, and other stakeholders.” Code of Corporate Governance for Listed Companies in China (promulgated by the China Securities Regulatory Commission, State Economic and Trade Commission, Jan. 7, 2001), available at [http://www.ecgi.org/codes/documents/code\\_en.pdf](http://www.ecgi.org/codes/documents/code_en.pdf). Emerging concepts of “fiduciary duty” in China remain constrained by the current limitations of that legal system.

<sup>17</sup> See, e.g., Dieter Sadowski, Joachim Junkes & Sabine Lindenthal, *Employees and Corporate Governance: Germany: The German Model of Corporate and Labor Governance*, 22 Comp. Lab. L. & Pol’y J. 33 (2002).

<sup>18</sup> Other jurisdictions, as diverse as Canada, India, and the Philippines, recognize the importance of stakeholder consultation in designing and implementing environmental laws and regulations, and use expert and citizen advisory committees. See, e.g. Canada, *Smart Regulation: Report on Actions and Plans* (2005), at 55, available at: [http://www.regulation.gc.ca/docs/report1/rap\\_e.pdf](http://www.regulation.gc.ca/docs/report1/rap_e.pdf), and India Biodiversity Act, secs. 7.2.2 and 41(2). Consultation duties are also frequently enshrined as a matter of common law or statutory law in Canada and other jurisdictions to protect the rights of indigenous peoples. See, e.g. Sandra Gogal et al, *Aboriginal Impact and Benefit Agreements: Practical Considerations*, 43 Alberta L. Rev. 129 (2005) (citing Canadian Supreme court cases as well as constitutional and statutory duties); Philippines Exec. Order No. 247 (May 18, 1995), sec. 2, available at <http://law.nus.edu.sg/apcel/dbase/filipino/primary/phobio.html>

<sup>19</sup> For example in the process of environmental permitting under the auspices of the US Environmental Protection Agency.

<sup>20</sup> See, e.g. Edward Adams and John Matheson, “A Statutory Model For Corporate Constituency Concerns,” 49 Emory L.J. 1085 (2000)(analyzing the 32 U.S. constituency statutes).

<sup>21</sup> *E.g. A.P. Smith Manufacturing Co. v. Barlow*, 98 A.2d 581, 586 (N.J. 1953)(upholding charitable donations on grounds that “modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of communities of which they operate”).

Socially Responsible Investment funds, increased litigation under ATCA, and the potential damage to reputation in the market if human rights risks are ignored, US company directors may have a fiduciary duty to consider the impacts of their companies' decisions on the human rights of their companies' stakeholders.<sup>22</sup>

The thrust of Canadian law is similar, based on the common law fiduciary duty of directors to consider the best interests of the corporation—defined in cases such as *Teck Corporation Ltd. v. Millar*,<sup>23</sup> and *Peoples Department Stores v. Wise*<sup>24</sup> to include not just shareholders but also socially responsible conduct vis-à-vis stakeholders.<sup>25</sup> Courts in other jurisdictions such as Australia have noted the link between equitable and statutory directors' duties of care and tort law negligence duties of care.<sup>26</sup> Such duties of care clearly relate to the human rights due diligence expected of companies as identified in the SRSB's recent report.<sup>27</sup>

Of course, outside of the corporate law and tort law contexts, companies have independent legal duties to comply with safety, anti-discrimination laws, human rights and labor rights laws, health laws, and environmental laws—failing which they could be held liable on various constitutional, civil code, or common law grounds in the various countries.

### C) CORPORATE GOVERNANCE REQUIREMENTS

Legally mandated corporate governance principles place affirmative duties on companies to maintain sound internal controls, which include systems for the assessment, management, and reporting of significant risks facing the company. Those principles are similar from country to country, and the risks to be considered should now include human rights risks.

The Corporate Governance Codes of the European Union Members and the UK take a 'comply or explain' approach to risk, requiring publicly traded companies to analyze and mitigate risk, or explain to its shareholders why it didn't do so. In the UK, for example, companies listed on the London Stock Exchange are subject to the Combined Code on Corporate Governance, which is overseen by an independent regulator called the Financial Reporting Council. The Code's Turnbull Report sets out how directors of listed companies should comply with the Code's requirements for internal controls, including financial, operational, compliance and risk management.<sup>28</sup> It requires companies to state in their annual reports that they have an ongoing process to identify, evaluate, and manage risk, to summarize the effectiveness of their internal controls, and confirm that they have taken necessary actions to remedy any significant failings or weaknesses. If a company cannot make such disclosures, it must state that and explain why. Significant human rights risks that might subject the company to significant legal liability or reputational damage would fall within the Report's assessment and disclosure requirements, wholly apart from the UK Companies Act.<sup>29</sup>

For example, the 2008 Woolf Committee Report on the BAE Systems Saudi Arabian defense contract scandal criticized the company for taking inadequate steps to protect the company's global reputation from long-term damage resulting from allegations of corruption and bribery, even where the company believed that it had violated no law.<sup>30</sup> Allegations of

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See also Lynn Sharp Paine, *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance* (2002), at 158.

<sup>22</sup> Conley and Williams, *supra*.

<sup>23</sup> *Teck Corporation Ltd v. Millar* [1972] 33 D.L.R. (3d) 288 (stating in the takeover context that "the facts of modern life" make attention to the interests of employees as well as consequences to the community consonant with duties to the company itself).

<sup>24</sup> *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 S.C.R. 461, 2004 SCC 68 (hereinafter *Peoples*).

<sup>25</sup> In *Peoples*, the Supreme Court of Canada held that the "best interests of the corporation" under the corporate code should not be read simply as equated with the "best interests of the shareholders," but may also include the interests of "employees, suppliers, creditors, consumers, governments, and the environment." Furthermore, the Court held that the duty of care was even more open-ended, extending to any injury caused to "another person." *Peoples*, *supra*, at par. 57.

<sup>26</sup> See, e.g. *Daniels v Anderson* [1995] 16 ACSR 607.

<sup>27</sup> Ruggie, Framework, at par. 56 (citing Allens Arthur Robinson, "Corporate duty and human rights under Australian law", prepared for the Special Representative, p. 1, available at <http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers>).

<sup>28</sup> Available at: <http://www.frc.org.uk/documents/pagemanager/frc/Revised%20Turnbull%20Guidance%20October%202005.pdf>

<sup>29</sup> For example, National Grid, a UK Company, regularly performs a combined bottom-up, top-down analysis of risks, including nonfinancial risks pertaining for example to the environment and human rights. It annually requires all executives to personally attest to compliance with all company policies, including its ethics code and its human rights policy, to identify and explain any exceptions, and to formulate plans with deadlines to close those gaps. It closely tracks compliance with all external requirements and company policies, assigns responsibility to specific executives, and monitors progress towards solving all compliance issues.

<sup>30</sup> Woolf Committee, *Business ethics, global companies, and the defence industry—Ethical business conduct in BAE Systems plc—the way forward* (May 2008), executive summary available at [http://217.69.43.26/woolf/Woolf\\_exec\\_summary\\_2008.pdf](http://217.69.43.26/woolf/Woolf_exec_summary_2008.pdf)

complicity in human rights allegations have equal potential to damage a company's global reputation, whether or not those allegations result in legal liability. Such risks must be identified, managed, and reported as a matter of corporate governance.

The US corporate governance counterpart to the UK and European internal controls described above is the system of internal controls derived from the Committee of Sponsoring Organizations of the Treadway Commission ("COSO"), a private sector initiative of accounting and auditor industry associations to examine the causes of financial fraud, and to develop recommendations for public companies and independent auditors, based on best practices. The COSO internal controls require an appropriate tone at the top of the organization, risk assessment, policies and procedures, information and communication, and measurement and monitoring. The US Securities and Exchange Commission explicitly follows COSO in implementing the financial self-assessment requirements of Section of 404 of the Sarbanes Oxley Act.<sup>31</sup>

Moreover, COSO-based internal controls are not confined to the US, but are followed in Europe as well; for example, the French Autorité Des Marchés Financiers (AMF, the French counterpart to the US SEC) and the Dutch Corporate Governance Code also look at COSO to determine whether a company has a proper system of internal controls.<sup>32</sup>

The relevance of internal controls is not limited to financial issues. For example, the US Congress used COSO-based internal control principles to design a due diligence program to prevent corporate crime generally, as seen in the US Sentencing Guidelines for Organizational Defendants. The Guidelines were enacted in 1993 to provide for uniformity in sentencing companies convicted of crimes based on the actions of their employees.<sup>33</sup> In essence, if the company demonstrates to the sentencing judge that it had a robust compliance program to prevent crime—with clear standards, training, investigation and discipline, monitoring and auditing—then the employee who committed the crime is considered to be a rogue who would break the law despite the best efforts of the company. In such a case, the company would receive a reduced sentence.

Although Congress articulated the need for compliance programs in the criminal sentencing context, the strength of such a program influences a prosecutor's discretion whether or not to indict in the first place. And it shapes a director's fiduciary duty under state law; the corporate law of Delaware, where most major US companies are chartered, recognizes that corporate directors have a fiduciary duty to ensure that their managers have effective compliance programs, as outlined in the Sentencing Guidelines.<sup>34</sup>

Although the United States has not ratified the Rome Statute on the International Criminal Court, domestic US law applies extraterritorially to prohibit illicit activities that often accompany grave breaches of international criminal law, such as bribery of foreign officials, sanctions violations, money laundering, importing stolen property and illicit drug trafficking.<sup>35</sup> Thus, the Sentencing Guidelines would apply directly to a company's efforts to prevent such crimes. And since corporate governance principles require companies to manage the human rights risks of their businesses, the COSO principles embedded in the Guidelines would be a logical source of guidance on how to structure a management system. Indeed, the BLIHR Human Rights Management Guide, referenced above, corresponds closely to core COSO internal control principles.

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<sup>31</sup> [www.coso.org](http://www.coso.org)

<sup>32</sup> "Recommendations of the Autorité des Marchés Financiers on the "Internal control: Reference Framework" (2007), available in English at: [http://www.amf-france.org/documents/general/7620\\_1.pdf](http://www.amf-france.org/documents/general/7620_1.pdf); The Dutch Corporate Governance Code: Principles of Good Corporate Governance and Best Practice Provisions, Corporate Governance Committee, December 9, 2003, available at <http://corpgov.nl/page/downloads/CODE%20DEF%20ENGELS%20COMPLEET%20III.pdf>

<sup>33</sup> US Sentencing Guidelines: [http://www.ussc.gov/2005guid/8b2\\_1.htm](http://www.ussc.gov/2005guid/8b2_1.htm)

<sup>34</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996); *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

<sup>35</sup> Fafo Report, "Commerce, Crime and Conflict," p. 25-27, available at: <http://www.faf.no/pub/rapp/536/536.pdf>

## II. EXTERNAL STANDARDS - “SOFT LAW” NORMS

Due to the lack of specific guidance that hard law provides in many concrete circumstances, a responsible company should also consider the experience and practice of companies and civil society under norms contained in numerous public and private codes of conduct, normative regimes, and multi-stakeholder initiatives that attempt to fill in the gaps caused by the absence of a global central governing authority (collectively, “Soft Law Norms”).<sup>36</sup> The “Essential Steps” that companies must take to respect human rights developed by the BLIHR companies is one of many examples of a Human Rights Norm.

### A) SOFT LAW NORMS OFTEN HAVE BITE

The body of such norms is called often ‘soft law’ because it is formally non-binding. However, the characterization of Soft Law Norms as strictly voluntary is not accurate because they define society’s expectations of responsible corporate behavior; examples include the OECD Guidelines for Multinationals and the International Labor Organization’s Tripartite Declaration.<sup>37</sup> As the SRSG recently stated, the distinction between hard and soft law “can be exaggerated and take on a life of its own.” While companies may be free to ignore them in a technical sense, “systematic non-compliance or exiting is not costless.”<sup>38</sup>

Companies must pay attention to relevant Soft Law Norms because, for the stakeholders who created them, and often for many others, they constitute an effective means to hold companies accountable for avoiding and mitigating human rights risks—including helping companies commit to internal standards and compliance mechanisms. Governments, contracting parties, and civil society increasingly look to them as a source of objective, reasonable standards that have been thoughtfully constructed and represent social consensus. Ignoring them can expose the company to significant risks, including greater and more hostile external scrutiny, dissatisfaction by key stakeholders such as customers, employees, and socially responsible investment funds, serious reputational impact and license-to-operate problems, and in the event of legal claims, a higher likelihood of prosecution, a weakened ability to defend, and stiffer penalties.

### B) THE EMERGING “LEX MERCATORIA” OF HUMAN RIGHTS AND BUSINESS

A decentralized regulatory environment has blurred traditional public-private and state-market boundaries; this has spawned “collectivities of transnational civil society in partnership with intergovernmental organizations or transnational associations of government employees, all in partnership with private entities such as corporations, labor, and institutional investors.”<sup>39</sup> This “new governance” regime sees power exercised “through collecting and distributing information.”<sup>40</sup> The need for information about standards, what works, and what does not, is critically important for companies and civil society.

This need results from the fact that the problems affecting business and human rights are interrelated and impact each other in a global network. The worldwide credit collapse, recession and job loss will disproportionately affect the most vulnerable in

- HUMAN RIGHTS NORMS
- OECD GUIDELINES FOR MULTINATIONALS
- ILO’S TRIPARTITE DECLARATION
- NEW GOVERNANCE REGIMES
- MAJOR GLOBAL ISSUES
- CONCRETIZING SOFT LAW
- WORLD BANK, IFC, EQUATOR PRINCIPLES
- SULLIVAN PRINCIPLES, CAUX PRINCIPLES
- GRI, SA8000, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY’S PRINCIPLES
- BLIHR ESSENTIAL STEPS
- VOLUNTARY MULTISTAKEHOLDER INITIATIVES
- MACBRIDE PRINCIPLES INTEGRATION INTO NATIONAL LAW
- NON-JUDICIAL DISPUTE MECHANISMS

<sup>36</sup> We use the term “Soft Law Norms” solely in the popular sense of a dictionary definition of “a principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior.” <http://www.merriam-webster.com/dictionary/Norm>. We do not mean to refer to the “UN Norms” set forth in the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev.2.

<sup>37</sup> Organization for Economic Co-operation and Development, Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, OECD Doc. DAFFE/IME/WPG (2000)15/FINAL (2001), available at [http://www.oilis.oecd.org/ohs/2000doc.nsf/LinkTo/daffe-ime-wpg\(2000\)15-final](http://www.oilis.oecd.org/ohs/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)15-final); see also, e.g., International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (rev. Nov. 2000), 83 ILO OFF. BULL. (ser. A), No. 3 (2000).

<sup>38</sup> Ruggie, *Business and Human Rights: A Political Scientist’s Guide to Survival in a Domain Where Lawyers and Activists Reign*, Remarks to the Annual Conference of the International Law Association (May 17, 2008), p. 6, available at <http://www.business-humanrights.org/Links/Repository/804431>

<sup>39</sup> Conley and Williams, supra, pp. 99-100.

<sup>40</sup> Id.

global society. These economic problems were triggered by the failure of the US subprime mortgage market, demonstrating that the risks as well as the benefits of a global economy transcend borders. Top global challenges today include economic volatility and instability, energy poverty and justice, climate change, disease, food and water shortages, natural disasters such as Hurricane Katrina and the Myanmar cyclone, financial poverty, inequality, refugees, terrorism, conflict, and war. Higher food prices, now said by the World Bank to have set back the war on poverty by seven years, have resulted from global drivers including the Australian drought (climate change), greater demand from China and India coming on-stream (via modernization/ globalization/urbanization leading to paving over agricultural fields in order to build parking lots and skyscrapers), and the use of corn ethanol aimed at mitigating energy demand and addressing global warming (and ironically making matters worse), among other factors.

The expanding web of Soft Law Norms is developing into what has been called the new ‘lex mercatoria’ or ‘law merchant’ of human rights.<sup>41</sup> The term refers to a body of mainly soft law, consisting of largely self-regulatory rules and principles based on usages and customs that medieval European merchants followed in order to fill in the gaps created by what was, at the time, an unresponsive civil law; it embodied concepts of mutual restraint and good faith, and was enforced primarily by the merchants themselves, who internalized and acted pursuant to collective norms. To oversimplify a complex and often romanticized story of merchants developing transnational law as they traded colorful silks and crafts, disputes were often resolved not by non-merchant judges but by merchant councils, guilds, or courts, or what we would today call informal mediation and arbitration by the merchants themselves. The bulk of the law merchant was not hard law since the government did not promulgate it. But its violation had real commercial consequences, since violators were excluded from the market. Ultimately, courts and legislatures adopted much of the lex mercatoria and concretized it into hard law.

Although Soft Law Norms complement rather than contradict each other, there is significant variability among them; the variations include the scope of substantive coverage of rights, conflicting positions on key issues, levels of generality and substantive meaningfulness, degrees of uptake within still limited overall market penetration, and the existence (or not) of related monitoring and assurance, and grievance mechanisms.

### **C) CONCRETIZING SOFT LAW NORMS INTO HARD LAW**

Governments and domestic and international agencies and institutions sometimes use Soft Law Norms to determine various rewards (such as government procurement advantages, other subsidies, export credit guarantees, or tax breaks)<sup>42</sup> or punishments (including benefits withheld) for meeting or not meeting various standards. For example, the World Bank, the International Finance Corporation<sup>43</sup>, and other lenders require that companies meet human rights and environmental operational guidelines and comply with the Equator Principles (an MSI)<sup>44</sup>, in order to receive funds. The stakeholder consultation requirements of these Soft Law Norms recall some of the hard law consultation requirements mentioned above,<sup>45</sup> demonstrating how hard and soft law regimes influence one another.

These largely complementary standards may begin with the “external” codes drafted with or at the instigation of governments, or the hundreds of normative performance standards and reporting instruments produced by business groups and industry associations, NGOs, faith groups, and socially responsible investment groups; these range from the original and new Sullivan Principles, to the Caux Principles, to the Interfaith Center on Corporate Responsibility’s Principles, to SA8000, to those of BLIHR. But such external codes also end up serving as sources of a corporation’s own internal codes, policies, practices, and procedures—while simultaneously influencing the ongoing development of soft law and hard law.

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<sup>41</sup> Steinhardt, *The New Lex Mercatoria*, in Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press, 2005). pp. 221-226

<sup>42</sup> The U.K. and other governments extend public procurement benefits based on compliance with such standards. U.S. examples are various, ranging from lighter sentences under the U.S. Sentencing Guidelines for corporations demonstrating an ethical culture, available at [http://www.ussc.gov/2005guid/8b2\\_1.htm](http://www.ussc.gov/2005guid/8b2_1.htm), to government subsidies for charitable donations of conservation easements. See, e.g., I.R.C. § 170(h)(4)(A)(iii) (1999).

<sup>43</sup> IFC, *Environmental and Social Standards* (Feb. 2006), available at <<http://www.ifc.org/ifcext/enviro.nsf/>>

<sup>44</sup> Available at: <<http://www.equator-principles.com>>

<sup>45</sup> This is in keeping with the growing recognition globally of the importance of consulting with civil society and stakeholders before taking actions that affect them. See, e.g. Community of Democracies, 2005 Santiago Ministerial Commitment, *Cooperating for Democracy*, § I (Apr. 30, 2005) (on the commitment to enhance “the participation of a dynamic civil society at the domestic and international level”), available at <<http://www.state.gov/drl/c10712.htm>>

For example, soft law concretizes quickly into hard law when binding contracts incorporate nominally voluntary MSI's and codes. This forms a private law regime between the parties and even a public law regime where the host government ratifies the agreements as treaties; e.g., the BTC Pipeline case and many mining and forestry agreements.

Soft Law Norms may also be imported into hard domestic law. For example, the US Congress adopted the MacBride Principles as part of the 1999 Omnibus Appropriations Act, in order to ensure that US contributions to the International Fund for Ireland were in compliance with its principles. The Global Reporting Initiative ("GRI") is evolving into a de facto global disclosure and reporting standard, having influenced legislation ranging from civil law countries such as Japan to common law countries like Australia.<sup>46</sup> GRI is referenced in legislation and securities guidelines in several countries, including e.g. the King Code and Joint Stock Exchange listing rules in South Africa,<sup>47</sup> and the Public Accountability Statements that Canada requires from major banks and financial institutions<sup>48</sup> and that Sweden requires from state-owned enterprises.<sup>49</sup> The OECD anti-corruption principles have influenced national legislation such as Canada's Corruption of Public Officials Act and similar laws of many other countries globally.

Core International Labor Organization ("ILO") conventions and the ILO Tripartite Declaration are also referenced in various domestic statutes and regulations globally.<sup>50</sup> They are increasingly incorporated into implementing legislation for free trade agreements, which can be bilateral (like the recent US-Peru Agreement) or regional (like the North American Free trade Agreement, or NAFTA, which is embedded in US domestic law as a statute).<sup>51</sup>

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<sup>46</sup> Allen L. White, *Why We Need Global Standards for Corporate Disclosure*, 69 *Law & Contemp. Prob.* 167, 178 (Summer 2006), n.55.

<sup>47</sup> See, e.g., Executive Summary of King Report II, available at:

[http://www.ifc.org/ifcext/corporategovernance.nsf/AttachmentsByTitle/South+Africa+CG-Code.pdf/\\$FILE/South+Africa+CG-Code.pdf](http://www.ifc.org/ifcext/corporategovernance.nsf/AttachmentsByTitle/South+Africa+CG-Code.pdf/$FILE/South+Africa+CG-Code.pdf)

<sup>48</sup> E.g. *Trust and Loan Companies Act*, S.C. 1991, c. 45, sec. 444.2; *Bank Act*, S.C. 1991, c. 46, sec. 459.3; *Insurance Companies Act*, S.C. 1991, c. 47, sec. 489.1.

<sup>49</sup> "Sweden pioneers a global first in sustainability reporting," available at:

<http://www.globalreporting.org/NewsEventsPress/LatestNews/2007/NewsDec07Sweden.htm>

<sup>50</sup> See, e.g., 19 U.S.C. § 2462(c)(7) (conditioning generalized system of preferences U.S. trade benefits to developing countries and designated zones within such countries, as with certain other trade agreement benefits, on whether the country has taken steps to afford workers there "internationally recognized labor rights"). Countries also implement ILO Conventions directly in their domestic labor codes, e.g. *Codigo De Trabajo*, Decreto No. 1441, art. 150 (Guatemala's implementation of ILO Convention 138 on minimum age of employment to avoid child labor).

<sup>51</sup> See e.g., Ambassador Schwab Statement on Peruvian Legislature Approving Amendments to U.S.-Peru Trade Promotion Agreement, available at: [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/June/Ambassador\\_Schwab\\_statement\\_on\\_Peruvian\\_Legislature\\_approving\\_amendments\\_to\\_US-Peru\\_Trade\\_Promotion\\_Agreement.html?ht=:](http://www.ustr.gov/Document_Library/Press_Releases/2007/June/Ambassador_Schwab_statement_on_Peruvian_Legislature_approving_amendments_to_US-Peru_Trade_Promotion_Agreement.html?ht=:); see also The North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1499 (1993), annex 1 (committing the countries to strive to ensure labor rights principles including but transcending ILO core labor rights); see also, e.g., See, e.g., The Trade Act of 1974, 19 U.S.C. 2462(c)(7) (2004)(US legislation that, like other countries, conditions trade benefits on respect for internationally recognized labor rights).

### III. INTERNALIZING LAW & NORMS INTO SHARED VALUES

As Eleanor Roosevelt said, human rights exist in “small places, close to home . . . [in] the world of the individual; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works.”<sup>52</sup> A key strength of the law merchant was the internalization by merchants of the values of self-restraint and good faith, which enabled them to apply those values in day-to-day commercial transactions. So too must external human rights law and norms be internalized as core corporate values if companies are to be held accountable to these standards. The internalization requires leadership from the top and sound management that embeds respect for human rights in the values shared throughout the organization. Such shared values comprise the corporation’s culture.

The BLIHR human rights management guide sets out an overall management system for human rights, including strategy, policies and procedures, communications, training, measuring impact, auditing, and reporting. These are derived from basic business management controls designed to ensure that the company’s conduct lives up to fundamental standards, internal or external. These controls should be applied to each of the Essential Steps identified by BLIHR as necessary to determine whether a company’s actions

are properly aligned with its human rights responsibilities. This requires focused attention on specific parts of the business, such as supply chain, business development, product safety, environmental affairs, legal affairs, etc. However, it is important not to get lost in the details and lose sight of the larger picture. In implementing its management system, the company must promote throughout the organization fundamental ethical values - including a respect for human rights - that executives, managers, and employees can embrace, understand, and apply in their day-to-day work.

A company whose managers and employees tend to act solely in accordance with prescribed rules cannot respond flexibly to changing circumstances, may step into ethical minefields not mapped by specific rules, and equate conduct that is arguably legal with moral conduct. A company that also acts pursuant to fundamental ethical values, in contrast, is better equipped to avoid these problems. This is particularly true in the human rights field, given the frequent lack of specific guidance provided by hard law on exactly what companies should do to respect human rights in concrete situations.

The need to align conduct with values was shown by an explosion at BP’s Texas City Refinery in 2005, which had resulted in multiple deaths and injuries. A blue ribbon panel headed by former U.S. Secretary of State James Baker concluded in 2007 that the company had a defective safety culture; that is, it found that although BP had stated highly worthy safety values (*i.e.*, no harm to people), it did not effectively act in alignment with those values, due to ineffective safety leadership, mixed messages, a fear by employees to report safety problems and concerns, and the overall lack of unifying safety values.<sup>53</sup>

The US Congress also recognized the importance of ethical values following the string of financial flameouts starting with Enron Corporation in 2001, and including WorldCom, Tyco, HealthSouth, and others. Enron had written a thoughtful code of conduct for the prevention of corporate crime, and in particular the need to avoid conflicts of interests, of which the CEO, Ken Lay, was very proud. Unfortunately, the primary cultural value of Enron’s executive team was to increase the price of Enron’s

- SENIOR LEADERSHIP
- OVERALL MANAGEMENT SYSTEMS
- FUNDAMENTAL ETHICAL VALUES CODES OF CONDUCT AND LIMITS
- STAKEHOLDER FOCUSED
- VISION & STRATEGY
- VALUES BASED PROBLEM SOLVING
- AUTHENTIC LEADERSHIP, INCENTIVES
- DISTRIBUTED OWNERSHIP
- EMPATHY, MORAL SPACE
- TRAINING & COMMUNICATION
- ENGAGING INNER LIVES
- THE POWER OF QUESTIONS
- ASSURANCE MECHANISMS
- AUDITING & METRICS, SURVEY & QUESTIONS
- DEALING WITH BAD NEWS
- INTERNAL TRANSPARENCY & OPENNESS
- DILEMMAS , SENSITIVITY TO LOCAL CULTURE

<sup>52</sup> See quote available at: <http://www.udhr.org/history/Biographies/bioer.htm>

<sup>53</sup> BP US Refineries Independent Safety Review Panel (January, 2007) (“Baker Panel”), [http://www.safetyreviewpanel.com/cmtfiles/charter\\_related/Panel%20Report%20-%20January%202007.pdf](http://www.safetyreviewpanel.com/cmtfiles/charter_related/Panel%20Report%20-%20January%202007.pdf)

stock (and their own personal wealth) from quarter to quarter. They ignored or overrode the code when it suited their own purposes, relying instead on the advice of legal counsel (flawed as it turned out), that their actions did not violate the law.

As a result, Congress amended the Guidelines in 2004 to require that boards of directors ensure that their companies have cultures that facilitate *ethical* conduct as well as legally compliant conduct.<sup>54</sup> This reflected a view that ethical corporate action is critical to avoid breaking the law. In fact, most codes of conduct throughout the world embrace ethical values. A recent study of company codes of conduct, global codes of conduct (including interfaith and cross-cultural codes) and business ethics literature revealed the following generally accepted ethical values for companies: Trustworthiness (including notions of honesty, integrity, transparency, reliability, and loyalty); Respect (including notions of respect for human rights); Responsibility (including notions of accountability, excellence, and self-restraint); Fairness (including notions of fair process, impartiality, and equity); Caring (including the notion of avoiding unnecessary harm to others); and Citizenship (including notions of obeying the law and sustainability).<sup>55</sup>

Above all, companies with ethical cultures are stakeholder-focused. That is, they recognize that people are ends in themselves, not means to an end. They understand the need to assess the impact of their actions on those whom their business affects, and endeavor to minimize harm and do what good they can. In an ethical culture, internal and external stakeholders support the company's values. For example, in response to a handful of mysterious deaths involving cyanide-laced Tylenol in the 1990s, Johnson & Johnson pulled the drug from the market after rapidly but comprehensively analyzing the impact of many alternative actions on all of its key stakeholders. The decision saved lives and enhanced its reputation as a highly ethical company.

The International Bill of Human Rights - consisting of the 1948 Universal Declaration of Human Rights and the 1966 covenants - has a natural and prominent place in the pantheon of corporate ethical values. Human rights concepts traverse most of the six universal moral principles for company codes referred to earlier, especially Respect (for the inherent worth of the individual and his or her dignity and human rights) and Caring (the need to avoid unnecessary harm to people). The International Bill of Human Rights embraces these values, and has the added force of being "universal, indivisible, and interdependent, and interrelated."<sup>56</sup> Although these rights are unfortunately not always accepted in practice, nearly all nations recognize and accept them in theory. As a result, any company that professes to have an ethical culture should embed human rights firmly in its constellation of values.

Values do not exist in splendid isolation, independent of corporate leadership and an effective management system. Instead, good leadership and management drive those values into the organization. Doing so requires that companies take the following steps, at minimum:

- A. Develop a human rights vision and strategy.**
- B. Lead with the right incentives.**
- C. Distribute ownership of human rights goals.**
- D. Care about and respect the human rights of others.**
- E. Ask questions.**
- F. Listen to human rights problems and fix them.**
- G. Use effective assurance mechanisms.**
- H. Appreciate local cultures without derogating respect for human rights.**

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<sup>54</sup> Fiorelli, *Will US Sentencing Commission Amendments Encourage a New Ethical Culture within Organizations?*, 39 Wake Forest L. Rev 565, 578-9 (2004).

<sup>55</sup> Schwartz, *Universal Moral Values for Corporate Codes of Ethics*, *Journal of Business Ethics* (2005) 59: 27-44. These are also the "six pillars of character" identified by the Josephson Institute of Ethics that now form the basis of the "character counts" program used by various for-profit, governmental, and non-profit entities. <http://josephsoninstitute.org/MED/MED-2sixpillars.html>

<sup>56</sup> World Conference on Human Rights, June 14-25, 1993 Vienna Declaration and Programme of Action, P 5, U.N.Doc A/CONF.157/231 (July 12, 1993), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En) (Vienna Declaration).

## **A) DEVELOP A HUMAN RIGHTS VISION AND STRATEGY**

Embedding human rights values into corporate culture begins with developing the company's unique human rights business vision and strategy. A vision and strategy that is not rooted in the company's business will not get far beyond the wall-poster or wallet card stage; executives, managers, and employees may have a hard time understanding how their individual and collective actions may affect human rights, and how those actions fit into the big picture for the company. Moreover, the company may set human rights goals that are unsustainable in the long run, leading to the tacit understanding that human rights values are mere window-dressing.

Companies may go through several stages in their attitude towards human rights, depending on the issue affecting the company. These stages can run from denial ("it's not our responsibility"), to compliance ("we'll do just as much as we have to"), to managerial ("our core business will manage the problem and the solution"), to strategic ("we'll get a competitive edge"), and to civic ("we'll make sure others do it").<sup>57</sup> Companies could be at different stages with respect to different issues, and the civic stage could come earlier. However, companies must move beyond the defensive "check-the-box" stages.

Therefore, a company's vision and strategy is best developed in a participatory fashion. This involves increasingly wider groups of people, which expands recognition of human rights values from those responsible for ethics and compliance, or who defend the company from claims and allegations, to those who monitor compliance with external requirements, to those who run the core business, to those who plan and implement the company's long-term growth strategies, and to the external stakeholders affected by corporate actions.

An ethical culture can take root when the business effectively manages problems and reaches values-based solutions. However, where human rights are seen to add value to the company - beyond simply avoiding risk - human rights values have an opportunity to flourish. "Automobile companies know that their future depends on their ability to develop environmentally safer forms of mobility. Food companies are struggling to develop a different consciousness about how their products affect their customers' health. And pharmaceutical companies are exploring how to integrate health maintenance into their business models alongside their traditional focus on treating illnesses."<sup>58</sup>

## **B) LEAD WITH THE RIGHT INCENTIVES**

The development of an ethical corporate culture starts with active and effective leadership from the top. Responsibility for ensuring the existence of an ethical culture ultimately resides with the directors and with the senior executive team, as the US Congress recognized in its amendments to the Sentencing Guidelines.<sup>59</sup> The real value of leadership consists in the enduring attention given to ethical issues outside of crisis situations; *i.e.*, in the daily actions of business leaders, managers, and employees that align with and communicate a deep commitment to stated ethical values.

Parents and teachers know instinctively that a leader should model expected behavior, and good leadership is inherently moral. Employees are quick to sniff out the hypocrisy of a corporate leader who emphasizes the importance of integrity in statements to corporate stakeholders, yet engages in ethically questionable, self-serving personal conduct. Such behavior unfortunately becomes part of the company's real values: *i.e.*, ethical restrictions apply only to the troops but not the generals.

The first step is to align incentives with human rights values; conduct that respects human rights must be rewarded, and conduct that does not must be discouraged, with penalties up to and including termination. This happens when senior leaders embed human rights values in hiring and promotion decisions, performance review, compensation, and incentive programs that reward effective implementation of values and punish transgressions. When push comes to shove, there must be a willingness

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<sup>57</sup> Zadek, *The Path to Corporate Responsibility*, *Harvard Business Review* (2004) (Zadek).

<sup>58</sup> Zadek, *supra*, p. 3. As one example, the "Women Go-Beyond" program of MAS, a large Sri Lankan clothing manufacturer that supplies world-wide brands, empowers and improves the work lives of its predominately female workforce. MAS has adopted this program as part of a strategic plan to grow its business by differentiating itself through the use of co-branding and ethical codes. In this environment, shared human rights values have become deeply embedded throughout all levels of the company. "MAS and the Women Go Beyond Programme," in *Embedding Human Rights into Business Practice*, UN Global Compact 2007 (EHRBP) p. 88, available at: [http://www.ohchr.org/Documents/Publications/Embedding\\_II.pdf](http://www.ohchr.org/Documents/Publications/Embedding_II.pdf)

<sup>59</sup> See note 37, above.

even to lose business if it involves the wrong course of action in terms of human rights considerations—and correct incentives reinforce that willingness in the heat of the moment.

More than one BLIHR company, for example, uses corporate responsibility targets in their performance appraisal processes, to spread those targets widely throughout the organization, not confining them to legal or CSR silos. Some of the BLIHR companies compensate executives not only on how well they meet their economic performance goals (their “What” goals), but also on whether they have achieved them in an ethical manner that reflects their values (their “How” goals). This includes evaluation of whether they have set the right ethical goals, whether they have built the right systems, whether they have built high ethical standards into their business processes, how they manage ethical crises, how they conduct global-compliance reviews, how they make integrity resource decisions in tough markets, and whether they put their best players in jobs where it is important to fuse high performance and high integrity. Executives who achieve their economic goals but do so unethically can be and have been disciplined, up to and including dismissal.<sup>60</sup>

### **C) DISTRIBUTE OWNERSHIP OF HUMAN RIGHTS GOALS**

In a pure compliance culture, by contrast, responsibility for meeting compliance goals often is in the hands of a relatively small group who have the responsibility to keep the company out of trouble. In an ethical culture, however, responsibility for meeting ethical standards is spread throughout the business. Defining values in a participatory fashion, involving employees and other stakeholders—in ways that connect human rights to the company’s core business goals, strategies, and broader ethical values—can reinforce a sense of ownership of human rights goals.

This ownership of ethical and human rights responsibilities, by the respective leaders of business functions and units, cascading down to the individual employee level, promotes broad awareness of and effective actions on human rights issues. Such ownership helps bridge the divide between rhetoric and action. Gap's and GE's efforts to distribute such ownership are good examples.<sup>61</sup>

### **D) CARE ABOUT AND RESPECT THE HUMAN RIGHTS OF OTHERS**

A shrunken sense of corporate responsibility leads to the belief that potential human rights victims are so distant - due to geography, indirect causation, lack of clear legal duty, absence of company intent to harm, or otherwise - that the company need not concern itself too much about human rights. In a culture that embraces human rights, by contrast, a broader, more empathetic vision of moral responsibilities is evident both for the company generally and the individuals that constitute it.

Individual employees and managers occupy a moral space in which they owe obligations to those whom they encounter. So do companies. Employees and managers may readily understand that the company owes moral duties to safeguard fellow employees with whom they can readily identify. However, without training and communication, employees and managers may not as readily grasp that the company owes moral duties and perhaps even legal duties to the employees of suppliers, in remote locations, particularly those whose behavior the company can influence.

Respect for human rights is grounded in empathy. As applied to companies, empathy requires that a company identify its stakeholders—i.e., those who are affected by its conduct, such as employees, investors, customers, suppliers, government,

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<sup>60</sup> Heineman, “Avoiding Integrity Land Mines,” *Harvard Bus. Rev.* (April 1, 2007).

<sup>61</sup> For example, The Gap emphasizes the connection between safe, healthy, and fair working conditions and happier, more productive, longer-term employees. Strategic philanthropy at The Gap emphasizes underserved youth and women, needy populations from among The Gap’s current and future customer and employee base. In a New York project called “This Way Ahead”, employees teach life skills such as conflict resolution and communication that help address poverty by helping locate jobs and building sustainable capacities to succeed, which in turn inspires and builds a sense of ownership among all those participating. Such values also inform similar projects The Gap runs for women in Africa. In its efforts to drive a culture of integrity, GE assigns responsibility for achieving that goal to individual business leaders. As one GE executive told us, “a mere ‘Code’ approach cannot possibly recognize the infinite variety of situations to be addressed; it confuses an external approach with the required internal approach that relies on responsible people charged with leadership.” GE’s plant managers are thus formally responsible for resolving environmental, health and safety issues in their operations, its consumer finance leaders are responsible for embedding legal and ethical requirements into their businesses, the sourcing executives in individual businesses are responsible for adhering to its ethical sourcing guidelines, and its M&A teams have the responsibility of conducting due diligence that identifies potential ethical landmines. Legal, HR, and Finance develop integrity tools for the businesses, and through their close involvement in company strategic decisions, make sure that their voices are heard.

regulators, local communities, and wider society—and to see the world from their viewpoint. Indeed, as noted above, the UK Companies Act of 2006 now requires that companies consider the impact of its decisions on such stakeholders. The rights, legitimate interests, expectations, and claims of the stakeholders may arise from many sources, including law, contracts, industry standards, professional codes, organizational policies and norms, personal moral values and accepted ethical principles, all of which can give rise to human rights issues. Of paramount importance is openly and respectfully listening to and acknowledging concerns and issues of these stakeholders. So many disasters, scandals, and tragically missed opportunities stem from failure to do so. This seems simple, but it often takes extraordinary effort to bypass biases, hierarchical or peer pressure, and naturally defensive thinking.

Human-rights training and communications - of suppliers and contractors as well as employees - are vehicles through which companies can help executives, managers, employees, and contractors understand their expanded responsibilities in a global economy. This usually must start with basic information about what human rights are - the rights arising from merely being human that are recognized in the Universal Declaration of Human Rights and the leading international instruments - and why they are relevant to the company and its business.

As Harvard Business School Professor Joseph Badaracco observed, “We pay far too little attention to the inner lives of leaders. A lot of what you learn in business school seems to suggest that you can treat executives like lab animals whose behavior can be controlled if you get the environment right. Pay-for-performance systems, for example, assume that the right pellets, like stock options, will produce the right behavior.”<sup>62</sup> Therefore, training should engage the inner lives of its target audiences by focusing on hard cases and dilemmas - including issues of rights versus rights, or rights versus production or operational goals. Because they engage our whole brains and being, theater, stories, literature, multimedia techniques, scenario-planning, and role-playing help build in the sensitivity, empathy, and capacity for ethical reasoning required to enhance the chances that such dilemmas would be resolved fairly and effectively.

Theater and role-playing are especially effective means of inculcating anti-discrimination values and respect for diversity (which depends on engaging the emotions and understanding the other’s perspective). For example, when a Levi Strauss contractor was considering a joint venture in El Salvador, its human resource director moved to El Salvador from Mexico for six months and played several roles - a reporter, a churchgoer, a worker, and a neighbor - in order to learn the local culture and identify differences that exist between the two countries (despite a common language and religion).<sup>63</sup>

## **E) APPRECIATE THE POWER OF ASKING QUESTIONS**

Gut level reactions to ethical problems (such as the ‘sniff’ test) will always have value. But they must be supplemented by rigorous, systematic ethical analysis to supplement the usual cost/benefit analysis taught in business schools. Cost/benefit analysis can be quite misleading if it is narrowly applied, since it may not detect potential ethical landmines that could destroy the company’s reputation and market position if ignored; in particular, it may fail to distinguish the moral difference between the costs of rights and the costs of interests. The well-known Ford Pinto example made clear that equating the saved costs from unsafe vehicles with the costs of wrongful death suits is wrong, since the rights of the victims morally trump the interests of the company in saving money.<sup>64</sup>

Encouraging managers and employees to ask questions is an overlooked but powerful ethical tool. Harvard Business School Professor Lynn Sharp Paine has developed a “moral compass” which consists of a series of questions designed to bring out the often hidden ethical issues in a business decision:

- What worthwhile purpose is served and are we within our power and rights to take the action?

<sup>62</sup> Badaracco, *Leadership In Literature*, Harvard Business Review (March 1, 2006).

<sup>63</sup> Radin, *The Effectiveness of Codes of Conduct: Role Models That Make Sense*, Business and Society Review, 109:4, 429-440 (2004).

<sup>64</sup> Paine, *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance* (McGraw Hill 2003), Chapter 8 (“A Moral Compass”), pp. 199-226. (Paine).

- Is the action consistent with the relevant principles from law, ethics, and other sources (which in the case of human rights would include international human rights and humanitarian law and Soft Law Norms)?
- What stakeholders will be affected by the company's actions, and how will their rights, legitimate interests, expectations, and claims from various legal or ethical sources be respected?
- Of the various alternative actions that the company can take, which best serve the interests of all of the company's stakeholders by minimizing harm and optimizing opportunities for mutual benefit?<sup>65</sup>

Asking and answering these questions requires time, organizational human rights literacy, courage, flexibility, imagination, and perhaps most important, empathy. It's a way to illuminate the moral space in which a company operates.

For both companies and individuals, a key issue in a complex ethical and moral decision is how to balance different duties owed to competing stakeholders. This requires an assessment of the relative strengths of the rights and interests affected by the company action, with the understanding that 'rights' trump 'interests.'<sup>66</sup> The examination of alternatives and the balancing of duties is not an easy one, and the balance is not just a matter of pleasing all parties. Moral judgments must be made and rights-sensitive decisions will favor human rights even over otherwise tempting short-term economic considerations.<sup>67</sup>

## **F) LISTEN TO HUMAN RIGHTS PROBLEMS AND FIX THEM**

Despite the best plans, problems inevitably occur. Even the best functioning and most responsible companies can discover problems in areas like child labor that they did not anticipate (because, for example, they arose from ancillary businesses or suppliers). But companies must encourage bad news to travel upwards quickly to enable senior management to ensure that they are fixed promptly and that systems avoid recurrence.

### **(1) Open and Trusting Environment**

Creating an environment for this is a challenge, however, since employees are naturally reluctant to report bad news for fear of retaliation, disapproval, or just not being considered a team player. Defeat is an orphan; victory has many fathers. For example, a key contributing factor to the 1986 Challenger space vehicle disaster was the reluctance of the spaceship's builder and designer, Morton Thiokol, to inform its customer, NASA, of the likelihood that the spaceship would have problems launching in cold weather. The reluctance to report bad news is especially acute in larger, more complex, and more dispersed global organizations such as today's transnational corporations, with leaders from often remote from operations and each other.

To reinforce the value of respecting human rights, leaders should create an open and trusting environment that encourages the reporting of accurate information - good or bad - on a timely basis. This places a premium on internal transparency and systematic study of failures. One might argue that it is better not to know of problems since knowledge may create a duty to address them effectively, the failure of which might give rise to legal liability. But companies can lower their risk profiles only by discovering and solving problems before they become massive and intractable and break out into the public arena through litigation and divestiture campaigns. A company must manage its risks, and cannot manage risks that it ignores.

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<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> For example, ABB, a large Swiss electro-engineering company, wrestled with balancing competing human rights values in the Sudan, where the electric transmission and distribution equipment it was supplying for Merowe dam project in the Sudan would have supported such key human rights as the rights to education, health and housing, but would also have led to displacement of people and an environmental impact. ABB, like other companies, was under strong pressure from NGOs to leave Sudan as a result of human rights atrocities in Darfur (where ABB had no direct presence and paid no taxes to the government), but a number of stakeholders in Sudan wanted ABB to stay because of the human rights value it provided. Ultimately, ABB's senior management suspended its business in Sudan after engaging in extensive stakeholder engagement and consultation. ABB's efforts highlight the need to develop a common framework for working in sensitive countries that is recognized by all key stakeholders, including business, governments, NGOs, investors, and legislators. *ABB and Sudan: the values of stakeholder engagement*. EHRBP, p. 29; see also, e.g., <http://www.abb.com/cawp/seitp255/74168f7a72d50e7ec1256c6a00487101.aspx>

## (2) Confidential Hotlines

Confidential hotlines, which permit employees to make anonymous reports about corporate misconduct via phone, email, or web, have become a standard corporate practice. They are maintained globally by many multinational companies, and are mandated by law and regulation in the US and the UK. However, they are regarded with distrust in many European and other countries due to concerns over data privacy and possible abuse. They do not fit well into corporate cultures in countries with the memory of totalitarian regimes, which encouraged citizens to spy and report on one another. Significant issues also arise when companies are complicit in failing to respect data privacy, as in the recent case of Yahoo disclosing journalist names to the Chinese authorities.

While confidential hotlines have their place - i.e., to protect the identities of employees who are afraid to come forward for various reasons - they do not substitute for a broader affirmative commitment by companies to encourage the reporting of problems, to investigate and resolve those problems on a timely basis, and to identify and fix any systemic issues that are revealed.<sup>68</sup> Listening to and addressing such complaints can be a source of continuous learning and improvement as to the real impact of company operations on human rights.

## (3) Conflict Management

In his April 7, 2008 report on Protect, Respect and Remedy, the SRSG stated that in order to discharge their duty to respect human rights, companies should employ effective human rights grievance procedures. Such procedures are means of managing risk, which are often preferable to fighting lawsuits or divestiture campaigns. Integrated conflict management systems arose in the 1990s to resolve workplace conflicts in response to failures in corporate culture, the increased costs of litigation, and corporate crises, among other factors. The systems varied from company to company, but typically are intended to encompass all types of disputes, are embedded in a culture that is open to the resolution of conflicts, offer multiple access points, provide non-litigation options to resolve conflicts, and are well supported by the company. They are designed to enable the company to resolve individual disputes fairly, quickly, and at low cost - the traditional justification for non-judicial dispute resolution. But they also enable companies to learn from those conflicts and fix systemic problems in order to prevent their recurrence. A number of very different organizations have implemented and reported favorably on the use of such systems in the workplace, including the World Bank, the US National Institute of Health, the Royal Canadian Mounted Police, the US Air Force, and the US Postal System.<sup>69</sup>

Of particular relevance to human rights is the use of such conflict management techniques as “transformative mediation,” which recognizes that unresolved conflict can give rise to a vicious cycle of mutually destructive, alienating, and dehumanizing character. Transformative mediation is designed to resolve not only the immediate dispute, but also to restore the parties to a sense of individual strength and recognition of the other side’s viewpoint, thereby reducing dramatically the number and severity of complaints. Mediation techniques that emphasize the importance of mutual empowerment and recognition are particularly well suited to address conflicts between companies and their external stakeholders.<sup>70</sup> Human rights conflicts between companies and these stakeholders are typified by a lack of voice, and a failure to understand or recognize the other side’s interests, giving rise to a vicious cycle of mistrust and alienation. Human rights conflict management systems provide companies not only with the opportunity to learn from their mistakes.

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<sup>68</sup> GE maintains an internal ombuds system that serves as the ‘voice of the employee’ to ensure that employees may lodge concerns directly with the ombuds function or through multiple alternative avenues, “anonymously if they wish, without fear of retaliation. More than 500 people serve in a full- or part-time ombudsperson capacity around the globe. Receiving reports in 31 languages, and more than half from outside the US, the ombudspersons act as neutral intake points, referring concerns to financial, legal, and HR staffs for investigation.” Review with GE’s ombuds department confirmed that a substantial percentage of the complaints received have human rights dimensions (although these are often phrased in other terms). “The ombudspersons are also responsible for ensuring follow-up on all of the issues brought to their attention to ensure prompt resolution and to keep the reporting employees apprised of the status of their concerns.” Heineman, *supra*, note 64, pp. 8-9.

<sup>69</sup> Walker and Deavel, *The Strategic Relationship between Ethics and Dispute Resolution: What Every CEO Should Know*, 8 Pepperdine Dispute Resolution Law Journal, (2008); Bingham and Novac, *Mediation’s Impact on Formal Discrimination Complaint Filing: Before and After the REDRESS™ Program at the US Postal Service*, 21 Review of Public Personnel Administration (2001); Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 Harvard Negotiation Law Review (2003); Menkel Medow, *And Now a Word About Secular Humanism, Spirituality, and the Principle of Justice and Conflict Resolution*, 28 Fordham Urban Law Journal (2001); and Bush, *Handling Workplace Conflict: Why Transformative Mediation?* 8 Hofstra Lab. & Emp. L.J (2001).

<sup>70</sup> Siedel, *The Role of Business Deal Making and Dispute Resolution in Contributing to Sustainable Peace*, 44 Am. Bus. L.J. 379 (2007).

They also provide companies with the opportunity to transform their relationships with external constituencies from vicious cycles of mistrust and alienation to virtuous cycles of empowerment and recognition.

## G) USE EFFECTIVE ASSURANCE MECHANISMS

In order to embed respect for human rights as a shared value that drives behavior, a company must know whether its actions align with its stated goals – otherwise, its goals will be little more than rhetoric. To do this, a company must have rigorous, system-wide assurance mechanisms and measurements - such as measuring, monitoring, and auditing - to know whether it is complying with its own standards and policies. These mechanisms can range from human rights impact assessments for major projects to monitoring of ongoing operations. They guide actors at all levels of the company, ranging from board-level committees to the employee on the factory floor, to enable all to meet the same human rights metrics and goals. Merely relying on representations and self-certifications, without more in-depth examination and assurance, does not suffice. A company's external stakeholders now expect to be able to look at the measures of a company's human rights performance with confidence that the quantitative and qualitative assessments reflect reality.

### (1) Auditing

Just as announced audits should be supplemented with unannounced audits,<sup>71</sup> so too should internal self-audits be supplemented with independent external audits and verification, as the U.S. Department of Labor<sup>72</sup> and United Nations agencies<sup>73</sup> have recognized. Independent external audits were used even in early human rights corporate accountability efforts such the effort to confirm corporate compliance with the anti-apartheid Sullivan Principles, and are envisioned by contemporary standards such as SA8000 and the Fair Labor Association.<sup>74</sup> But even nominally independent audits may not be independent in fact if, as is often the case, the auditors are easily deceived,<sup>75</sup> or shade their audits positively in order to keep the business in the future.<sup>76</sup>

Thus, the emerging best practice in auditing takes its cue from the corporate scandals of recent years to enforce rotation of auditors and design auditing regimes that involve truly independent actors, including NGOs.<sup>77</sup> In addition to independence, recent best practice also emphasizes audit thoroughness and transparency. Still, although the best firms increasingly use independent audits for human rights issues, only a small minority of firms does so.

Important as these assurance mechanisms are, they have limitations in detecting cultural issues that are not easily quantified. Although audits of factory suppliers on human rights grounds have been happening for over a decade, to date there is no agreed-upon common methodology or uniform accreditation for factory human rights audits globally, and the audits typically do not readily detect cultural issues. Indeed, in one case, two apparel suppliers in the same country passed a rigorous compliance audit by their buyer, but one had severe labor problems. The difference, it turns

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<sup>71</sup> As contrasted, e.g., with Wal-Mart's audits, which Women's Wear Daily and others reported were less than 1% unannounced audits for many years, and litigation in 2005 confirmed were only in single digit percentages that were raised to 20% in 2005 and 26% unannounced in 2006 (at which level the company expects them to remain). See e.g. Wal-Mart, "Ethical Sourcing Report" 15 (2006), available at:

[http://walmartfacts.com/reports/2006/ethical\\_standards/documents/2006ReportonEthicalSourcing.pdf](http://walmartfacts.com/reports/2006/ethical_standards/documents/2006ReportonEthicalSourcing.pdf)

<sup>72</sup> Bureau of Int'l Labor Affairs, U.S. Dep't of Labor, *The Apparel Industry and Codes of Conduct: A Solution to the International Child Labor Problem?* P.17 (1996).

<sup>73</sup> See, e.g., UN Development Report 2000, at 89, 105, (2000)(confirming the contribution that independent monitors make to corporate accountability, and describing Mattel's Independent Monitoring Commission), available at: [http://hdr.undp.org/en/media/hdr\\_2000\\_ch5.pdf](http://hdr.undp.org/en/media/hdr_2000_ch5.pdf)

<sup>74</sup> Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 Law & Pol'y Int'l Bus. 111, 143-44 (1998). The Extractive Industry Transparency Initiative also requires independent audits to reconcile financial figures.

<sup>75</sup> Which happens frequently, according to empirical academic studies, e.g. Kai-Ming Liu and Shen Tan, *Kuaguo Gongsi De Shehui Zeren Yu Zhongguo Shehui [Corporate Social Responsibility in China]*, 76-9 (2003), discussed e.g. at <http://austlii.law.uts.edu.au/au/journals/MULR/2004/10.html#fn122>, or Dara O'Rourke, "Monitoring the Monitors: A Critique of Corporate Third-Party Labour Monitoring" in Gill Seyfang, Rhys Jenkins and Ruth Pearson (eds), *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy* (2002), and the popular business press (e.g. Dexter Roberts and Pete Engardio, "Secrets, Lies and Sweatshops: How the Chinese Suppliers Hide the Truth from U.S. Companies," *Business Week*, Nov. 27, 2006).

<sup>76</sup> A risk highlighted in the ILO's 2002 Code of Conduct Implementation Study.

<sup>77</sup> Id. On the explosion of the practice and a cottage industry surrounding auditing, see e.g. Power, Michael, *The Audit Explosion* (Oxford: Oxford Univ. Press 1997). Transnational corporations which have involved NGOs in external audits of operations include Chiquita (which has worked with the Rainforest Alliance and the Sustainable Agriculture Network) and the apparel firms working in the Fair Labor Association.

out, was in the differing management systems, practices, and cultures of the two factories. The more successful factory paid higher wages, but it also engaged in teamwork, multitasking, job rotation, worker participation in factory decisions, and voluntary as opposed to mandatory overtime. The audit did not detect this difference.<sup>78</sup>

Over time, human rights audit methodologies and results should improve. There is no inherent reason why human rights audits cannot include attention to management systems and root cause analysis, and that certification criteria and standard protocols for auditors cannot be agreed upon.

## **(2) Metrics**

It is a truism that a company cannot manage what it cannot measure. The key to ensure that the human rights metric is integrated into the strategy and operations of the unique organization, and where feasible, enables comparison with other companies and industries.<sup>79</sup> The human rights assurance mechanisms that enable a company to know whether its values are real must be supported by adequate measurement metrics. By distilling large volumes of data into easily understood pieces, metrics enable companies to see how they are doing, to find out whether their programs are working, to make corrections to improve performance, to communicate to internal and external stakeholders, and to assess whether individual executives achieve their financial and operational goals in a manner consistent with the company's values.

Metrics are only as useful as they are appropriately selected and accurate, and correctly implemented: improper collection and fraud will distort data. However, even the best-designed metric contains the danger of leading managers to conclude that hitting the numbers are the only things that matter. This reinforces a flawed check-the-box compliance approach, which places greater weight on the numbers than on the conduct that it is trying to measure. For example, the Baker Panel criticized the company for relying too much on past safety incidents (a lagging indicator) rather than on assessments of the future likelihood of refinery process accidents (leading indicators).<sup>80</sup> A company should use both.

Metrics can be designed to track performance with respect to particular human rights. For example, a recently proposed human rights grievance program for companies includes a variety of metrics, including the number of complaints received, the time it takes to acknowledge them, the number of cases resolved without the intervention of a third party, the reduction of similar grievances over time, the reduction of grave complaints over time, surveys of complainants who report the process as fair, changes in company policies brought about as a result of the grievances, etc.<sup>81</sup>

## **(3) Surveys and Questions**

Employee surveys can supplement audits by measuring whether human rights values are internalized and manifested in everyday decisions and actions. Different forms of surveys can be used alone or in combination. Broad-based, periodic surveys of the entire employee population are critical to obtaining an accurate enterprise-wide view. Another option is focused complementary surveys of a smaller selection of employees on specific issues pertaining to Code of Conduct issues and what's perceived as working versus what's seen as flawed.

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<sup>78</sup> Locke and Romis, *Beyond Corporate Codes of Conduct: Work Organization and Labor Standards in Mexican Garment Factories*, CSR Initiative at Harvard JFK School of Government (2006).

<sup>79</sup> Chatterje and Levin, *Breaking Down the Wall of Codes: Evaluating Non-Financial Performance Measurement*, California Management Review (2006).

<sup>80</sup> Baker Report, supra, pp. 22-23.

<sup>81</sup> *Rights Compatible Grievance Mechanisms; A Guidance Tool for Companies and their Stakeholders*, Corporate Responsibility Initiative, JFK School of Government, Harvard University (January, 2008). Available at [www.ksg.harvard.edu/m-rcbg/CSRI/pub\\_main.html](http://www.ksg.harvard.edu/m-rcbg/CSRI/pub_main.html) ("grievance mechanisms").

The surveys should comprehensively and confidentially question issues of responsibility, communication, ethics, openness, human rights and other internal policy and external legal compliance, and values.<sup>82</sup> Compilation of the anonymous responses should be conducted by an independent and qualified outside firm to assure objectivity.

As noted earlier, questions are a powerful and often underutilized tool in allowing individuals and companies to tease out the ethical and human rights implications of their decisions and behavior. Questions also play an important role in enabling a company to assess its values and culture. Included in Appendix A is a suggested set of open-ended questions to enable a company to begin to diagnose its human rights values by engaging in dialogue with the organization.

## **H) APPRECIATE LOCAL CULTURES WITHOUT DEROGATING RESPECT FOR HUMAN RIGHTS**

Local cultural variability is one of the more difficult issues facing a company that wishes to implement uniform values of respect for human rights throughout its worldwide operations. Values vary from department to department within a company, from company to company within a sector, from sector to sector, and from country to country. Drivers of variability include tradition, markets, regions, and cultures in which they operate and compete. The differing emphases that a company may place on such corporate goals as product quality or service reliability, customer satisfaction, flexibility, and technology, will also foster different cultures and produce varying strategies, structures, and measures of success. Moreover, values are not static, but are dynamic and evolve as companies form, grow, shrink, and respond to new challenges. A company that wishes to embed human rights values throughout its organization may be confronted by problems due to this dynamism and variability, particularly by cultural differences in the various countries into which the company has expanded and where its employees or contractors work.

The debate over cultural relativism versus universality of human rights is not new. It was much discussed at the time of signing the Universal Declaration of Human Rights in 1948 and again at the 1993 UN World Conference on Human Rights in Vienna. In both cases, some nations (such as Saudi Arabia in 1948 and certain Asian nations in 1993) argued that the meaning of human rights should vary according to the context in which they were applied, whereas most other nations saw such cultural relativism as counter to the universality of human rights.<sup>83</sup> The Conference's final Vienna Declaration stated that "while the significance of national and religious particularities and various historical, cultural, and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."<sup>84</sup> This means that companies should permit sensible variation where human rights and fundamental freedoms are not really affected, but do their best to maintain high and consistent global standards when it comes to such rights and freedoms. This will require the company to exceed the requirements of local law when local law falls below international human rights standards.

In practical terms, the challenge of cultural diversity requires a company to proactively understand and appreciate local values in universal context, in order to overcome an "us versus them" attitude. For example, concepts of the inherent worth of the individual and freedom clearly are not exclusively Western values; they reflect deeply-rooted non-Western values as well.<sup>85</sup> Western countries are not free from human rights problems; there are over 100,000 cases pending before the European Human Rights Commission, for example. Objective scientific evidence is clarifying the emotional and physical damage done by certain traditional practices, such as female genital mutilation or corporal punishment of children, which are now widely seen as legitimate issues of universal human rights not based on a disdain for non-Western culture and customs. And a corporate

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<sup>82</sup> For examples of approaches (tailored to ethics generally more than human rights in particular), see, e.g., [http://www.emergeinternational.com/content/CHI\\_FAQS.html](http://www.emergeinternational.com/content/CHI_FAQS.html); <http://www.ethics.org/research/surveys-and-benchmarking.asp>

<sup>83</sup> Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 *Emory Int'l L. Rev.* 391 (2001).

<sup>84</sup> World Conference on Human Rights, June 14-25, 1993 Vienna Declaration and Programme of Action, P 5, U.N.Doc A/CONF.157/231 (July 12, 1993), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En) (Vienna Declaration).

<sup>85</sup> E.g. Amartya Sen, *The Argumentative Indian: Writings on Indian Culture, History, and Identity* (London: Penguin Books, 2005), at 284 (citing the example of the emperor Ashoka in India who in the third century BCE published laws calling for freedom for all, and not excluding "women and slaves as Aristotle did"); see also, e.g., Karen Armstrong, *The Great Transformation: The Beginning of Our Religious Traditions* (2006).

culture that respects and promotes human rights as part of its strategic vision is just as likely to arise in a Sri Lankan apparel supplier (such as MAS Holdings) as it is to arise in Denmark.

Respecting local values without derogating respect for universal human rights could therefore involve the following steps, among others: focusing on proactively addressing those issues at the interface of the global/local, especially through dialogue and creative solutions that nevertheless respect and protect fundamental rights; understanding and celebrating local accomplishments as well as challenges; emphasizing that all regions have human rights problems; making human rights communications very practical, with clear explanations of concrete benefits (e.g. meeting the expectations of partners and growing the business in ways that benefit all concerned); cultivating and demonstrating knowledge of local culture; identifying change agents to assist with mediating divergent perceptions; and nurturing local ownership of visions, strategies, etc.<sup>86</sup>

Meeting these challenges is not easy. In its experience in implementing the Danish Human Rights Compliance Assessment Tool, for example, Shell found that due to the sometimes politicized nature of human rights, talking with employees about “human rights” could have negative consequences for them, that some recommendations may not fit local realities (e.g., local governments may not respect individual rights of privacy), that residents of countries don’t like to be told that they are deficient in human rights, and that the ‘made in Denmark’ brand of the compliance assessment tool may not go over well in the Middle East. It observed that unless care is taken with these local sensitivities, the tool could devolve into a check-the-box exercise.<sup>87</sup> In its efforts to implement a living wage in the 60 countries where it did significant business, Novartis developed a market basket approach that factored in local and regional differences and involved local governments, communities, employees and managers deeply in the process. It was able to achieve this goal notwithstanding difficulties in collecting the data, and the need to take into account the impact of its salaries on local markets.<sup>88</sup>

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<sup>86</sup> Conversation with Sune Skadegaard Thorsen, BLIHR Advisor.

<sup>87</sup> EHRPB, pp 69-70, available at [http://www.ohchr.org/Documents/Publications/Embedding\\_II.pdf](http://www.ohchr.org/Documents/Publications/Embedding_II.pdf)

<sup>88</sup> EHRBP, pp. 130, 133, 135, available at: [http://www.ohchr.org/Documents/Publications/Embedding\\_II.pdf](http://www.ohchr.org/Documents/Publications/Embedding_II.pdf)

# CONCLUSION

This Guide has treated laws, norms, and values as relatively distinct subjects for human rights accountability. It is important, however, not to overdo the separation. All three areas operate synergistically and dynamically. That is, values that embrace human rights support compliance with law and norms. And knowledge of law and norms reinforces values. For example, decisions of governments to prosecute companies are driven by perceptions that those companies are bad actors. Those perceptions in turn are driven by whether those companies abide by the spirit as well as the letter of the law; i.e., whether they fulfill society's norms of responsible corporate conduct. And whether companies actually live up to those social norms is driven by the values inherent in their corporate cultures. The three parts of accountability discussed in this Guide are part of an interactive system in which changes to one affect the others. Corporate human rights accountability, therefore, depends on a proper understanding of all relevant external standards and upon internalization of those standards, through leadership and sound management, into real values that support human rights and prevent their abuse.

# APPENDIX A: CULTURE DIAGNOSIS

A good way to start to understand a company's culture is to engage in dialogue with those who run the business. A reader of this paper with experience in organizational culture and learning created this list of questions to start the dialogue.

Since the time for reflection and dialogue in companies is highly limited, here is an effective and efficient approach.

- Convene a group from across the business for 1.5 hours and discuss the questions (ideally a cross-functional and senior group)
- Send out the questions to a sample of (e.g. 50) employees and ask for their anonymous written input (the questions can be easily adapted to become multiple choice in terms of level of agreement – hence providing quantitative data)
- Request a third party to interview a sample of people across the business where their decisions and actions have an inherent human rights risk or opportunity

The questions follow:

## 1. IN ESSENCE

- Expanded moral vision: How does your business purpose and identity align with the big challenges facing the world — including human rights, environmental challenges, competition for natural resources and global rule of law?
- Culture and Values: How would you describe the culture and values at your company? Do you have a clear sense of what drives behavior from day to day - regardless of human rights concerns?
- Perception: Who really understands your current company culture and what drives and influences people? Is there a shared picture of this in your organization? Would stakeholders agree?

## 2. VALUES, RULES AND ASSUMPTIONS

- Connecting Human Rights to your Real Values: What are the shared values of your business are and how do they connect to your human rights obligations (using for example, BLIHR's essential steps)?
- Spoken v Unspoken Rules: When it comes to human rights, what are the implicit rules and tacit assumptions that allow the business to lead?
- Wallet Cards: What would pocket cards in your business say? Are there implicit or tacit words - good or bad - that should be included? What messages do people really get about what behavior works?
- Daily commitment to Human Rights: Can you provide an example of a daily - or maybe weekly - action that an individual or individuals in your business take that fits this description? What drove the birth of this behavior in the first place?

## 3. CONFRONTING ISSUES AND DILEMMAS

- Human Rights Pressure Points (i.e., disincentives for respecting or promoting human rights, such as time pressure, conflicting corporate goals, etc.): What are these for your business? What do you think they are for your sector?
- Challenges: What are the top three challenges for your company to create an ethical culture? Can you provide stories/examples of where you have recognized and overcome/dealt with these challenges
- Limits of Cost Benefit Analysis (Ford Pinto Example): Is there an example in your industry of such a clear dilemma? How has it been dealt with? What was the process to reach the end decision?

- D. Listening to Bad News: Is your business good at hearing the voice of the minority or the ‘irritant’? Are people the ask questions labeled as ‘stalling’ or ‘ineffective’? How does your business create opportunity for challenge and critique in the day to day running of the business? In which part of your business is this essential?

#### **4. LEADERSHIP**

- A. What examples do you have of a leader in your business inspiring others into ethical action? What was the story? When, where, how, what, who, context etc.?
- B. Translating human rights into business language: Are your business leaders good at taking complex ideas and communicating them in language that works for others? Where else in the normal running of the business is this critical? Who is really good at it and how did they get good at it?
- C. Entrepreneurship/Autonomy v. Acting Ethically: How does your business balance this in the course of doing business and driving profit?
- D. Participation of Wider Group of Stakeholders in Company Vision: Are cross-functional groups common in your business? If so, what has driven their creation in the past? Have you used them in relation to human rights specifically?
- E. Making ethical decisions: What approach, framework or set oOf questions does your company use? Who is involved in the dialogue and when are matters discussed? Are they given time?

#### **5. PROCESSES, PROCEDURES, DRIVERS**

- A. Helps and Hindrances: What aspects of your business purpose, identity, vision, strategy, policies and procedures enable effective responses to human rights risks and opportunities? What aspects constrain?
- B. Incentives/Disincentives: How does your business incentivize ethical behavior? How does your business incentivize - unintentionally or as an unintended consequence - unethical behavior?
- C. Organizational cultural variability: Are you clear what drives behavior and responses to human rights issues of different functions (e.g. CSR, HR, Procurement, Marketing, Strategy, and Legal)? Are you aware of the different cultures of certain disciplines and departments in your business? If so, how do they impact the business’s approach to human rights?

#### **6. LEARNING AND GROWTH**

- A. Experiential learning: Does your company make use of these experiential and possibly ‘life changing’ interventions? Would it work in your business? Why? What allows it? Why not? What would get in the way?
- B. How do you existing leadership development and education opportunities support or undermine the behaviors that human rights or other ethical training interventions make?

**Links:** Pdf versions of this report can be found at:

[www.blihr.org](http://www.blihr.org) and [http://www.hks.harvard.edu/m-rcbg/CSRI/pub\\_reports.html](http://www.hks.harvard.edu/m-rcbg/CSRI/pub_reports.html)