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### **PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT**

#### **Clarifying the Concepts of “Sphere of influence” and “Complicity”**

#### **Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie\***

#### **Summary**

Responding to the request in paragraph 1 (c) of Commission on Human Rights resolution 2005/69, which established the Special Representative’s mandate, to “research and clarify the implications for transnational corporations and other business enterprises of concepts such as ‘complicity’ and ‘sphere of influence’”, this companion report to the Special Representative’s 2008 report to the Human Rights Council explains how both concepts fit into the corporate responsibility to respect rights, one of the three principles comprising the strategic policy framework he identified in his 2008 report. The concept of “sphere of influence” is considered too broad and ambiguous a concept to define the scope of due diligence required to fulfil the responsibility to respect, and the Special Representative sets out an alternative approach. In contrast, avoiding complicity is viewed as an essential ingredient in the due diligence carried out to respect rights because it describes a subset of the indirect ways in which companies can have an adverse effect on rights through their relationships.

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\* This document is submitted late to reflect the most recent information.

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## I. INTRODUCTION

1. In its resolution 2005/69 of 20 April 2005, the Commission on Human Rights established the mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises and requested him in paragraph 1 (c) to “research and clarify the implications for transnational corporations and other business enterprises of concepts such as ‘complicity’ and ‘sphere of influence’”.

2. The present report constitutes the Special Representative’s response to this part of the mandate. It addresses the two concepts specifically in relation to the corporate responsibility to respect human rights, a principle which forms part of the strategic policy framework he identified in his 2008 report to the Human Rights Council.<sup>1</sup> That framework comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.

3. To respect rights essentially means not to infringe on the rights of others, put simply, to do no harm. But how do companies know they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence? Most do not. What is required, therefore, is due diligence, a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.

4. The concepts of sphere of influence and complicity have potential implications for the scope of due diligence - the range of factors and actors a company needs to consider as it exercises its due diligence. However, after careful deliberation and consultation, the Special Representative has concluded that “sphere of influence” is too broad and ambiguous a concept to define the scope of due diligence with any rigour, and therefore he suggests an alternative approach. Complicity though remains an important concept because it describes a subset of the indirect ways in which companies can have an adverse effect on rights through their relationships. A proper process of due diligence helps companies to manage risks of complicity in human rights abuses.

## II. SPHERE OF INFLUENCE AND BEYOND

5. The concept of a corporate “sphere of influence” is widely used in corporate social responsibility discourse. In response to his mandate requirement to research and clarify the concept, the Special Representative commissioned case law searches and examined related legal concepts. He reviewed literature related to business and human rights, corporate social responsibility, stakeholder theory, and moral philosophy. The issue was addressed at a multi-stakeholder consultation convened by the Special Representative,<sup>2</sup> and two members of his research team published an article in the journal entitled *Ethical Corporation* to which scores of

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<sup>1</sup> A/HRC/8/5.

<sup>2</sup> The December 2007 consultation focused on the corporate responsibility to respect. For a summary report, see A/HRC/8/5/Add.1.

e-mail responses were received.<sup>3</sup> On this basis, he reached the conclusion that sphere of influence concept combines too many different dimensions to serve as the basis for defining the scope of due diligence, and that influence by itself is an inappropriate basis for assigning corporate responsibility.

6. This section on sphere of influence is organized in three parts. The first summarizes the origins and current usage of the concept, acknowledging that it has been a helpful metaphor for companies to use in conceptualizing human rights responsibilities and opportunities outside the workplace. The second part notes that the field of business and human rights has advanced rapidly since the concept was first introduced, and that greater rigor is necessary today to provide companies with sufficient guidance in identifying specific actions they need to take to respect human rights. The third part briefly outlines an alternative approach to defining the scope of due diligence.

### A. Origins and current usage of sphere of influence

7. The United Nations Global Compact first introduced the concept of sphere of influence into corporate social responsibility discourse. It was intended to help companies “support and respect the protection of internationally proclaimed human rights” within and beyond their workplaces.<sup>4</sup>

8. The Global Compact developed a model to visualize the sphere of influence, which a number of companies then adopted. It consists of a set of concentric circles, mapping stakeholders in a company’s value chain: with employees in the innermost circle, then moving outward to suppliers, the marketplace, the community, and governments. The model made the implicit assumption that the “influence”, and thus presumably the responsibility, of a company declines as one moves outward from the centre.<sup>5</sup>



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<sup>3</sup> The article is available at: <http://www.ethicalcorp.com/content.asp?ContentID=5504>.

<sup>4</sup> “The concept of sphere of influence seeks to establish the scope of corporate responsibility for human rights issues based on the extent of a particular business’ influence.” Office of the High Commissioner for Human Rights, United Nations Global Compact, E-Learning, Module 2, <http://www.unssc.org/web/hrb/details.asp?mod=2&sec=2&cur=1>.

<sup>5</sup> Concerns about this model are reflected in the Special Representative’s most recent report to the Human Rights Council, A/HRC/8/5, paras. 65-72.

9. This model has helped companies to consider their roles in society beyond the workplace, and what actions to take in order to respect and support human rights. For example, a survey of the Fortune Global 500 firms conducted by the Special Representative showed that respondents appeared to prioritize their obligations to stakeholders in approximately this order; the only significant variation being that firms in the extractive sector placed communities ahead of supply chains.<sup>6</sup>

#### **B. Limitations of the concept for today's business and human rights agenda**

10. As companies sought to determine more precisely what actions their social responsibilities may require, and to whom they owe specific responsibilities, imprecision and ambiguity in the sphere of influence concept became increasingly apparent. Moreover, the need for heightened clarity escalated severalfold when the United Nations draft norms on the responsibilities of transnational corporations and other business enterprises sought to employ the concept of sphere of influence to demarcate legal obligations of companies, using the concept as though it were a functional equivalent to a State's jurisdiction.<sup>7</sup>

11. Imprecision and ambiguity in the concept stem from a number of sources, above all the fact that the concentric circles model does not differentiate stakeholders whose rights could be affected negatively by a company's practices, such as communities, from actors over whose actions the company might have some degree of influence, whether suppliers, communities, or Governments.

12. However, this conflates two very different meanings of "influence". One is "impact", where the company's activities or relationships are causing human rights harm. The other is whatever "leverage" a company may have over actors that are causing harm or could prevent harm. Impact falls squarely within the responsibility to respect; leverage may only do so in particular circumstances.

13. Anchoring corporate responsibility in influence defined as leverage is problematic, because it requires assuming, in moral philosophy terms, that "can implies ought".<sup>8</sup> However, companies cannot be held responsible for the human rights impacts of every entity over which they may have some leverage, because this would include cases in which they are not contributing to, nor are a causal agent of the harm in question. Nor is it desirable to require companies to act wherever they have influence, particularly over Governments. Asking companies to support human rights voluntarily where they have leverage is one thing; but attributing responsibility to them on that basis alone is quite another.

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<sup>6</sup> A/HRC/4/35/Add.3.

<sup>7</sup> E/CN.4/Sub.2/2003/12.

<sup>8</sup> "The sphere of influence concept implies that the more control, authority or influence a business has over a situation giving rise to human rights abuses (or the means to improve respect for human rights), the greater the business responsibility to act." OHCHR, UN Global Compact, E-Learning, Module 2, <http://www.unssc.org/web/hrb/details.asp?mod=2&sec=1&cur=1>.

14. Influence as a basis for assigning responsibility invites manipulation. This is so because influence can only be defined in relation to someone or something. Thus, it is itself subject to influence. A Government can deliberately fail to perform its duties in the hope or expectation that a company will yield to social pressures to promote or fulfil certain rights, demonstrating why State duties and corporate responsibilities must be defined independently of one another.

15. When the concept of sphere of influence has been operationalized further, it has been through the term proximity: “The ‘sphere of influence’ of a business entity tends to include the individuals to whom it has a certain political, contractual, economic or geographic proximity. Every business entity, whatever its size, will have a sphere of influence; the larger it is, the larger the sphere of influence is likely to be.”<sup>9</sup> But the precise meaning of proximity remains unclear. What constitutes “political proximity”, for example? The most intuitive meaning of proximity - geographic - can be misleading. Clearly, companies need to be concerned with their impact on workers and surrounding communities, but their activities can equally affect the rights of people far away from the source, as, for example, violations of privacy rights by Internet service providers can endanger dispersed end-users. Hence, it is not proximity that determines whether or not a human rights impact falls within the responsibility to respect, but rather the company’s web of activities and relationships.

16. To discharge the mandate requirement to “clarify” the concept of sphere of influence and its implications, the Special Representative has explored the possibility of redefining corporate “influence” in terms of “control” or “causation”. However, those concepts, in turn, may be too restrictive for companies that seek to not only respect rights but also to voluntarily “support” them, as, for example, in the context of the Global Compact.

17. Furthermore, the concepts of control or causation could wrongly limit the baseline responsibility of companies to respect rights. The responsibility to respect requires that companies exercise due diligence to identify, prevent and address adverse human rights impacts related to their activities. If the scope of due diligence were defined by control and causation this could imply, for example, that companies were not required to consider the human rights impacts of suppliers they do not legally control, or situations where their own actions might not directly cause harm but indirectly contribute to abuse.

18. These considerations have led the Special Representative to conclude that, while sphere of influence remains a useful metaphor for companies to think broadly about their human rights responsibilities and opportunities beyond the workplace, it is of limited utility in clarifying the specific parameters of their responsibility to respect human rights.

### **C. The scope of due diligence**

19. If companies are to exercise human rights due diligence, what is its scope? The process inevitably will be inductive and fact-based, but the principles guiding it can be stated succinctly.

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<sup>9</sup> “Report of the United Nations High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises” (E/CN.4/2005/91).

Companies should consider three sets of factors. The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context, for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances.

### **Understand the context**

20. A company should be aware of the human rights issues in the places in which it does business to assess what particular challenges that context may pose for them. Such information is readily available from reports by workers, NGOs, Governments and international agencies.<sup>10</sup> The analysis should include the country's national laws and international obligations as they relate to human rights, and potential gaps between international standards and national law and practice.

### **Assess the company's own activities**

21. A company should analyze potential and actual impacts arising from its own activities on groups such as employees, communities, and consumers. It should determine which policies and practices may harm human rights and adjust those actions to prevent harm from occurring. An illustrative list of activities with direct impact might include the production process itself; the products or services the company provides; its labour and employment practices; the provision of security for personnel and assets; and the company's lobbying or other political activities.

### **Analyse the company's relationships**

22. A company should ensure that it is not implicated in third party harm to rights through its relationships with such parties. This possibility can arise from a company's business activities, including the provision or contracting of goods, services, and even non-business activities, such as lending equipment or vehicles. Therefore, a company needs to understand the track records of those entities with which it deals in order to assess whether it might contribute to or be associated with harm caused by entities with which it conducts, or is considering conducting business or other activities. This analysis of relationships will include looking at instances where the company might be seen as complicit in abuse caused by others. This is explored further in Part III below.

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<sup>10</sup> For guidance on how to assess the local context, see *Guide to Human Rights Impact Assessment and Management*, Road-testing Draft, a joint publication of the International Finance Corporation, the Global Compact, and the International Business Leaders Forum, June 2007, p. 31, available at: [http://www.unglobalcompact.org/docs/news\\_events/8.1/HRIA\\_final.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/HRIA_final.pdf).

#### **D. Summing up**

23. Due diligence comprises reasonable steps by companies to become aware of, prevent, and address adverse impacts of their activities and relationships. These steps may vary depending on factors such as country context, the nature of the activity and industry, and the magnitude of the investment or exchange.

24. Similarly, what companies should do in terms of monitoring and mitigation may also vary along these dimensions. For example, the steps a company takes to address and monitor human rights impacts of its own operations may differ from those regarding its business relationships or relationships with other social actors. Moreover, the required actions regarding the human rights impact of a subsidiary may differ from those taken in response to potential or actual impacts of suppliers several layers removed.

25. In sum, the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities.

### **III. THE IMPLICATIONS OF COMPLICITY**

26. The corporate responsibility to respect human rights includes avoiding complicity. Over the last three years, the Special Representative has convened, in 2006, a multidisciplinary seminar specifically on complicity, and the concept has been discussed in many of his other multi-stakeholder consultations, including the most recent consultation, in December 2007, on the nature of the corporate responsibility to respect.<sup>11</sup> The Special Representative's reflections have also drawn upon the work of two non-governmental organizations with extensive experience in this area.<sup>12</sup>

27. The concept of corporate complicity in human rights abuses has attracted the attention of Governments, companies, lawyers, philosophers, advocates, and victims of human rights abuse. They may have differing understandings of what the term means in practice. Some observers emphasize the legal pedigree of "complicity" and refer to the developments in international criminal law as the guiding light for defining complicity in the business and human rights context. Others emphasize condemnation of corporate indirect involvement in human rights abuses based on social expectations, irrespective of actual legal liability.

28. This section describes the most relevant considerations underpinning complicity, from both legal and non-legal points of view. As international criminal law is a useful starting place, this

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<sup>11</sup> See A/HRC/8/5/Add.1.

<sup>12</sup> See the Fafo Institute's project on Business and International Crimes, information available at: <http://www.faf.no/liabilities/index.htm>. See also the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, information available at: <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity>.



section discusses at some length the international legal standards for aiding and abetting. It also explores the key non-legal contexts in which indirect involvement in human rights abuses has carried important implications for companies.

### A. Introducing the concept

29. The concept of complicity is highly relevant to the context of business and human rights. Most of the over 40 Alien Tort Claims Act (ATCA) cases brought against companies in the United States to date, now the largest body of domestic jurisprudence regarding corporate responsibility for violations of international law, have concerned alleged complicity, where the actual perpetrators were public or private security forces, other government agents, armed factions in civil conflicts, or other such actors.<sup>13</sup> Moreover, a recent study conducted by the Office of the High Commissioner for Human Rights (OHCHR) for the Special Representative, which maps allegations against companies, documents that 41 per cent of the 320 cases (from all regions and sectors) in the sample alleged indirect forms of company involvement in various human rights abuses.<sup>14</sup>

30. Complicity in the business and human rights context refers to the indirect involvement of companies in human rights abuses. In essence, complicity means that a company knowingly contributed to another's abuse of human rights. It is conceived as indirect involvement because the company itself does not actually carry out the abuse. In principle, complicity may be alleged in relation to knowingly contributing to any type of human rights abuse, whether of civil or political rights, or economic, social and cultural rights.

31. Allegations of company complicity typically have concerned involvement in abuses by State or non-State actors. For example, legal uses of the term refer to both indirect involvements in government abuses and those of non-State actors, such as paramilitaries.<sup>15</sup> Additionally, shareholder divestment decisions have been made in response to alleged indirect involvement of a company in a supplier's violations of human rights in the workplace.

32. Understanding the implications of complicity requires an appreciation of how both the law and various social actors might view company contributions to human rights abuse and the possible consequences of those views. This may seem a daunting task. Yet, companies can become aware of, prevent and address risks of complicity by integrating the common features of legal and societal benchmarks into their due diligence processes. Indeed, avoiding complicity is

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<sup>13</sup> ATCA is discussed further in section B below.

<sup>14</sup> See A/HRC/8/5/Add.2.

<sup>15</sup> For examples of cases brought against companies for aiding and abetting alleged State abuse, see: *Doe v. Unocal*, 395 F.3d 932 (9th Cir., 2002) (settled out of court); *Khulumani v. Barclay National Bank*, 504 F.3d 254 (2d Cir., 2007) (ongoing) and *Xiaoning v. Yahoo! Inc.* (N.D.Cal., case filed on 18 April 2007) (ongoing). For examples of cases against companies for aiding and abetting non-State abuse, see: *Carrizosa v. Chiquita* (S.D. Fla., case filed on 13 June 2007) (ongoing); *Doe v. Chiquita* (D.N.J., case filed on 18 July 2007) (ongoing).

part and parcel of due diligence for ensuring that companies respect human rights. While there are no guarantees that acting with such due diligence will protect a company from legal liability or public allegations, it should go a long way in improving the company's ability to recognize and act on risks of complicity, and to highlight to stakeholders that it is serious about not contributing to the abuses of others.

## **B. Guidance from law**

33. Owing to the relatively limited case history in relation to companies rather than individuals, and given the variations in definitions of complicity within different legal contexts, it is not possible to specify exacting tests for what constitutes complicity even within the legal sphere. The Special Representative notes that the clearest guidance comes from international criminal law and the cases on aiding and abetting. These cases exhibit several key principles that can form the basis of useful guidance for companies.<sup>16</sup> International criminal law is also relevant because it can influence domestic criminal and non-criminal standards.

### **1. Guidance from legal standards: aiding and abetting under international criminal law**

34. The jurisdiction of ad hoc international criminal tribunals, such as the War Crimes Tribunals after the Second World War, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) has applied only to natural persons, not legal persons such as companies. The permanent International Criminal Court (ICC) also has this feature.<sup>17</sup> Caution should be exercised, therefore, when analogizing standards from individuals to companies. Nevertheless, international criminal law standards discussed in these cases are important for considerations of corporate complicity for at least two reasons. First, these standards can provide guidance to domestic criminal courts, some of which allow for criminal prosecution of companies. Second, international criminal law can directly influence domestic non-criminal legal proceedings involving companies.

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<sup>16</sup> There are other ways in which involvement with another who commits a crime is prohibited in international criminal law. Examples include joint criminal enterprise and superior responsibility. Joint criminal enterprise criminalizes participation with others for a common plan, design or purpose to commit an international crime. Those who participate in such a group and take actions intentionally to bring about the common plan can be guilty. Superior responsibility criminalizes the failure of either a military or civilian superior to carry out their duty to prevent or punish the crimes committed by a subordinate.

<sup>17</sup> Pursuant to article 123 of the Rome Statute establishing the International Criminal Court, seven years after the entry into force of the Statute, the Secretary-General of the United Nations will convene a Review Conference. Such review will take place in 2009, and some have signalled that the idea of including legal persons in the jurisdiction of the Court might be re-proposed for discussion.

35. As mentioned above, international criminal law prohibits aiding and abetting international crimes. Aiding and abetting requires (i) an act or omission having a substantial effect on the commission of an international crime and (ii) knowledge of contributing to the crime.<sup>18</sup>

**(a) Act or omission that has a substantial effect**

36. Cases on aiding and abetting heard in ad hoc international tribunals have found that aiding and abetting consists of “acts [by individuals] directed to assist, encourage or lend moral support to the perpetration of a crime, and which have a substantial effect upon its perpetration”.<sup>19</sup>

37. The assistance need not cause, or be a necessary contribution to, the commission of the crime. In other words, it does not have to be shown that the crime would not have happened without the contribution. Furthermore, the assistance may occur before, during, or after the principal crime has been committed, and it need not occur within geographic proximity to the crime.<sup>20</sup>

38. The International Law Commission Code indicates that an accomplice must provide the kind of assistance that contributes “directly and substantially” to the commission of the crime. A substantial and direct contribution could be, for example, providing the means that enable the perpetrator to commit the crime. The assistance must facilitate the crime in some significant way.<sup>21</sup>

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<sup>18</sup> The Statutes for the ICC, ICTY and ICTR as well as other international criminal tribunals provide for individual liability based on aiding and abetting. In the jurisprudence before the ICTY and ICTR, the tribunals have emphasized that such liability will depend on proving a physical element (substantial assistance) and a mental element (knowledge). For example, see *Furundžija* (ICTY Trial Chamber), 10 December 1998, para. 249; *Simić* (ICTY Appeals Chamber), 28 November 2006, paras. 85-86; *Blagojevic and Jokic* (ICTY Appeals Chamber), 9 May 2007, para. 127; and *Ntagerura* (ICTR Appeals Chamber), 7 July 2006, para. 370.

<sup>19</sup> For example, see *Simić* (ICTY Appeals Chamber), 28 November 2006, para. 85; *Blagojevic and Jokic* (ICTY Appeals Chamber), 9 May 2007, para. 127; *Blaskic* (ICTY Appeals Chamber), 29 July 2005, paras. 45-46; *Vasiljevic* (ICTY Appeals Chamber), 25 February 2004, para. 102; and *Ntagerura* (ICTR Appeals Chamber), 7 July 2006, para. 370.

<sup>20</sup> *Blaskic* (ICTY Appeals Chamber), 29 July 2004, para. 48. Also see *Blagojevic and Jokic* (ICTY Appeals Chamber), 9 May 2007, para. 127; *Simić* (ICTY Appeals Chamber), 28 November 2006, para. 85; and *Ntagerura* (ICTR Appeals Chamber), 7 July 2006, para. 372.

<sup>21</sup> According to the International Law Commission, this standard is consistent with the other relevant international provisions including the Nuremberg Charter and the ICTY and ICTR Statutes. See *Yearbook of the International Law Commission*, 1996, vol. II, Part Two, document A/51/10, p. 21, para. (11) of the commentary to article 1.

*Omission and silent presence*

39. In the business and human rights context the question often arises whether a company's mere presence in a country where human rights violations are occurring can amount to complicity. Legal liability for complicity when a company is merely present is unlikely. Analogizing from international criminal law cases, it would have to be shown that the company's silence amounted to a substantial contribution to the crime, such as legitimizing or encouraging the crime, and that the company provided such encouragement knowingly.

40. In international criminal law, individuals have been convicted of aiding and abetting international crimes when they were silently present at the scene of a crime or in the vicinity of a crime. However, in these cases presence was only one factor that led to a finding that the individuals' acts or omissions had a legitimizing or encouraging effect on the crime in the specific context, and all of the accused also had some form of superior status.<sup>22</sup>

*Benefiting from abuses*

41. As with mere presence, the sole fact that a company benefits from human rights abuses, is unlikely to result in legal liability for complicity. Nevertheless, the South African Truth and Reconciliation Commission noted that benefiting from abuse constituted a relevant factor in determining the responsibility of companies for involvement in abuses.<sup>23</sup> As discussed further below, benefiting is a relevant consideration in non-legal contexts.<sup>24</sup>

**(b) Knowledge**

42. Cases in international criminal tribunals have required that the accused know the criminal intentions of the principal perpetrator, and that their own acts provide substantial assistance to

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<sup>22</sup> See *Kvočka* (ICTY Trial Chamber), 2 November 2001, paragraphs 257-261, summarizing the ICTY cases dealing with presence and accomplice liability.

<sup>23</sup> In 1998, the South African Truth and Reconciliation Commission found that there were three levels of business involvement in apartheid: (i) playing a central role in designing and implementing apartheid; (ii) profiting directly from activities that promoted apartheid; and (iii) benefiting indirectly by operating in apartheid society (Truth and Reconciliation Commission, Final Report 1998, at vol. 4, Chap. 2). The Commission said that the first two levels must result in accountability (paras. 23 and 27). However, it said that benefiting indirectly from apartheid policies was of a "different moral order" (para. 23). It implied that it would be inappropriate to hold such companies accountable for furthering apartheid per se (para. 32), notwithstanding the Commission's support for companies to engage in "realistic moral behaviour grounded in a culture of international human rights law" (para. 148). The Final Report is available at: <http://www.polity.org.za/polity/govdocs/commissions/1998/trc/4chap2.htm>.

<sup>24</sup> See section C below.

the commission of the crime.<sup>25</sup> However, aiding and abetting has not required that the individual share the same criminal intent as the principal, or even desire that the crime occur.<sup>26</sup> It is also not necessary to show that the accused knew either the precise crime that was intended and which was actually committed, but only that one of several possible crimes might be committed.<sup>27</sup>

43. The knowledge requirement can be established through direct and indirect or circumstantial evidence. Therefore objective facts can be used to infer the subjective mental state of the accused,<sup>28</sup> and constructive knowledge could be inferred even where the accused has not explicitly expressed that they had such knowledge or in fact denied they had knowledge.<sup>29</sup>

44. What would be required to prove knowledge on the part of a company would depend on the context. The international criminal law cases imposing liability on individuals for their role in abuse by companies during the Second World War imputed knowledge to individuals by looking to information readily available to the company representative about the perpetrator at the time the company provided the assistance. This included records of meetings,<sup>30</sup> or the context of the business transaction, such as unusually large orders for harmful chemical substances.<sup>31</sup>

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<sup>25</sup> The ICC has yet to interpret the Rome Statute's provision on aiding and abetting, which states that liability will arise if "for the purpose of facilitating" a crime, an individual, "aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission". There is some disagreement whether the words "for the purpose of" place an additional requirement that what has been used in the ad hoc tribunals and what is now considered custom, that is whether there is an extra requirement of proof that the contribution was given for the *purpose* of facilitating a crime.

<sup>26</sup> *Simić* (ICTY Appeals Chamber), 28 November 2006, para. 86; and *Aleksovski* (ICTY Appeals Chamber), 24 March 2000, para. 162.

<sup>27</sup> *Blaskić* (ICTY Appeals Chamber), 29 July 2005, para. 50; and *Simić* (ICTY Appeals Chamber), 28 November 2006, para. 86.

<sup>28</sup> See *United States v. Carl Krauch, et al (The Farben Case)*, Trials of War Criminals, vol. VIII, p. 1187; Trial of the Major War Criminals Before the International Military Tribunal (1947), vol. 1, Judgment, pp. 305-306; *Tadić* (ICTY Trial Chamber), 7 May 1997, paras. 675-676 and 689; *Akayesu* (ICTR Trial Chamber), 2 September 1998, para. 548; and *Aleksovski* (ICTY Trial Chamber), 25 June 1999, para. 65.

<sup>29</sup> *Limaj* (ICTY Trial Chamber), 30 November 2005, para. 518; see also *Fofana & Kondewa* (Special Court for Sierra Leone Trial Chamber), 7 August 2007, para. 231.

<sup>30</sup> *The Zyklon B case Trial of Bruno Tesch and two others*, Law Reports of Trials of War Criminals, vol. I, p. 95, available at: <http://www.ess.uwe.ac.uk/WCC/zyklonb.htm>.

<sup>31</sup> *Ibid.*, p. 101.

In some of these cases knowledge was also imputed from the position and experience of the individual in the company - for instance where the individual occupied a particular position of authority or influence.<sup>32</sup>

## 2. Domestic criminal liability

45. Criminal law in many States prohibits providing knowing assistance to someone who commits a crime. Even if the terminology aiding and abetting is not always used in domestic systems, the domestic standards generally resemble the international criminal law concept of aiding and abetting.<sup>33</sup>

46. A number of domestic jurisdictions allow for holding legal persons, including companies, criminally liable for at least some international crimes. Provided these jurisdictions also have aiding and abetting liability, it will generally be possible to criminally prosecute companies for aiding and abetting such crimes.<sup>34</sup>

47. The particular requirements for knowledge and the type of assistance provided will vary according to national laws.<sup>35</sup> However, when the crime being prosecuted is a violation of international criminal law, the national courts may choose to employ international criminal law standards.<sup>36</sup>

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<sup>32</sup> See *United States v. von Weizsaecker*, Trials of War Criminals, vol. XIV pp. 622.

<sup>33</sup> Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law* (2006), Executive Summary, p. 17, available at: [www.fafon.org/liabilities](http://www.fafon.org/liabilities). [hereinafter Fafo Report]

<sup>34</sup> *Ibid.* The survey of 16 countries from a cross section of jurisdictions and regions found that 11 countries had established criminal liability for corporations. These countries were Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom and the United States (p. 13). While there were some differences in what international crimes corporations could be prosecuted for depending on whether the State was a party to and had fully incorporated the Rome Statute's three crimes into its domestic law, all of these States had incorporated international crimes in some fashion (p. 15). Further, all of these States had legislation in place establishing aiding and abetting liability (p. 17).

<sup>35</sup> *Ibid.*, pp. 17-22. For instance, the concept of "corporate culture" may be a relevant element in deciding whether the company had the requisite knowledge or intent to aid or abet the commission of the crime. For more information see: "Corporate Culture as a Basis for the Criminal Liability of Corporations" prepared for the Special Representative by the law firm Allens Arthur Robinson, available at: <http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>.

<sup>36</sup> Fafo Report, p. 19.

48. Generally, in neither international nor national criminal law jurisdictions is the liability of an accomplice dependent on the conviction of the principal perpetrator.<sup>37</sup>

### 3. Domestic civil liability

49. The issue of legal responsibility for company participation in human rights abuses has also been raised in non-criminal cases filed against companies in domestic courts.

50. In the United States, ATCA allows tort claims to be brought in federal courts by non-US citizens for violations of international law.<sup>38</sup> The parameters of how this Statute can be used with respect to companies are still being defined, and no case against a company has yet been determined on its merits. As stated previously, recent cases against companies under ATCA have tended to involve claims of complicity rather than direct involvement in an international law violation.

51. The US Supreme Court's only decision under ATCA does not appear to preclude aiding and abetting liability for corporations under the Statute,<sup>39</sup> and the weight of current US judicial opinion appears to support the existence of such liability.<sup>40</sup> Moreover, some courts that have entertained ATCA claims for company complicity in human rights abuses have referred to and applied the international criminal law standards of aiding and abetting in this context.<sup>41</sup>

52. Beyond the context of ATCA, other types of non-criminal law, such as the laws of intentional torts, negligence and of non-contractual obligations, are increasingly employed to claim that corporations should be held accountable for their indirect participation in human rights

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<sup>37</sup> Ibid., p. 18. See also, *Akayesu* (ICTR Trial Chamber), 2 September 1998, para. 531.

<sup>38</sup> 28 U.S.C. §1350.

<sup>39</sup> *Sosa v. Alvarez-Machain*, 542 US 692 (US, 2004).

<sup>40</sup> For a recent discussion of the ways in which US courts have approached this question, see *Khulumani v. Barclay National Bank*, 504 F.3d 254 (2d Cir., 2007), part of the so-called "Apartheid litigation". Note that the defendants in the Apartheid litigation recently asked the Supreme Court to review the Second Circuit's decision, arguing, inter alia, that the Second Circuit erred in deciding that aiding and abetting liability exists under ATCA (re: *American Isuzu Motors, Inc., et al. v. Ntsebeza, et al.*). See <http://www.scotusblog.com/wp/petitions-to-watch-conference-of-42508/> for relevant documentation. The Supreme Court will consider the petition on 25 April 2008.

<sup>41</sup> For example, see: *Khulumani v. Barclay National Bank*, 504 F.3d 254, 276 (2d Cir., 2007); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 285-286 & n.33 (E.D.N.Y. 2007); and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006).

abuses.<sup>42</sup> These claims tend not to be based on international law and are unlikely to be labelled as “human rights” cases as such, but rather will allege liability for failure to comply with basic non-criminal law tenets.

53. Accordingly, the legal inquiry applying in such cases can differ from the examination in international criminal law described above. Even where the inquiry is similar, such as where the court essentially looks at knowledge and assistance requirements, the specific elements of those requirements may differ. For example, in the context of negligence, proving knowledge might require showing only that the company *should* have known that it was taking a foreseeable risk of contributing to an abuse as opposed to needing to prove that there was actual knowledge. This is known as a reasonableness test, simply put, would a reasonable person have appreciated that there was a risk of contributing to abuse and have changed their behaviour to avoid the risk?<sup>43</sup> This inquiry may not be posed as a knowledge test but rather a question as to whether the company acted in accordance with the requisite standard of care.<sup>44</sup>

### C. Social expectations that companies avoid complicity

54. While legal standards, particularly those from international criminal law, are useful for understanding complicity, they are only part of the story. In non-legal contexts, corporate complicity has become an important benchmark by which other social actors judge companies. The avoidance of complicity features in international standards and principles set for business behaviour by, for example, the Global Compact. Likewise, public and private investors and human rights advocacy organizations also judge companies based on alleged indirect involvement in human rights abuses.

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<sup>42</sup> For commentary on a selection of cases, see Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press, 2006), Chap. 5.

<sup>43</sup> *Ibid.*, Zerk provides that “in identifying the substantive obligations of the parent company, the courts will take account of the general state of knowledge about the risks posed by the particular industry, process or technology and how to minimize them. To this end, home state regulatory requirements, codes of conduct, industry ‘best practice’, safety cases and risk control manuals are likely to be important sources of evidence” (pp. 220-221).

<sup>44</sup> For instance in *Lubbe v. Cape plc* [2000] 1 Lloyd’s Rep 139, which concerned parent company liability for harm caused by a subsidiary, the plaintiff alleged that the parent company’s negligence consisted of instructions and advice it gave or failed to give its subsidiaries in following health and safety practices. It was alleged that “the instructions and advice ... showed a careless disregard for the foreseeable risk of injury to those who were closely affected by the asbestos operations in South Africa, taking account of the knowledge which they [defendant company’s directors and senior employees] had or ought to have had of the health risks involved” (p. 146). (The case settled so this argument was not decided on its merits.)



55. Importantly, companies themselves recognize the potential for complicity in human rights abuses, and company-sponsored codes include avoiding complicity.<sup>45</sup> Certain collective initiatives established to prevent abuses in contexts where indirect rather than direct corporate abuse is more likely, such as the Kimberly Process and the Voluntary Principles on Security and Human Rights, also implicitly provide guidance on how to avoid complicity.<sup>46</sup>

56. Sometimes, the use of complicity standards in the non-legal context closely follows the applicable tests under international and national law. At other times, they may not require the same degree of knowledge and assistance as under law, such as those which provide censure for mere presence in a country where there is abuse or the receipt of benefits from a known abuser. These claims can lead to a variety of outcomes including shareholder disapproval, reputational damage and even divestment.

## 1. International standards, principles and other guidance

### (a) The United Nations Global Compact

57. In 1999 the then United Nations Secretary-General Kofi Annan introduced the Global Compact, addressing business leaders in the following terms:

*You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business. Indeed, you can use these universal values as the cement binding together your global corporations, since they are values people all over the world will recognize as their own. **You can make sure that in your own corporate practices you uphold and respect human rights; and that you are not yourselves complicit in human rights abuses.***<sup>47</sup> (Emphasis added)

58. Principle 2 of the Global Compact specifically refers to complicity: “business should make sure that they are not complicit in human rights abuses”. The explanatory statement to this principle indicates that corporate complicity in human rights abuse could occur in three main forms: direct, beneficial and silent:<sup>48</sup>

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<sup>45</sup> See for example the International Code of Ethics for Canadian Business which includes amongst its “Principles” that signatories agree to “not be complicit in human rights abuses”. The Code is available at: <http://www.lib.uwo.ca/business/intlethi.html>.

<sup>46</sup> The Kimberley Process was established to help stem the flow of conflict diamonds (see <http://www.kimberleyprocess.com/>) while the Voluntary Principles on Security and Human Rights promote corporate human rights risk assessments and training of security providers in the extractive sector (see <http://www.voluntaryprinciples.org/>).

<sup>47</sup> Press Release, SG/SM/6881, 1 February 1999, available at: <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html>.

<sup>48</sup> See commentary on Principle 2 from the Global Compact, available at: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html>.

*“Direct Complicity occurs when a company knowingly assists a State in violating human rights. An example of this is where a company assists in the forced relocation of peoples in circumstances related to business activity.*

*Beneficial Complicity suggests that a company benefits directly from human rights abuses committed by someone else. For example, violations committed by security forces, such as the suppression of a peaceful protest against business activities or the use of repressive measures while guarding company facilities, are often cited in this context.*

*Silent Complicity describes the way human rights advocates see the failure by a company to raise the question of systematic or continuous human rights violations in its interactions with the appropriate authorities. For example, inaction or acceptance by companies of systematic discrimination in employment law against particular groups on the grounds of ethnicity or gender could bring accusations of silent complicity.”*

59. In relation to Principle 2, the Global Compact suggests a number of possible actions that might help companies avoid “being implicated in human rights violations”, including human rights impact assessments to identify the risk of company involvement in abuse; explicit policies to protect workers both in the company’s direct employment and throughout their supply chain; and explicit policies to ensure that the company’s security arrangements, even when supplied by the State or another party, do not contribute to human rights abuse.<sup>49</sup>

60. The Global Compact also suggests that businesses establish clear safeguards to ensure that if financial or material support is provided to security forces it is not used to violate human rights, and that companies “make clear in any agreements with security forces that the business will not condone any violation of international human rights laws”.<sup>50</sup> More generally, it is suggested that business “privately and publicly condemn systematic and continuous human rights abuses”.<sup>51</sup>

#### **(b) The OECD Guidelines for Multinational Enterprises**

61. Pursuant to the (OECD) Guidelines, amended in 2000, companies should “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”.<sup>52</sup> Member States and other countries that adhere to the Guidelines are required to establish a National Contact Point, with which complaints against companies, called “specific instances”, may be filed. These cases often involve allegations of indirect involvement in human rights abuses.

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> See Organization for Economic Co-operation and Development, DAF/IME/WPG(2000)15/FINAL, available at: <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

62. One such complaint involved a company providing services to a State detention facility where it was alleged that human rights abuses were taking place. In considering the complaint, the National Contact Point highlighted that “companies can, through their own actions or failure to act, be complicit in or profit from violations of human rights by States”.<sup>53</sup> Although the National Contact Point report stated that the nature and extent of the company’s activities in the detention centre were unclear, it “ascertained” that the company had not included the Guidelines in the basis for its ethical assessments. The report emphasized the importance of continuous company assessments of human rights issues arising in the context of company operations.<sup>54</sup>

## 2. Investors

63. In recent years, public and private investment funds alike have formally expressed a willingness to suspend, cease or reconsider their associations with companies who are involved even indirectly in human rights abuses. These expressions have come in the form of published investment policies, and divestment and delisting decisions of investment funds.

64. Investment policies may help investors to decide when to exclude companies from the investment universe based on non-financial factors, including human rights, and more specifically to assess the risk that the fund itself may be considered complicit in abuse by investing in such companies. The Ethical Guidelines used by the Norwegian Council on Ethics for the Government Pension Fund are a prime example.<sup>55</sup> The Council on Ethics issues recommendations upon request by the Ministry of Finance as to whether an investment may be at odds with the Guidelines, as well as whether it might constitute a violation of Norway’s obligations under international law.

65. The relevant portion of the Norwegian Guidelines states that the Fund’s ethical basis should be promoted through the use of three mechanisms. First, while the Fund should exercise its ownership rights to promote long-term financial returns, it should do so based on the United Nations Global Compact and OECD Guidelines. Second, the Fund should engage in “negative screening of companies from the investment universe that either themselves, or through entities they control, produce weapons that through normal use may violate fundamental humanitarian principles”. Finally, the Fund should exclude companies from investment “where there is considered to be an unacceptable risk of contributing to: serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst

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<sup>53</sup> Statement by the Norwegian National Contact Point, 29 November 2005, Enquiry from the Forum for Environment and Development (ForUM) on Aker Kværner’s activities at Guantanamo Bay, p. 69, available at: <http://www.oecd.org/dataoecd/23/33/37439881.pdf>.

<sup>54</sup> *Ibid.*, p. 70.

<sup>55</sup> The Ethical Guidelines are available at: <http://www.regjeringen.no/en/dep/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund-Global-/The-Ethical-Guidelines.html?id=434894>.

forms of child labour and other child exploitation; serious violations of individuals' rights in situations of war or conflict; severe environmental damages; gross corruption; other particularly serious violations of fundamental ethical norms".<sup>56</sup>

66. Thus the concern is not only about investing in companies which may be complicit in abuses but that the Fund may also be considered to have contributed to abuse through its association with such companies.<sup>57</sup>

67. In recent years it has become increasingly common to see divestment campaigns based on an investor's stake in a company seen to be directly or indirectly abusing rights.<sup>58</sup> Investors will likely base their decisions about such campaigns on their own investment policies and the views of their members. For instance, the Norwegian Government Pension Fund has relied on the Ethical Guidelines to publicly divest from companies based on their alleged complicity in human rights abuses.<sup>59</sup>

### 3. Human rights advocacy

68. Over the last decade major international human rights groups have drawn attention to the issue of companies' indirect involvement in human rights abuses, often employing the term complicity to describe such involvement. In 1998, Amnesty International published its

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<sup>56</sup> Ibid.

<sup>57</sup> For another example of an investment policy dealing with human rights issues, see the Corporate Governance Policy of the Second Swedish National Pension Fund, chapter 10, available at: <http://www.ap2.se/template/Page.aspx?id=468>. The Special Representative has also learned that in May 2008, ABP, the pension fund for employers and employees in the Dutch Government and educational sector, will publish a responsible investment policy, with the United Nations Global Compact amongst its guiding principles. The policy provides that ABP expects companies in which it invests to follow the Global Compact's principles, thus effectively requiring that companies must not be complicit in human rights abuses, with divestment a possible consequence of persistent failure to improve practices in this regard.

<sup>58</sup> For background information on recent divestment campaigns, see <http://www.business-humanrights.org/Categories/Issues/Investmenttradeglobalisation/Divestment>.

<sup>59</sup> In 2006, following consideration of allegations that Wal-Mart was "implicit in violations of human rights and labour rights in its business operations", the Norwegian Ministry of Finance announced the Government Pension Fund's divestment from the company based on recommendations from the Council of Ethics, which were made pursuant to the Ethical Guidelines. The Ministry said the Fund would "incur an unacceptable risk of contributing to serious or systematic violations of human rights by maintaining its investments in the company". The 6 June 2006 press release is available at: <http://www.regjeringen.no/en/dep/fin/Press-Center/Press-releases/2006/Two-companies-Wal-Mart-and-Freeport-.html?id=104396>.

“Human Rights Principles for Companies”, which state, inter alia, that “companies should establish procedures to ensure that all operations are examined for their potential impact on human rights, and safeguards to ensure that company staff are never complicit in human rights abuses”.<sup>60</sup> Human Rights Watch has also published reports on allegedly complicit behaviour of companies.<sup>61</sup> Other advocacy groups are increasingly making allegations against companies for their indirect involvement in human rights abuses, often in the public arena.

69. As noted above, in a recent OHCHR report prepared for the Special Representative, mapping the types of allegations against companies, approximately 41 per cent of the 320 cases were of indirect forms of company involvement in abuse.<sup>62</sup> The report highlights the range of allegations of indirect involvement that may be made against companies, from complaints that companies provided the means to carry out abuses to allegations about the provision of loans to actors said to abuse human rights, and even complaints about silent presence in a region where abuses were known to be occurring.

#### **D. Summing up**

70. What constitutes complicity in both legal and non-legal terms is not uniform, nor is it static. Despite this messy reality, the evidence to date lends itself to several conclusions. First, knowingly providing a substantial contribution to human rights abuses could result in a company being held accountable in both legal and non-legal settings. Second, being seen to benefit from abuse may attract the attention of social actors even if it does not lead to legal liability. Third, and similarly, mere presence in contexts where abuses are taking place may attract attention from other social actors but is unlikely, by itself, to lead to legal liability. In short, both operating in contexts where abuses occur and the appearance of benefiting from such abuses should serve as red flags for companies to ensure that they exercise due diligence, adapted for the specific context of their operations.

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<sup>60</sup> See “Human Rights Principles for Companies” page 7, Amnesty International, document number ACT 70/001/1998, available at: <http://www.amnesty.org/en/library/info/ACT70/001/1998>.

<sup>61</sup> See for example “The Enron Corporation: Company Complicity in Human Rights Violations” (2002), available at: <http://www.hrw.org/reports/1999/enron/>; and “Race to the Bottom, Corporate Complicity in Chinese Internet Censorship” (2006), available at: <http://www.hrw.org/reports/2006/china0806/>.

<sup>62</sup> See A/HRC/8/5/Add.2. For the purposes of the study, “direct” involvement was considered to occur when the company caused the abuse through its own acts or omissions. “Indirect” involvement was considered to occur where firms were alleged to contribute to or benefit from the abuse of third parties, such as suppliers, individuals, arms of a State and other businesses.

71. Avoiding complicity is part and parcel of the responsibility to respect human rights, and entails acting with due diligence to avoid knowingly contributing to human rights abuses, whether or not there is a risk of legal liability. Due diligence will help companies identify and act upon risks that the company should investigate or avoid so as to ensure they do not knowingly contribute to abuses, or knowingly reap benefits from such.

72. In sum, the key tools companies use to determine their human rights impacts for the purpose of fulfilling the responsibility to respect, whether human rights policies, impact assessments, integration policies and/or practices for tracking performance, should focus not only on the company's own business activities, but also on the relationships associated with those activities, to ensure that the company is not complicit, or otherwise implicated in human rights harms caused by others.

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