



International Chamber of Commerce

The world business organization

The Secretary General

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7 September 2004 MLC/SB/am

Subject: Request for input on report concerning the “Responsibilities of transnational corporations and related enterprises with regard to human rights”

Dear Mr Kedzia,

I am writing in response to your letter of 29 June requesting input from the International Chamber of Commerce (ICC) towards a report of the High Commissioner for Human Rights concerning the “Responsibilities of transnational corporations and related business enterprises with regard to human rights”.

Let me start by thanking the Office of the High Commissioner for Human Rights for giving ICC the opportunity to contribute to this report.

Since its foundation in 1919, ICC, through its core mission of promoting international trade and investment and the market economy, has sought to contribute to the realization of human rights, in particular, economic and social rights. ICC therefore applauds the priority accorded by the United Nations Commission on Human Rights to the question of business and human rights. While ICC considers that the establishment of the legal framework for protecting human rights and its enforcement is a task for governments, we also believe that business has an interest in encouraging the improvement of social conditions, including by providing an example of good human rights practices, as these are an essential factor for stable development.

ICC believes that responsible entrepreneurship is the driving force for sustainable economic development and for providing the managerial, technical and financial resources needed to meet social and environmental challenges, including the improvement of human rights. Through their international activities, companies often make important contributions to the improvement of living and working conditions essential to the enjoyment of human rights. By investing in production facilities and purchasing goods and services from local firms, they help to create jobs, develop skills and know-how, act as a vehicle for the transfer of

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technology and improve productivity and competitiveness. In this way, companies strengthen the economy in the countries where they operate, thereby making an important contribution to the enjoyment of human rights, particularly economic and social rights.

Furthermore, business actively supports human rights since protecting human rights benefits all actors in society, including private enterprise. Indeed, business and human rights defenders share support for the policies and institutions needed to protect human rights: democracy, the rule of law, independent courts, free speech, individual liberty, and freedom from arbitrary government action, to name just a few. ICC and the business community in general are dedicated to these principles and work to ensure their promotion through open markets, good governance, and sound economic, social and environmental policies.

As you probably know, ICC has been following closely the work of the United Nations Sub-Commission for the Promotion and Protection of Human Rights on business and human rights and the further discussion of this issue by the United Nations Commission on Human Rights at its 60th session. Throughout this process, ICC – together with the International Organisation of Employers – has expressed serious reservations regarding the approach to business and human rights taken by the draft document prepared by the Sub-Commission. Most recently, these views were submitted to governments represented on the Commission on Human Rights in advance of the discussion at its 60th session (this document is available from ICC upon request).

Therefore, ICC welcomed the April 2004 decision (2004/116) taken by the UN Commission on Human Rights requesting that the Office of the High Commissioner for Human Rights “compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia, the draft ‘norms’”. In particular, ICC was encouraged by the clear recognition by the Commission in its decision that the draft prepared by the Sub-Commission was not requested by the Commission, that as a draft it has no legal standing and that the Sub-Commission should not perform any monitoring function with respect to the draft.

ICC views the Commission’s decision as an opportunity to start afresh a dialogue on business and human rights in the form of an open and constructive exchange of views in the context of an inclusive multi-stakeholder process in which we very much look forward to participating. We would hope that your letter constitutes the beginning of such a process.

Please find below an attempt to provide you with some basic elements of response to the questions outlined in your letter, for the High Commissioner’s consideration in the preparation of the report, namely:

- *existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights;*
- *the scope and legal status of these initiatives; and*
- *any outstanding issues.*



Existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights

In our view, existing standards and initiatives can be organized into three broad categories, listed in order of their importance to protecting human rights:

- national laws, which are binding on all actors in a given country;
- international treaties, which are binding on those states that have ratified them and which are implemented through national law; and
- non-binding declarations and other voluntary initiatives that have been developed by intergovernmental organizations, national governments, business, trade unions, and non-governmental organizations. By their nature, these instruments are voluntary.

First, national laws are the most important instruments in protecting human rights, as they are legally-binding, and apply to all actors in a given country, including all businesses regardless of size or home country. But such laws only work when they are implemented effectively and impartially. Therefore, governments' performance in promoting and protecting human rights should be assessed not only on the basis of what laws they have enacted but more importantly on the basis of how effectively these laws are enforced. This gap between legal standards and their implementation in practice is the most pressing human rights issue today.

Second, there are main international treaties in the field of human rights¹ that are based on the Universal Declaration on Human Rights. However, it is important to note that while the Declaration has inspired most of these treaties, the Declaration is not in itself a legally binding document. This distinction between the Declaration, which is a "political" document, and legal treaties subject to ratification and that have the force of law, is an important one. Indeed, international conventions and treaties are binding on those states that have ratified them. The rights and obligations contained in international treaties are conferred to states, but some of these rights and obligations can be conferred to private actors when a state implements and enforces those rights and obligations through national law, for example against discrimination in the workplace and setting the minimum age of employment. Thus, international conventions and other treaties are only effective if they are implemented and enforced domestically.

Third, there is a large number of international voluntary instruments which have been developed by intergovernmental organizations, national governments, business, trade unions, and non-governmental organizations. Examples include the OECD Guidelines for Multinational Enterprises (www.oecd.org), the Global Compact (unglobalcompact.org), the

¹ These include the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and relevant ILO conventions.



Voluntary Principles on Security and Human Rights,² and the work of the Business Humanitarian Forum (www.bhf.org).

Importantly, this category of international voluntary initiatives also includes the many voluntary initiatives by individual companies. There are numerous such initiatives, undertaken either by individual companies, by groups of companies in specific sectors, and by individual companies in partnership with government and/or non-governmental organizations to improve human rights in the countries where they operate, particularly the developing world. Examples of such initiatives – particularly in the area of economic and social rights – are those that were showcased by Business Action for Sustainable Development (a joint initiative of ICC and the World Business Council for Sustainable Development) on the occasion of the World Summit on Sustainable Development held in Johannesburg in September 2002.³ Other examples of how voluntary company initiatives can contribute to the enjoyment of human rights can be found on the website of the World Business Awards in support of the Millennium Development Goals (another ICC initiative in association with the International Business Leaders Forum and the United Nations Development Programme).⁴

Such voluntary initiatives serve many constructive and useful purposes, including setting aspirational goals that organizations can work to achieve, coordinating policies among various organizations, communicating the commitment of an organization to a policy or position, and providing guidance to organizations seeking to improve their own performance. However, these voluntary instruments can only be a complement to and not a substitute for national law and its effective implementation.

Therefore, the issue in our view is not whether we need yet another initiative or standard on business and human rights – we do not. Rather, the real question should be: given the many different existing initiatives, what can be done to improve the capacity of governments, businesses, intergovernmental organizations, labour, and non-governmental organizations, to work together towards their full and effective implementation?

The scope and legal status of these initiatives

In accordance with the typology proposed above, we would expect the report to confirm the primacy of the role and responsibility of the State for implementing the human rights provisions in their national laws, and living up to their international commitments on human rights through the establishment and implementation of appropriate regulatory frameworks at national level. Priority should therefore be given to improving the capacity of national governments to effectively protect and promote human rights in national law and by respecting their international legal obligations.

² <http://www.state.gov/g/drl/rls/2931.htm>

³ A database of these initiatives can be found on the ICC website through the following link: http://www.iccwbo.org/home/business_better_world/partnership_initiatives.asp

⁴ <http://www.iccwbo.org/awards/>



The report should also explain that international voluntary initiatives on human rights by private actors can only be a complement to and not a substitute for national law. ICC fully shares the view that business has a role to play in supporting governments in their efforts to improve the enjoyment of human rights. However, ICC cannot accept the approach taken by the draft developed by the Sub-Commission. It is simply not feasible to transfer the responsibilities of the State with regards to human rights onto business because of governments' unwillingness and/or lack of capacity to meet their responsibilities effectively. No initiative or standard with regard to business and human rights can replace the primary role of the State and national laws in this area.

The report could establish such an operational typology of initiatives, outlining both their common elements and their differences in terms of their scope and legal status, as suggested above. For such a typology to be useful, it should make a clear distinction between those initiatives that are the prerogative of government and those that are properly within the sphere of influence of business. The blurring of this fundamental distinction in the Sub-Commission's draft, by confusing the role of business and the obligations contracted by governments through various international instruments – many of them far outside the scope of what is generally understood to constitute “human rights” – is unhelpful and the report should clearly reject such an approach.

The report might usefully try to focus the scope of what is understood by “human rights” in the context of business and human rights. In this respect, the proposals made in the first section (“Question 1: What is meant by human rights”) of the paper submitted to your office in response to your letter by the Confederation of British Industry and ICC United Kingdom, makes some very clear and helpful suggestions that we would support.

Finally, the report should also discuss to what extent governments that have ratified international human rights instruments have effectively implemented the provisions of these instruments through national laws. Improving the implementation by governments at national level of their international human rights commitments is the most effective way of increasing the enjoyment of human rights in countries where it is lacking. The reason for this is that legally binding obligations with respect to human rights through national legislation will apply to all actors of society in these countries, including not only transnational corporations operating in these countries. Therefore, improving the implementation of international human rights commitments through national laws is essential.

Any outstanding issues

Establishing an ongoing consultation process

We note that the mandate from the UN Commission on Human Rights to the Office of the High Commissioner for Human Rights (OHCHR) asks the OHCHR to “consult with all relevant stakeholders in compiling the report” rather than simply to “solicit input”. Therefore, asking for written “input” on a brief list of fairly broad questions is quite different



from a process of “consultation”, which is based on open discussion without pressure, among a group of equals, feedback and joint reflection, and some effort to arrive at joint conclusions.

Therefore, while we understand that this written solicitation of input is necessary to satisfy the time constraints under which your office is required to produce the report, we feel strongly that this can only be a first step in a proper process of consultation and cannot be a substitute for such a process.

Our reason for taking this position is that the issue of business and human rights is extremely complex, involving many stakeholders with different perspectives, governments with different laws, different cultures, international instruments, etc. It is only through a true consultation process, and an earnest effort to reach common conclusions, that a constructive path forward can be found. The “list of questions” approach cannot do justice to the importance and sensitivity of the issue, including the enormous range of initiatives that have been and are being implemented in this field.

ICC hopes that the preparation of this report and its follow-up will lead to the establishment of an ongoing and more systematic dialogue among business, governments, intergovernmental bodies and non-governmental organizations on business and human rights, under the aegis of the Office of the High Commissioner for Human Rights. ICC is of the view that the establishment of such a dialogue would constitute a valuable practical outcome of the report and of its consideration by the Commission on Human Rights.

Building the capacity of governments to implement human rights

Another useful contribution that the report could make to the debate would be to propose ways in which intergovernmental organizations – chiefly the UN – together with business, labour and NGOs, could help national governments improve the enjoyment of human rights. Again, we wish to stress our strong belief that the key way to improve the enjoyment of human rights is to improve the performance of governments in protecting and promoting human rights through national legislation and effective implementation.

We also wish to take this opportunity to note that, in our view, business and non-governmental organizations active in the field of human rights have much the same objectives with regard to improving the enjoyment of human rights. Consequently, we hope that the preparation of this report and the necessary consultative process which should accompany it will provide an opportunity for business and human rights NGOs to work together constructively on business and human rights. Business fully shares human-rights-NGO’s objective to improve the promotion and protection of human rights in countries where these are lacking, especially in the developing world. It should come as no surprise that it is considerably easier for transnational corporations to operate in jurisdictions where human rights are effectively upheld by a properly functioning legal framework, than in jurisdictions where this is unfortunately not the case.



Improving the enjoyment of human rights in the domestic business sector

A key point in this debate, which the report should highlight, is that “transnational corporations” (to use the terminology of the Commission on Human Rights’ decision) are more often than not part of the solution to human rights challenges than part of the problem. There is overwhelming empirical evidence to show that transnational corporations tend to raise standards – including human rights standards – where they operate. The Sub-Commission based its draft on the assumption that multinational companies are the major source of human rights violations, when the evidence shows the opposite: that multinational companies avoid investing in countries with rampant human rights abuses and, as stated above, generally bring high standards of practice with them whenever they invest.

One of the main issues that the report should seek to address is how to deal with human rights challenges in the domestic business sector, where many of these challenges occur. This is why the ultimate long-term solution to these challenges can only be to build the capacity of governments, especially in the developing world, to improve human rights through national law, which will apply not only to multinational companies but also to the domestic business sector. No instrument seeking to coerce transnational companies into substituting themselves for ineffective governments will ever address this challenge. Furthermore, an instrument focussing solely on “transnational corporations and related enterprises” will fail to capture domestic business sectors, which is where practical measures to foster the improvement of human rights conditions are most needed. Only human rights provisions contained in national law, appropriately enforced, can effectively capture all actors in a country.

Encouraging companies to address human rights in their core activities through voluntary initiatives

Companies should be encouraged to continue to address human rights in a pragmatic and value-adding way within their core business operations. Many companies focus on human rights protection and promotion in three main areas:

- human rights in product quality and safety,
- human rights in employee practices, and
- human rights in employee practices through supplier and/or collaboration partner network management.

Companies can effectively put in practice their voluntary commitment to respecting human rights through the application of their own business principles. Companies have developed implementation and follow-up procedures to ensure compliance with such principles. Individual company business principles often reference external frameworks such as, for example, the Universal Declaration on Human Rights, relevant ILO conventions, the OECD Guidelines for Multinational Enterprises, and the Global Compact.



Through such voluntary initiatives, companies can make valuable contributions in driving the improvement of human rights in their core business activities. The vast majority of companies consider that respecting human rights is part of the requirements to operate in any country, by conforming to national laws and through voluntary initiatives. Such voluntary initiatives tend to be far more efficient in developing innovative and sustainable responses to human rights challenges than, for example, pro-forma compliance with a certifiable standard.

Thank you again for the opportunity to provide input towards the report of the High Commissioner.

We trust that the above will provide useful input towards the preparation of the report and we look forward to opportunities for further consultations in the lead-up and follow-up to the report.

Sincerely,

A handwritten signature in black ink, appearing to read 'Maria Livanos Cattau', is positioned below the word 'Sincerely,'.

Maria Livanos Cattau