



**Submission to the  
High Commissioner for Human Rights  
for the report on the  
“Responsibilities of transnational corporations and related  
business enterprises with regard to human rights”**

The United States Council for International Business (USCIB) welcomes the opportunity to submit comments regarding the report of the High Commissioner for Human Rights concerning the “*responsibilities of transnational corporations and related business enterprises with regard to human rights.*” USCIB believes that the High Commissioner’s report can usefully provide an objective and factual assessment of the business role towards the universal goal of protecting human rights.

**EXECUTIVE SUMMARY**

The business role in promoting respect for human rights is an important issue and USCIB welcomes the broader discussion of the issue currently taking place. But the business role is also very complex, providing both opportunities for positive contributions as well as legal and practical limitations faced by any non-State actor. There is much that business has done and can do to help promote respect for human rights, but such efforts cannot replace the singular role of the State in implementing and enforcing national laws on human rights. Thus, the long-term objective of the international community must be to assist governments in developing the institutions, managerial capacity and financial resources necessary to implement and enforce their laws protecting human rights. The Office of the High Commissioner for Human Rights can help to advance the discussion by clarifying the legal issues, by providing an objective assessment of the opportunities and limitations of business efforts to promote respect for human rights, and by establishing an open and constructive dialogue with the global business community.

This submission has five parts: The first provides an overview of USCIB. The second presents USCIB positions on the role of business and business and human rights. The third restates our concerns with the approach taken by the Sub-Commission. The fourth presents views on existing standards and initiatives related to business and human rights. And the fifth sets out USCIB recommendations for further action by the High Commissioner for Human Rights.

## **I. ABOUT USCIB**

USCIB promotes an open system of global commerce in which private enterprise can flourish, thereby contributing to economic growth, respect for human rights, human welfare and protection of the environment. Its membership includes some 300 leading U.S. companies, professional services firms and associations, representing all major sectors of the economy. USCIB works to harmonize international trade and commercial practices through services such as international commercial arbitration and the ATA Carnet system for temporary duty-free imports. USCIB also provides business views to policy makers and regulatory authorities worldwide and serves as the American affiliate of the International Chamber of Commerce, International Organization of Employers and the Business and Industry Advisory Committee to the OECD.

## **II. CORPORATE RESPONSIBILITY AND HUMAN RIGHTS**

### The Role of Business in Society

Companies are an integral part of society and are committed to operating in a responsible and sustainable manner. Business creates value for shareholders, employees, customers and society at large. Private enterprise is unmatched in its ability to assemble people, capital and innovation to create meaningful jobs and profitably produce goods and services that meet the needs and requirements of the world's people.

Corporate responsibility involves a commitment by a company to manage its roles in society – as producer, employer, marketer, customer, taxpayer, and neighbor – in a responsible and sustainable manner. That commitment starts with meeting all legal requirements wherever the company operates, and can include a set of voluntary commitments – over and above legal requirements – that seek to maximize the company's positive impact on the societies in which it operates. Strategies related to production and marketing of goods and services, business ethics, health, safety and environmental practices, treatment of employees, approach to human rights and community engagement are integral parts of a comprehensive approach to corporate responsibility.

### Business Support for Human Rights

USCIB strongly supports respect for human rights not only because it is the right thing to do, but also because protecting human rights benefits all actors in society, including private enterprise. To flourish, both national and international commerce require the same principles, government policies and national institutions needed to protect human rights, including democracy, the rule of law, anti-corruption, independent courts, free speech, individual liberty, anti-discrimination, and freedom from arbitrary government action. Business has worked consistently to promote effective national frameworks based on good governance, open markets, and sound fiscal, social and environmental policies.

Companies are also committed to respect the human rights and civil liberties of employees, customers, suppliers and the communities in which they operate. At an absolute minimum, companies must comply with the laws and regulations of the countries in which they operate, which clearly include laws related to human rights and civil liberties. Because national laws related to human rights vary in many important aspects, companies operating in more than one country often face different national requirements, for example in areas such as the freedom of association and the rights of women. Companies must comply with these differing requirements in carrying out their activities.

In addition to complying with national human rights laws and practices, many companies seek to improve human welfare in the communities in which they operate through voluntary actions. Whether alone or in partnership with other organizations, these efforts have contributed to a wide array of positive actions, including the development of schools, medical facilities, cultural centers, and general support for a variety of community needs and requests. However, such efforts should not divert attention from the urgent need for national governments to create the underlying legal framework for protecting human rights and taking action when those rights are denied.

Efforts that seek to absolve national governments from their human rights obligations and to shift that burden to the private sector are misguided and will not be effective in improving human rights in the countries affected.

### **III. COMMENTS ON THE WORK OF THE SUB-COMMISSION**

While the important issue of business and human rights is broader than a debate about a single document, USCIB does wish to respond to the Office of the High Commissioner's specific request for comments on the draft document produced by the Sub-Commission on the Promotion and Protection of Human Rights. As stated previously by USCIB and by our international affiliates in the International Chamber of Commerce and the International Organization of Employers, USCIB found the approach taken by the Sub-Commission to be unfeasible, unnecessary and counter-productive.

First and most importantly, the approach taken by the Sub-Commission attempted to shift the obligations for protecting human rights from governments to the private sector. The Sub-Commission disregarded one of the key tenets of international law, namely that States have the sole responsibility to implement international human rights laws<sup>1</sup>. Instead, the Sub-Commission invented the notion that States have merely the "primary" obligation and that private actors (companies) also have obligations under international law. Had it been accepted, that effort would have constituted an unprecedented and radical change from the current state of international law, in which international treaties are only binding on the States that sign and ratify them.

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<sup>1</sup> As noted by the Confederation of British Industries, some instruments relating to international criminal law or the laws of war do enable individuals to be made legally responsible for their acts, but those topics are clearly outside the proper scope of human rights law in the present context.

Second, the draft would have transformed the qualified obligations and aspirational goals of governments contained in international treaties into unqualified, immediate requirements for companies. Simply put, the draft would have been impossible to comply with as it would have created requirements that conflicted with national law, would have imposed impossible demands on a company's supply chain, and would have required companies to avoid "indirect" contributions to human rights abuses, which includes paying taxes to abusive governments or even governments that might be abusive.

Third, the draft document was unnecessary since all companies, regardless of size or home country, are required to comply with national laws and thus must already comply with the elements of international human rights treaties that have been implemented through national law. Even in cases where a country has not signed and ratified an international human rights treaty, it is false to assume that this means there are no national human rights laws.

Fourth, the Sub-Commission document was based on a false assumption, namely that "transnational corporations" are somehow unregulated and that an international instrument is necessary to cover their activities. This is simply not the case. Companies that operate in multiple countries must still be legally registered in each of the countries in which they have operations. Multinational companies must follow the same rules and procedures as domestic companies in order to obtain business licenses, purchase land and equipment, and hire employees, among other activities. Thus, there is no gap that needs to be addressed by an international instrument.

And last, the draft document significantly confused the issue of business and human rights. It blurred the very real differences between the legal obligations of States and private actors, including companies, and used an impossibly broad definition of human rights that went far beyond core human rights to include aspirational goals (adequate housing for all) and unrelated issues (e.g. consumer protection, environmental protection, and competition policy). The document even confused the difference between legally binding and voluntary instruments, with the drafters claiming that, while the document was not legally binding, it was "not-voluntary." Further confusing the debate, the use of the word "norms" in its title was inaccurate as norms relate to legal standards while much of the content of the document was drawn from non-binding instruments. Business takes its responsibility to comply with legal requirements very seriously. Unfortunately, the Sub-Commission's draft obfuscated the line between legal requirements and voluntary actions, making it impossible for any company to comply with its requirements.

USCIB therefore welcomed the decision of the UN Commission on Human Rights (2004/116) that affirmed that the Sub-Commission document had not been requested, has no legal standing, and that the Sub-Commission should not perform any monitoring with respect to the document. USCIB also welcomed the decision of the Commission to ask the Office of the High Commissioner to produce a factual report on existing standards, which we believe will be very helpful in moving past the divisive debate created by the Sub-Commission document and starting a new and open dialogue on the important issue of business and human rights.

#### **IV. EXISTING STANDARDS AND INITIATIVES**

The range of existing standards and initiatives can be divided into four main categories, listed in order of importance relative to the goal of protecting human rights:

- 1) National laws, which are binding on all actors in the country regardless of the type of organization, its size, or home country;
- 2) International treaties, which are binding on the States that have signed and ratified them and which are implemented through national law;
- 3) Non-binding declarations and other voluntary instruments that have been developed by a variety of organizations, including governments, business, trade unions, social and environmental organizations, and other groups. By definition, these instruments are non-binding and voluntary; and
- 4) Individual company codes of conduct.

##### National Laws

First, in the context of business and human rights, national laws are by far the most important instruments in protecting human rights as they are legally-binding, apply to all private actors, and have the force of the State to enforce them. As stated above, national laws are the implementing mechanism for international human rights treaties: treaties bind the governments that sign and ratify them and national implementing legislation in turn binds private actors in that jurisdiction. Moreover, national laws apply equally to individuals and organizations, large and small companies, domestic and foreign-owned. And finally, human rights laws are already in place in most countries, so little additional standard setting is required.

But such laws only work when they are implemented effectively and impartially enforced. Therefore, governments' performance in promoting and protecting human rights should be assessed not only on the basis of which treaties they have ratified and what laws they have enacted, but also on the basis of how effectively these laws are enforced. It is clear from the many human rights abuses that occur around the world that many countries are not effectively or consistently implementing their existing human rights laws. This gap between existing national laws and their implementation in practice is without question the most pressing human rights issue today. But rather than trying to shift responsibility from governments to private actors, concerted steps should be taken at the international level to resolve political and military conflicts and where necessary to assist governments in developing the institutions, managerial capacity, and financial resources to implement and enforce their national laws protecting human rights.

##### International Treaties

The second category of existing standards and initiatives are legally-binding international treaties, including the seven main human rights treaties (racial discrimination; economic, social and cultural rights; civil and political rights; gender

discrimination; torture and inhuman punishment; the rights of the child; and the rights of migrant workers), as well as relevant conventions developed by the International Labor Organization (ILO). While it is an important political declaration, the Universal Declaration on Human Rights is not a legally binding instrument open for ratification by States.

Treaties are second in importance to national laws in the context of business and human rights because treaties only pertain to those States that have signed and ratified them. National laws, on the other hand, are legally-binding on private actors and must be complied with, even in areas of weak governance.

### Non-Binding Declarations and Voluntary Initiatives

The third category of existing standards and initiatives are non-binding declarations and other voluntary instruments that have been produced by governments, business, trade unions, human rights, social and environmental organizations, and other groups. Thousands of such instruments have been developed over the past quarter century, and many more continue to be developed. Prominent examples include the OECD Guidelines for Multinational Enterprises (1976), the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977), the CERES Principles (1989), the ICC Business Charter for Sustainable Development (1991), the Caux Principles for Business (1994), the U.S. Model Business Principles (1996), the Global Reporting Initiative (1997), the Amnesty International Human Rights Guidelines for Companies (1998), the Global Sullivan Principles (1999), the Global Compact (2000), and the Voluntary Principles on Security and Human Rights (2000). A compendium of these and other voluntary initiatives produced by governments, business, and NGO's is available from USCIB at: <http://www.uscib.org/index.asp?documentID=2602>

Voluntary initiatives serve many constructive and useful purposes, including setting aspirational goals that private actors in society can work to achieve, coordinating policies among a variety of organizations, communicating the commitment of an organization to a policy or position, and providing guidance and assistance to organizations seeking to improve their own performance. Voluntary instruments also help to maintain a process of innovation that is a critical aspect in the development and implementation of corporate responsibility programs and initiatives. Voluntary efforts allow companies and other organizations to set challenging goals and objectives, to test a variety of approaches or techniques, and to engage with an array of organizations to work toward a common objective. Voluntary efforts also allow programs to be tailored to the unique circumstances of a given company and the different countries in which it operates; a one-size-fits-all approach limits creativity and innovation in the development of effective corporate responsibility programs.

### Company Codes of Conduct

A large and growing number of companies have developed company specific codes of conduct to guide their operations and employee behavior. Such codes usually cover the entire company regardless of location and establish the minimum expectations that they and their business partners will meet. Many company codes also borrow significant provisions from a wide range of other instruments, including national laws, international

treaties, and non-binding declarations. The widespread development and use of company specific codes is a function of their flexibility and ability to reflect the unique circumstances and values of a given company and the different countries in which it operates. Indeed, to be most relevant to a company, business principles should be developed by the companies themselves to reflect their particular objectives and priorities.

#### **IV. RECOMMENDATIONS**

- 1) The High Commissioner's report must, at the outset, clearly identify the problem we are trying to address in the area of business and human rights as that will shape everything that follows from it. In our view, the core problem remains that too many governments do not effectively or consistently implement and enforce their national laws protecting human rights. Since national laws are the critical piece of human rights law that applies to private actors, the lack of implementation and enforcement creates a void in government oversight that encompasses the entire country, not just certain sectors or types of companies.
- 2) Similarly, the report should question the assumptions behind the decision of the Sub-Commission to focus its attention on companies operating in two or more countries. Most authoritative studies on the performance of multinational companies conclude that they bring high standards with them when investing abroad. Indeed, the vast majority of foreign investment is directed to countries with high standards and effective enforcement mechanisms. Further, as multinational companies must be legally registered in the countries in which they operate, the distinction between domestic and multinational companies is arbitrary in this context.
- 3) The report should address the confusion caused by the Sub-Commission document by presenting an authoritative assessment of the relationship between international treaties and national laws and the respective obligations of States and private actors. This should, in our view, reaffirm the existing construct that States have the sole obligation to implement international law and that, with few specific exceptions, international obligations apply to private actors only when they are enacted in national law.
- 4) The report should also address the barriers that governments face in trying to implement and enforce their national laws. While some governments are themselves the source of human rights abuses and others allow abuses by through inaction, many have the will to act but lack the capacity to do so. The report should review these barriers and present possible ways to address them. As an example, one barrier to effective enforcement is that many developing countries have informal economies that are considerably larger than their formal economies. This can have a negative impact on enforcement both from reduced tax collection to pay for labor inspectors, etc. as well as from a lack of information about the nature and location of unregistered domestic firms.

- 5) The report should assess the challenges and practical limitations to implementing human rights through supply chains. BIAC has written a comprehensive assessment of the complexities of supply chains and the role they play in corporate responsibility<sup>2</sup>. While many companies have developed internal policies that integrate social and environmental criteria into their purchasing requirements, using supply chains to enforce human rights would be an inefficient and potentially unfair substitute for implementation and enforcement by governments. The inefficiency is evident in existing initiatives to monitor suppliers for social and environmental performance, with many suppliers being audited on a nearly continuous basis by their different customers. Government enforcement would replace these redundant audits with official oversight backed by the force of the State. Using supply chains to enforce human rights also raises questions of fairness since the customer would have to assess whether the supplier met certain human rights criteria or not, as opposed to an independent court. And lastly, the supply chain model fails to capture most of the informal economy or suppliers selling only for the local economy, where most of the worst human rights abuses take place. By contrast, government enforcement would be able to cover domestic producers as well as foreign investors.
- 6) The report should review the potential of voluntary initiatives to help business and other actors work cooperatively with governments to promote the rule of law, anti-corruption, independent courts, free speech, individual liberty, anti-discrimination, and sound fiscal, social and health, safety and environmental policies. There are many voluntary actions that companies can and have undertaken to help promote respect for human rights, acting alone or in cooperation with other organizations. The report could assess ways to share information and experiences among interested members of the Commission on Human Rights to facilitate new initiatives to protect human rights.
- 7) The report could very usefully help to define what is meant by human rights in the international, national, and private actor (business) contexts, based on an appropriate scope that focuses on core human rights and excludes unrelated issues such as consumer protection and environmental protection. The report should also clarify which human rights are absolute and which are qualified or aspirational.
- 8) And last, the report should address the potentially negative implications of privatizing the implementation and enforcement of human rights by shifting responsibility to private actors. Calls for companies not only to manage their own activities but also to police independent organizations raise important issues of accountability and due process. In our view, private organizations, including business, do not have the mandate, authority or resources to assume what are and should remain the responsibilities and functions of governments.

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<sup>2</sup>*The Business and Industry Advisory Committee (BIAC) discussion paper on supply chain management prepared for the OECD Roundtable on Corporate Responsibility, June 2002.*



## **CONCLUSION**

The business role in promoting respect for human rights is complex, providing both opportunities for positive contributions as well as legal and practical limitations faced by any non-State actor. There is much that business has done and can do to help promote respect for human rights, but such efforts cannot replace the singular role of the State in implementing and enforcing national laws on human rights. States have and must retain the sole responsibility to implement international human rights laws and cannot shift that responsibility to companies. Given the central role of national laws on human rights, including those designed to implement international treaties, significant efforts should be made by the international community to assist governments in developing the institutions, managerial capacity and financial resources necessary to implement and enforce their laws protecting human rights.

USCIB again thanks the Office of the High Commissioner for Human Rights for the opportunity to comment and would welcome the possibility for further consultations in the future. We look forward to the release of the High Commissioner's report and the clarifications it could provide regarding the issues discussed above.