

WITH POWER COMES RESPONSIBILITY: HUMAN RIGHTS AND CORPORATE ACCOUNTABILITY

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I INTRODUCTION

The influence of transnational corporations ('TNCs') on the economic and political life of most countries – and on economic and political relations in general – has increased greatly in recent decades. Today, the economic capacities of transnational corporations go far beyond the economic capacities of the countries in which they operate, and their political muscle is often far greater than the ability of some states to regulate them effectively.¹

This power should be accompanied by responsibility and the United Nations *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*² ('the Norms') constitute the most recent attempt to definitively outline the human rights and environmental responsibilities attributable to business.³ The Norms, drafted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights and debated for the first time by the United Nations Commission of Human Rights at its annual meeting in March 2004, and again in April 2005, have provoked diverse reactions from business, governments, human rights organisations, and international and

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1 United Nations Research Institute for Social Development ('UNRISD'), *Corporate Social Responsibility and Business Regulation*, Research And Policy Brief 1 (2004) <[http://www.unrisd.org/80256B3C005BCCF9/\(httpPublications\)/F862A71428FAC633C1256E9B002F1021?OpenDocument&fromsearch=yes&query=research+and+policy+brief](http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/F862A71428FAC633C1256E9B002F1021?OpenDocument&fromsearch=yes&query=research+and+policy+brief)> at 29 September 2005. See also Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004) 1.

2 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, United Nations Sub-Commission on the Promotion and Protection of Human Rights Res 2003/16, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

3 The term 'business' is used throughout to refer generally to TNCs and other business enterprises as defined in the Norms: *ibid* [1].

corporate lawyers.⁴ The Norms elicited a predictable ‘knee-jerk’ negative reaction from some peak business bodies but were cautiously welcomed by others in the business community.⁵ Human rights organisations have generally welcomed the initiative.⁶

Corporate social responsibility, accountability or citizenship is not a new concept. What is new is an emerging international consensus on the human rights standards that are applicable to companies and some innovative proposals for ensuring companies implement such standards.⁷ Over the last 35 years, attitudes towards issues of corporate accountability have come full circle, starting and ending with an emphasis on regulation and ‘corporate accountability’ rather than ‘corporate social responsibility’. The 1970s were largely a period of ‘regulation’ during which both governments and inter-governmental organisations attempted to introduce (rather unsuccessfully) binding regulations on transnational

4 The response to the Norms by both the United States and Australian governments is indicative of the wary, negative approach adopted by several states with regard to the possibility of developing binding corporate accountability measures. See, eg, the stakeholder submissions of the United States and Australia to the Office of the High Commissioner for Human Rights: Office for the United Nations High Commissioner for Human Rights, *Stakeholder submissions to the Report of the High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* <<http://www.ohchr.org/english/issues/globalization/business/contributions.htm#states>> at 29 September 2005. The United States and Australia were two of only three countries that voted against the 2005 resolution of the Commission on Human Rights calling for an appointment of a Special Representative on business and human rights issues: see below n 18.

5 For a negative reaction, see International Organisation of Employers and International Chamber Of Commerce (‘IOE and ICC’), *Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/918bbd410b5a8d2cc1256d78002a535a?Opendocument>> at 29 September 2005. In contrast, The Business Leaders Initiative on Human Rights chaired by Mary Robinson, the former United Nations High Commissioner of Human Rights, is ‘road-testing’ the Norms. It is expected that the various company projects under the initiative will contribute learning and experience as to whether the Norms add value to the existing work on corporate social responsibility in the companies. Participating companies are Novartis, Transco Grid, Body Shop, Barclay’s Bank, MTV Europe, Novo Nordisk, ABB, Hewlett Packard and Gap Inc. The project is expected to conclude in 2006. See Sune Skadegaard Thorsen and Annemarie Meisling, ‘Perspectives on the United Nations Draft Norms’ (Paper presented at the IBA/AIJA Conference on Corporate Social Responsibility, Amsterdam, 25–26 June 2004) <<http://www.lawhouse.dk/?ID=259>> at 29 September 2005.

6 Amnesty International, *The United Nations Human Rights Norms For Business: Towards Legal Accountability* (2004) <<http://web.amnesty.org/library/index/engior420022004?open=&of=eng-398>> at 29 September 2005. See also a joint statement from a group of 15 human rights organisations welcoming the Norms: Human Rights Watch, *Nongovernmental Organizations Welcome the New UN Norms on Transnational Business* (2003) <<http://www.hrw.org/press/2003/08/un-jointstatement.htm#ngos>> at 29 September 2005.

7 The focus of this paper is primarily on human rights standards applicable to business but the Norms also include direct references to environmental obligations: [G]; anti-corruption measures: [E]; and consumer protection provisions: [F]. Environmental damage has a clear nexus to human rights, with Shell’s oil extractions in Ogoniland in Nigeria (which caused environmental damage and consequently impacts on the right to food and an adequate standard of living), providing a recent example. See Joseph, above n 1, 2. Anti-corruption obligations and consumer protection provisions are not derived directly from international human rights law although infringements of both could have a flow-on effect for the ability of persons to fully enjoy aspects of economic, social and cultural rights.

corporations.⁸ The discussions of the 1980s stand in contrast to this emphasising deregulation and corporate rights.⁹ The 1990s was a period when globalisation gathered force (including a growth in the number and influence of civil society actors) and media interest focused on sensational issues, such as the use of sweatshops by well-known brands like Nike, Disney and Levi Strauss.¹⁰ Corporate self-regulation was the key buzz word. The take-up and development of codes of conduct in various forms from 1991 (when Levi Strauss first introduced its code) to the end of the decade was remarkable and was accompanied by an impressive body of research literature focused on exploring this new phenomenon.¹¹ Recently, as the limits of self-regulation have started to become apparent, alternative approaches emphasising corporate accountability (versus corporate social responsibility, which has often come to mean a voluntary add-on to a company's activity) and a renewed interest in international regulation of business are emerging.¹²

This article considers the Norms as a framework for definitively outlining the human rights responsibilities of business and argues that the Norms are a welcome initiative in comprehensively defining these obligations. This article first examines the content of the Norms in the context of recent criticisms levelled against them by sections of the business community and argues that the inclusive nature of the Norms is both their greatest asset and their greatest potential defect. Consideration is also given to the apportionment of responsibility between state and non-state actors for human rights. The next section addresses possible mechanisms for implementing the Norms and examines how the Norms can best be used to create greater consistency in monitoring human rights. Although a legally binding global compliance framework may be many years off, the Norms offer civil society, governments

8 Jem Blendell, *Barricades And Boardrooms: A Contemporary History of the Corporate Accountability Movement*, Paper No 13, United Nations Research Institute for Social Development Programme on Technology, Business and Society (2004) 21 <<http://www.unrisd.org/unrisd/website/document.nsf/0/504AF359BB33967FC1256EA9003CE20A?OpenDocument>> at 29 September 2005. See also Rhys Jenkins, 'Corporate Codes Of Conduct: Self Regulation in A Global Economy' (Paper presented at the UNRISD Workshop on Promoting Corporate Responsibility in Developing Countries, Geneva, Switzerland, 23–24 October 2000) <<http://www.unrisd.org/unrisd/website/document.nsf/0/E3B3E78BAB9A886F80256B5E00344278?OpenDocument>> at 30 September 2005.

9 UNIRSD, above n 1, 1.

10 Bob Herbert, 'Children of the Dark Ages', *The New York Times* (New York), 21 July 1995, A25; Aaron Bernstein, 'A Floor under Foreign Factories?', *Business Week* (United States), 9 November 1998, 126; Timothy Egan, 'The Swoon of the Swoosh', *The New York Times* (New York), 13 September 1998, 66; Aaron Bernstein, 'A Potent Weapon in the War Against Sweatshops', *Business Week* (United States), 1 December 1997, 40.

11 See generally Helle Bank Jørgensen et al, Corporate Social Responsibility Practice, World Bank Group, *Strengthening Implementation Of Corporate Social Responsibility In Global Supply Chains* (2003) <<http://rru.worldbank.org/PapersLinks/Open.aspx?id=3502>> at 29 September 2005; Kathryn Gordon and Maiko Miyake, 'Deciphering Codes Of Corporate Conduct: A Review Of Their Contents', Working Paper 1999/2, Organization for Economic Co-Operation and Development (1999) <<http://www.oecd.org/dataoecd/23/19/2508552.pdf>> at 29 September 2005; Charles Sabel et al, Social Protection Unit, World Bank Group, *Ratcheting Labor Standards: Regulation For Continuous Improvement In The Global Workplace*, Discussion Paper No 11 (2000) <<http://www.archonfung.net/papers/RLS21.pdf>> at 29 September 2005; Janelle Diller, 'A Social Conscience in the Global Marketplace? Labor Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives' (1999) 138 *International Labour Review* 99.

12 UNRISD, above n 1, 1.

and companies themselves a consistent standard with which to assess and enforce those human rights most relevant to business.

II CONTENT OF THE NORMS

A Origin of the Norms

The Norms were developed at the instigation of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, a 26-member group of experts that reports to the 53 government members on the Commission on Human Rights.¹³ In 1998 the Sub-Commission established a working group on the activities of transnational corporations which, in 2001, was asked to ‘contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights’.¹⁴

Over the next three years, various versions of the Norms were circulated and commented on by a diverse group including representatives from governments, inter-governmental organisations, non-governmental organisations, transnational corporations, business, the United Nations (‘UN’), and other interested parties. On 13 August 2003, the Sub-Commission unanimously adopted the Norms, recognising that they ‘reflect most of the current trends in the field of international law, and particularly international human rights law, with regard to the activities of transnational corporations and other business enterprises’.¹⁵ The Sub-Commission transmitted the Norms to the United Nations Commission on Human Rights for consideration at their 2004 annual meeting. The Norms were placed on the agenda at the 2004 session of the United Nations Commission on Human Rights,¹⁶ sparking a war of words between business, government, human rights organisations and international and corporate lawyers. A number of key business organisations, principally the International Chamber of Commerce (‘ICC’), the International Organisation of Employers (‘IOE’) and the United States Council for International

13 The Human Rights Commission is the main body within the United Nations dealing with human rights issues and comprises (rotating) representatives of 53 member governments. The Commission sits each year in Geneva for approximately six weeks during March and April. At the time of writing, reform proposals are being discussed in the United Nations to replace the Commission with a smaller standing Human Rights Council. See Secretary-General of the United Nations, *In Larger Freedom: Towards Development, Security and Human Rights for All* (2005) <<http://www.un.org/largerfreedom>> at 29 September 2005.

14 UN Sub-Commission on the Promotion and Protection of Human Rights, Res 2001/3, UN Doc E/CN.4/Sub.2/RES/2001/3.

15 Sub-Commission Res 2003/16, UN Doc E/CN.4/Sub.2/2003/L.11 (2003).

16 UN Doc E/CNA/2004/L.73/Rev.I (16 April 2004) (Agenda Item 16 at the 60th Session).

Business ('USCIB'), objected to the Norms on a number of fronts and lobbied strongly against any moves by the Commission to 'adopt' the Norms.¹⁷

Opposition by these business organisations was again strong in anticipation of the issue being debated at the April 2005 session of the Commission of Human Rights. Nonetheless, the Commission decided in a 49–3 decision to call on the UN Secretary General to appoint a special representative on the issue of human rights and transnational corporations for an initial period of two years to investigate these issues further.¹⁸

The alarm with which the Norms have been greeted by certain sectors of the business community reflects concern with two principal issues. The first deals with the actual content of the Norms and the accusations that they are unnecessary, duplicative, vague and at times stretch the definition of human rights.¹⁹ The second broad area of concern relates to the legal status of the Norms and the apportioning of responsibility between government and business for their effective implementation, leading to claims that the Norms attempt to 'privatise' human rights.²⁰ Such concerns reflect a general wariness from sectors of the business (and legal) community about what some claim is the radical nature of the Norms and the prospect of moving a step closer to the development of binding regulation imposing human rights obligations directly on business.

It is true that the Norms are, in part, radical. They present the most comprehensive, action-oriented restatement to date of the human rights responsibilities applicable to business. Taken as a whole, they confirm the relevance of such principles to companies and clearly acknowledge the *direct* role

17 IOE and ICC, above n 5, 4; United States Council for International Business ('USCIB'), 'Talking Points on the Draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"' <<http://209.238.219.111/USCIB-text-Talking-Points.htm>> at 29 September 2005. This opposition to the Norms has continued and is evident in the separate submissions of the International Organization of Employers the International Chamber of Commerce) to the Office of the High Commissioner for Human Rights ('OHCHR') regarding its report on the 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights'. See International Organisation of Employers (2004) (unpublished paper, copy on file with author); International Chamber of Commerce *Request for Input on Report* (2004) <<http://209.238.219.111/Intl-Chamber-of-Commerce-submission-to-UN.pdf>> at 30 September 2005. The report was released by the OHCHR in February 2005 and discussed by UN Commission on Human Rights in April 2005. See *Report of the Sub-commission on the Promotion and Protection of Human Rights* UN Doc E/CN.4/2005/91 (2005) <<http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.91.doc>> at 30 September 2005.

18 UN Doc E/CN.4/2005/L.87 (2005). The three states who voted against the resolution were the United States of America, Australia and South Africa (although South Africa's vote signalled dissatisfaction with the weakened compromised language of the resolution). The resolution of the Commission on Human Rights provides the Special Representative with a mandate to: clarify the standards of corporate responsibility; elaborate on the role of states in regulating business; define concepts such as 'complicity' and 'spheres of influence', develop methodologies for human rights impact assessments of the activities of business; and compile a compendium of 'best practices'. On 28 July 2005 the UN Secretary General appointed Professor John Ruggie as the UN Special Representative. Professor Ruggie previously served as UN Assistant Secretary-General and senior adviser for strategic planning from 1997 to 2001 and he was one of the main architects of the United Nations Global Compact. The Special Representative is due to hold broad-based consultations and issue two reports; an interim report in 2006 and a final report in 2007.

19 USCIB, above n 17, 1.

20 Ibid.

of business in promoting and securing such rights.²¹ The Norms raise fundamental questions about how responsibility for the protection, promotion and fulfilment of human rights should be apportioned between state and non-state actors and call into question traditional assumptions that government is the only actor of substance in this arena. However some of the criticisms of the peak business organisations have resonance and provide a useful starting point for evaluating the currency and practicality of the Norms, both in terms of their content and proposals for implementing them. Such discussion will assist in considering whether the Norms are indeed a definitive and enduring statement of the responsibilities business should assume for human rights, or merely an overly optimistic attempt to regulate companies that overlooks the current limitations of international human rights law in directly guiding and enforcing responsible corporate behaviour.

B Duplication or Innovation?

Accusations that the Norms are, in part, duplicative and merely restate, albeit in a single comprehensive document, obligations which are already laid out in a multiplicity of documents, ranging from international conventions and declarations to corporate codes of conduct, are accurate. The Norms were not released into a political vacuum; rather, they are the latest in a (relatively) long line of recent attempts to define the human rights responsibilities of business. This means that they are necessarily duplicative of standards previously enounced. Their value comes from their comprehensive nature because in a single document they pull together the principal rights relevant to business in a single document and translate these statements, primarily addressed to states, to corporations.

Since the 1970s, a number of attempts have been made to draft voluntary guidelines, declarations and codes of conduct to regulate the activities of TNCs. The most notable of these (at an inter-governmental level) are the *Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises*²² ('OECD Guidelines'), the *International Labour Organisation's Tripartite Declaration of Principles Concerning Multinational Enterprises and*

21 See discussion below at n 91 which examines how the Norms apportion responsibility for human rights between the state and business while maintaining that the state has the primary responsibility for promoting and protecting human rights.

22 Organisation for Economic Co-Operation and Development ('OECD'), *Organisation for Economic Co-Operation and Development Guidelines For Multinational Enterprises* (2000) <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> at 29 September 2005. In contrast to the various voluntary guidelines, the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* imposes legal obligations on signatory parties. This Convention obliges signatory countries to make the bribery of a foreign public official a crime under domestic laws. It covers only bribery aimed at public officials, not private sector representatives.

*Social Policy*²³ and the *International Labour Organisation's Tripartite Declaration on Fundamental Principles and Rights at Work* ('ILO Tripartite Declarations'). The now defunct United Nations Centre on Transnational Corporations also attempted to draft a code regulating corporate activities over an extended period, but the Code ultimately failed to materialise.²⁴

The *OECD Guidelines* and the *ILO Tripartite Declarations* are revolutionary in the sense that they explicitly hone in on the need to delineate the obligations of companies with respect to protecting human rights; however, their impact is weakened because they continue to be subject to severe limitations. Apart from the fact that they are non-binding, their implementation mechanisms are extremely weak and the duties outlined are broad, lack detail and provide little practical guidance for companies aiming to implement their principles. While they both *encourage* companies to promote and protect internationally recognised human rights, there are no effective, independent enforcement mechanisms to ensure they do so. Decisions cannot be enforced directly against a company and their power to compel behavioural changes remains subject to the political will and ability of national governments.²⁵

More recently, in 2000, the United Nations established the Global Compact ('Compact'), whereby the United Nations Secretary General, Kofi Annan, called on world business leaders to voluntarily 'embrace and enact' a set of ten principles relating to human rights, labour rights, the protection of the environment and corruption, in their individual corporate practices.²⁶ The standards aim to reflect those norms as laid out in the Universal Declaration of Human Rights, the ILO Tripartite Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption. With the exception of the labour rights principles, which are narrowly focused, the Compact does little to advance the debate toward clarifying what the key human rights and environmental issues are for business. The human rights principles ask business to 'support and respect the protection of internationally proclaimed human rights' within their sphere of

23 The Declarations can be seen as providing guidance for how corporations should implement the fundamental International Labour Organisation conventions. The overarching obligations with respect to labour rights are set out in the eight fundamental conventions of the ILO: *Forced Labor Convention*; *Freedom of Association and Protection of the Right to Organise Convention*; *Right to Organise and Collective Bargaining Convention*; *Equal Remuneration Convention*; *Abolition of Forced Labor Convention*; *Discrimination (Employment and Occupation) Convention*; *Minimum Age Convention*; *Worst Forms of Child Labour Convention*. These Conventions are legally binding on those states who have ratified them. Obligations then exist at a national level, to ensure enforcement of these rights by corporations; they do not directly bind companies.

24 In 1975, the UN established a Centre on Transnational Corporations, which by 1977 was coordinating the negotiation of a voluntary *Draft Code of Conduct on Transnational Corporations*. Negotiations lingered until the early 1990s but no final agreement was concluded. See Blendell, above n 8, 11.

25 International Council on Human Rights Policy ('ICHRP'), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies Main Report* (2002) 99–102 <<http://www.ichrp.org/index.html?project=107>> at 29 September 2005.

26 For a criticism of the Global Compact see Letter from Oxfam International, Amnesty International, Lawyers Committee for Human Rights and Human Rights Watch to Ms Louise Fréchette, Deputy Secretary-General of the United Nations, 7 April 2003 <http://www.humanrightsfirst.org/workers_rights/wr_other/wr_joint_1_tr040703.htm> at 29 September 2005.

influence and ask that business 'should make sure that they are not complicit in human rights abuses'; however, it does not specify the exact human rights which business should support and respect.²⁷

Likewise, Principles 7, 8 and 9 of the Compact encourage businesses to support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility, and encourage the development and diffusion of environmentally friendly technologies. The principles in the Compact do not constitute a sufficient basis for designing enforceable standards, and are beneficial more from the point of view of acting as another indicator, in the global arena, of the relevance of international human rights norms to business. The lack of conceptual clarity leaves a wide margin of appreciation to business regarding the interpretation of these principles and their applications. Further, the Compact does not include any methods for monitoring and enforcing the implementation of these principles and, as such, is more effective as an educational tool than as a mechanism for ensuring the protection of these rights by companies.²⁸

The Global Compact has been successful in attracting a large number of participants, now estimated at more than 1700,²⁹ but its attempt to build such a broad and inclusive tent with a diverse range of corporate participants has resulted in a diminution of its overall effect. The focus on quantity rather than quality has been the subject of justifiable criticism from some of its participating non-governmental organisation partners who have decried the credibility and effectiveness of the Global Compact. They have suggested that the Compact has done little in the past four years to encourage companies to 'move ... beyond rhetoric and policy dialogues, and [to] demonstrate the tangible impact of their activities on human rights, labour rights and environment'.³⁰ In particular, the lack of transparency of companies' involvement and commitment to the Compact's principles has been singled out for criticism. In response, the Global Compact launched its Integrity Measures in June 2004, which contain general provisions on the use (or misuse) of the United Nations logo and its policy on the

27 For a criticism of the Global Compact see Letter from Oxfam International, Amnesty International, Lawyers Committee for Human Rights and Human Rights Watch to Ms Louise Fréchette, Deputy Secretary-General of the United Nations, 7 April 2003 <http://www.humanrightsfirst.org/workers_rights/wr_other/wr_joint_ltr040703.htm> at 29 September 2005.

28 For a criticism of the Global Compact see Letter from Oxfam International, Amnesty International, Lawyers Committee for Human Rights and Human Rights Watch to Ms Louise Fréchette, Deputy Secretary-General of the United Nations, 7 April 2003 <http://www.humanrightsfirst.org/workers_rights/wr_other/wr_joint_ltr040703.htm> at 29 September 2005.

29 Peter Engardio, 'Two Views of the Global Compact', *Business Week Online*, 20 July 2004 <http://www.businessweek.com/bwdaily/dnflash/jul2004/nf20040720_9215_db039.htm> at 3 November 2005.

30 Amnesty International, *United Nations Global Compact Leaders' Summit: Time to Move from Aspirations to Performance* (2004) <<http://web.amnesty.org/pages/ec-globalcompact-eng>> at 29 September 2005. See also correspondence from Human Rights First to the United Nations in relation to the Global Compact <http://www.humanrightsfirst.org/workers_rights/wr_other/wr_other.htm#jump1> at 29 September 2005.

requirement of participants to communicate their progress in integrating the Compact's principles into business practices.³¹

The commitments required of the participants in the Global Compact are not onerous and rely for the large part on the 'self-enlightened engagement of its participants'.³² Such tactics can only have a limited effect because the educational benefits may be outweighed by the damage being done to the United Nation's credibility and reputation through its association with less savoury companies.³³ Mostly though, the Global Compact is significant for what it is not. It is not a vehicle to push companies beyond their comfort zone in confronting their human rights responsibilities and it is not likely now or in the future to move beyond its voluntary *modus operandi*. In that way alone, despite there being overlap between the content of the Compact's principles and those contained in the Norms, it is a very different creature from the Norms.

Aside from such regional and multilateral efforts, in the last fifteen years there has also been a vast increase in the number of codes of conduct developed by companies, trade organisations, non-governmental organisations ('NGOs') and multi-stakeholder bodies. These have been largely aimed at delineating business's responsibilities with respect to specific human rights and environmental issues. Levi Strauss & Co was one of the early adopters in 1991 with the development of its ethical code, and was followed soon after by a raft of companies such as Gap Inc., Nike, Shell and BP Amoco, notably, these companies were principally representative of the apparel and footwear sectors, and extractive industries.³⁴ Codes of conduct assume many forms and roles.³⁵ One function is in setting a standard to which companies publicly commit. Although codes are not generally legally enforceable, they are backed by the reputation of the company that adopts them, supported by the ever-present threat of media exposure. As such, codes have tended to be adopted more quickly by

31 United Nations Global Compact, *Global Compact Integrity Measures*, <http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/unge_html_content/AboutTheGC/HowToParticipate/integrity_measures.pdf> at 29 September 2005.

32 Ibid [1].

33 Allegations of using the UN as a 'blue wash' were raised by groups such as CorpWatch which alleged violations of the Global Compact principles by companies such as Nike, Unilever and Rio Tinto. See generally CorpWatch: Holding Corporations Accountable <<http://www.corpwatch.org>> at 29 September 2005. See also Joshua Karliner and Kenny Bruno, Editorial, 'The United Nations Sits in Suspicious Company', *International Herald Tribune* (France), 10 August 2000, 6.

34 See Levi Strauss & Co, *Social Responsibility/Sourcing Guidelines* (2005) <<http://www.levistrauss.com/responsibility/conduct/index.htm>> at 29 September 2005.

35 Kathryn Gordon and Maiko Miyake, 'Deciphering Codes of Corporate Conduct: A Review of their Contents', Working Paper No 1999/2 (2000) 12 <<http://www.oecd.org/dataoecd/23/19/2508552.pdf>> at 3 November 2005. This OECD study was the result of an investigation of 246 voluntary codes collected 'from business and non-business contacts which OECD Member governments helped identify': 8. Out of this set of codes, Gordon and Miyake found that 118, or 49 per cent, were issued by individual companies (mostly multinationals); 34 per cent were industry and trade association codes; two per cent were codes issued by an international organisation; and 15 per cent were codes issued by a partnership of stakeholders (mainly NGOs and unions): 9. See also Gary Gereffi et al 'The NGO-Industrial Complex' (2001) 127 *Foreign Policy* 56, 57: 'the Global Reporting Initiative, an organisation dedicated to standardising corporate sustainability reporting, estimates that more than 2000 companies voluntarily report their social, environmental, and economic practice and performance'.

those companies that rely heavily on the value of their brand to sell their product. Many of these companies have become, in essence, marketing and distribution companies, which directly produce very little of what is sold under their brand name.³⁶ Protecting their brand name is critical to them, and as consumers in the United States and European markets, and elsewhere, become better informed about human rights issues, this creates opportunities to hold these companies accountable for activities throughout their entire supply chain.³⁷

Following the growth and subsequent criticism by NGOs and unions of company specific codes, various multi-stakeholder approaches were devised in the later 1990s to develop consensus on code standards, guidelines and monitoring mechanisms. Programs such as the Fair Labor Association's Workplace Code of Conduct,³⁸ Social Accountability 8000,³⁹ the Ethical Trading Initiative,⁴⁰ the Global Reporting Initiative,⁴¹ Accountability 1000,⁴² Voluntary Principles on Security and Human Rights,⁴³ the Global Sullivan Principles,⁴⁴ and the Business Principles for Countering Bribery⁴⁵ are just a few of the plethora of codes and guiding principles that have been developed. All are largely focused on transnational corporations that bear responsibility, either directly or via their supply chain, for the protection and promotion of human rights.⁴⁶ These codes provide a useful guide in developing consensus on the human rights issues most relevant to business, but their guidance is necessarily limited by the self-selecting nature of the standards.

Codes of conduct vary from company to company and amongst industries. Specific issues may have found their way into a code as a direct result of public

36 A large percentage of a high profile brand company's total market value is estimated to be comprised of intangible assets such as reputation, brand, strategic positioning, alliances and knowledge. See generally Rita Clifton and Esther Maughan (eds), *The Future Of Brands: Twenty Five Visions* (2000).

37 For further discussion on the value of codes of conduct and their form see Michael Posner and Justine Nolan, 'Codes of Conduct and Workers Rights' in Robert Flanagan and William Gould IV (eds), *International Labor Standards: Globalisation, Trade And Public Policy* (2003) 207–26.

38 See Fair Labour Association <<http://www.fairlabor.org/all/code/index.html>> at 29 September 2005.

39 Social Accountability International, *Overview of Social Accountability 8000* <<http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473>> at 29 September 2005.

40 See Ethical Trading Initiative <<http://www.ethicaltrade.org>> at 29 September 2005.

41 See Global Reporting Initiative <<http://www.globalreporting.org>> at 29 September 2005.

42 AccountAbility: Institute of Social and Ethical Accountability, *AA1000*, AccountAbility Series <<http://www.accountability.org.uk/aa1000>> at 29 September 2005.

43 Bureau of Public Affairs, United States Department of State, *Fact Sheet: Voluntary Principles on Security and Human Rights* (2000) <<http://www.state.gov/g/drl/rls/2931.htm>> at 29 September 2005.

44 Global Sullivan Principles of Social Responsibility <<http://globalsullivanprinciples.org/principles.htm>> at 29 September 2005.

45 Transparency International and Social Accountability International, *Business Principles for Countering Bribery: An Initiative of Transparency International and Social Accountability International* (2003) <http://www.transparency.org/building_coalitions/private_sector/business_principles/dnld/business_principles2.pdf> at 29 September 2005.

46 Several of these codes and guidelines can be distinguished by their focus on performance or reporting standards (cf Social Accountability 8000; Global Reporting Initiative). *AA1000* is more of a 'process' standard advising companies on how to approach these issues from a systems management point of view.

criticism of a company's practices.⁴⁷ These reactive codes most commonly reflect issues that companies, consumers, workers and others are motivated to address in a very public manner. Child labour is far more likely to figure in a code of conduct than the less headline-grabbing issues of freedom of association or the right to health.⁴⁸ However, given the 'copy cat' nature of code development, inclusion of an issue in one company's code of conduct may be enough to warrant inclusion (barring absolute irrelevance) in another code. While the proliferation of codes of conduct – whether company specific or as part of a multi-stakeholder initiative – in the last decade has meant that hundreds of companies have now publicly committed to upholding basic human rights, the challenge is to ensure the standards espoused in codes or guidelines adopted by business are consistent, comprehensive and implemented.

It is this precise challenge that the Norms attempt to address. While many codes are strong on more universally recognised labour rights, such as the prohibition of forced labour and child labour, and freedom from harassment and discrimination, there are variations even within such labour-focused codes. The greatest differences are in standards on freedom of association and wages. Different standards on freedom of association are in part due to companies' practical concerns for their ability to ensure compliance when producing in countries like China or Vietnam, where the rights of freedom of association and collective bargaining are severely restricted. Similarly, there is a lot of debate about how to determine a standard floor for wages, particularly in countries where national minimum wages are at or below subsistence levels. In such cases, many companies prefer to adopt codes that simply require compliance with national laws and argue that applying human rights norms is not their business. The Norms are an attempt to develop an overarching framework so that the standards are consistent and comprehensive, rather than allowing companies to accept the standards of the lowest common denominator.⁴⁹ The Norms can usefully counter the cacophony of opportunistic standard setting that has so far marked the code of conduct debate and worked to confound consensus building on human rights issues.

In the last three years, the growth of the socially responsible investment ('SRI') market and increasing interest in 'triple bottom line reporting' mechanisms, have provided another forum for divining emerging consensus on the human rights issues most relevant to business. Two of the more prominent SRI indexes, the Dow Jones Sustainability Index, launched in 1999,⁵⁰ and the

47 For example, the reaction of Nike in 1997 to the leaked report on one of their supplier factories by Ernst & Young. See Dara O'Rourke, *Smoke From A Hired Gun: A Critique of Nike's Labor and Environmental Auditing in Vietnam as Performed by Ernst & Young*, Transnational Resource and Action Center Report, 10 November 1997 <<http://corpwatch.org/article.php?id=966>> at 29 September 2005.

48 Gordon and Miyake, above n 35, 14.

49 Lance Compa and Tashia Hinchcliffe-Darricarrere, 'Enforcing International Labor Rights through Corporate Codes of Conduct' (1995) 33 *Columbia Journal of Transnational Law* 663, 686.

50 See Dow Jones Sustainability Index <<http://www.sustainability-index.com/>> at 29 September 2005.

FTSE4Good, launched in 2001 by the Financial Times Stock Exchange,⁵¹ aim to establish a baseline of challenging but achievable standards for corporate responsibility. Both emphasise environmental sustainability, labour rights and human rights. Other popular code issues, which are featured in the Norms, such as corruption, bribery, and security practices are emphasised.

The most recent players to step up and address issues arising at the intersection of business and human rights are some major financial institutions and the insurance sector. Attempts have been made to more clearly define the expectations and responsibilities placed on these businesses to respect human and environmental rights. For example, the development of the voluntary guidelines, known as the Equator Principles, in June 2003, by a number of financial institutions to assist in determining, assessing and managing environmental and social risk in project financing, provides another useful base for identifying the overlapping and repetitive nature of those specific human rights and environmental issues considered relevant to business, albeit again on a sector specific level.⁵² This notion of extending both culpability and responsibility in order to promote, respect and protect human rights to the traditional 'silent investment partners' illustrates the ever increasing relevance and acceptance of such responsibilities to business.⁵³ The adoption of the Equator Principles reflects the increasing scrutiny that project sponsors and lenders face in dealing with environmental and social issues which surround projects in emerging markets, and can be seen as a direct response, by the adopting banks, to criticism from NGOs and others relating to their past lending practices.

The *Association of British Insurers Disclosure Guidelines on Socially Responsible Investment*,⁵⁴ launched in 2003, are not intended to set a limit on disclosure, but rather to provide a minimum benchmark for best practices. These Guidelines suggest that a company should, in its annual report, disclose information on social, environmental and ethical risks and opportunities that may significantly affect a company's short and long-term value. While the

51 The FTSE4Good is not itself an SRI fund but is a tool that can be used by fund managers to assess the social, ethical and environmental 'worth' of a company: FTSE4Good <<http://www.ftse.com/ftse4good/index.jsp>> at 29 September 2005.

52 The Equator Principles apply to projects with a total capital cost of at least \$50 million and establish criteria that a project should satisfy as a condition to obtaining financing. The criteria include various environmental and social screening procedures, which will need to be followed by a project borrower in order to obtain loans, as well as ongoing covenants. Each bank, in adopting the principles, agrees to screen any proposed project and classify it into one of three categories to determine the extent and type of Environmental Assessment necessary. These categories are based on the existing categories used by the International Financial Corporation. Category A projects are likely to have 'significant adverse environmental impacts that are sensitive, diverse or unprecedented', and may affect an area broader than the actual project site. The impact of Category B projects is not considered irreversible, and mitigation measures are more readily available than for Category A projects. Category C projects are likely to have minimal or no adverse environmental impact. The Equator Principles are available at <<http://www.equator-principles.com/principles.shtml>> at 29 September 2005.

53 See generally Adam McBeth, 'Holding The Purse Strings: The Continuing Evolution of Human Rights Law and the Potential Liability of the Finance Industry for Human Rights Abuses', *Netherlands Quarterly of Human Rights* (forthcoming).

54 Institutional Voting Information Service, *United Kingdom Corporate Governance Guidelines* <<http://www.ivis.co.uk/pages/framegu.html>> at 29 September 2005.

Association's Guidelines do not specify what particular social, environmental and ethical issues should be of primary concern to this sector, the development by the Association of such guidelines is significant because it is encouraging that human rights and environmental risk reporting can become part of mainstream company practice (albeit limited to the socially responsible investment community at present), and because the Guidelines expand the notion of what is relevant to core business activities. The framework provided by the Norms could be used in concert with the Association's Guidelines to determine what constitutes sufficient minimum disclosure. Sector specific guidelines such as these necessarily address only a limited number of issues but, if viewed in tandem with the Norms, provide a comprehensive guide for investors and third parties in determining and assessing the human rights responsibilities of business.

This brief overview of developments since the 1970s, of standards voluntarily set to guide corporate activities with respect to human rights and environmental obligations, illustrates why the Norms are necessarily duplicative of prior efforts and that this is a positive rather than negative attribute. The Norms represent a growing refinement and acceptance of the core rights applicable to business. The transnational character of TNCs calls for a transnational reflection as to the appropriate content and shape of their responsibilities. The natural forum for such a world wide reflection is the United Nations, and the Norms represent a significant and welcome initiative to address this issue in a conveniently comprehensive way.⁵⁵

C Comprehensive or Overly Inclusive?

Another criticism levelled at the Norms by the International Chamber of Commerce is that the duties, as drafted, are 'extraordinarily vague' and as such, actions taken to enforce the Norms 'will result in widespread arbitrariness – violating the interests and rights of business'.⁵⁶ The allegation of vagueness has some substance. The question is whether the desire for the Norms to be comprehensive made the Norms overly inclusive of rights that are still emerging, and, whether as a result, both their content and ensuing obligations are ill-defined.

The rights encompassed by the Norms cover a wide spectrum of human rights, including the most fundamental and basic rights that have been agreed as accepted standards for nation states and individuals for decades. For example, the Norms state that businesses should not engage in, nor benefit from, war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking and other international crimes against the

55 Thomas McCarthy, 'Business and Human Rights: What Do the UN Norms Mean for the Business Lawyer?', *International Legal Practitioner*, November 2003, 73 <<http://209.238.219.111/McCarthy.pdf>> at 29 September 2005. McCarthy cites Sir Geoffrey Chandler (Founder-Chair of Amnesty International's UK Business Group and former Director of Shell International) in noting that the Norms 'provide significant value for business by bringing together, in a single comprehensive and authoritative document, accepted international standards' based on international declarations and treaties: 74.

56 IOE and ICC, above n 5, 3 [4].

human person.⁵⁷ Equally, security arrangements for businesses should observe international human rights, as well as the laws and professional standards of the countries in which they operate. Businesses should ensure equality of opportunity and treatment.⁵⁸ Businesses should provide a safe and healthy working environment, provide workers with remuneration that ensures an adequate standard of living for them and their families, and should not use child labour. Freedom of association and effective recognition of the right to collective bargaining should be guaranteed.⁵⁹ The Norms also prohibit business involvement in corrupt practices and bribery and incorporate restrictions relating to fair business practices, marketing and advertising.⁶⁰ The Norms acknowledge the proximity of business and environmental issues, and state (rather broadly) that business practices should be conducted in a manner consistent with preserving the environment and in a manner so as to contribute to the wider goal of sustainable development.⁶¹ Finally, a ‘catch all’ obligation is imposed on business to

respect economic, social and cultural rights as well as civil and political rights and contribute to their realisation, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realisation of those rights.⁶²

It is the latter broad statement that has particularly attracted the attention and criticism of business and led to allegations that the content of the rights contained in the Norms go beyond the status quo and stretch the definition of human rights.⁶³

The comprehensive – and arguably overly inclusive – nature of the Norms is both its greatest asset and its greatest potential defect. The incorporation with equal status of so called ‘third generation rights’, such as the right to development and environmental protection, go beyond the traditional human rights norms set out in the *International Bill of Rights*.⁶⁴ However, the concept of

57 Norms, above n 2, [C].

58 Ibid [B].

59 Ibid [D].

60 Ibid [E], [F]. Issues relating to irresponsible marketing may not be considered by some as a primary human rights concern, but the experience of Nestle and its inappropriate marketing of baby-milk products in Africa provide a useful example of how these restrictions are relevant to human rights. Subsequent to, and in part contingent on, Nestle’s experience, the World Health Organisation adopted an *International Code of Marketing of Breast-Milk Substitutes*. See Peter Muchinski, *Multinational Enterprises And The Law* (1995) 7.

61 Norms, above n 2, [E, 12].

62 Ibid [G].

63 USCIB, above n 17.

64 The International Bill of Rights is comprised of the Universal Declaration of Human Rights, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights* and its two Optional Protocols.

human rights is always progressing.⁶⁵ The fact that these ‘newer’ rights are not expressly defined in the *International Bill of Rights* does not mean that they are any less relevant; however, the lack of specificity and consensus around the content of the right does raise problems with respect to their implementation. Business can legitimately argue that if the right to development is not fully articulated and agreed upon at the state level, how should they then be expected to implement it?

Similar concerns regarding the exact nature of the obligations and the difficulty of measuring compliance have long been relevant to a discussion of many of the rights contained in the *International Covenant on Economic, Cultural and Social Rights* (‘ICESCR’),⁶⁶ and to a lesser degree, the *International Covenant on Civil and Political Rights* (‘ICCPR’).⁶⁷ However, going from broadly framed principles to more clearly defined obligations is not a new challenge for lawyers and international human rights law in particular. Over the years, the United Nations and other organisations have developed mechanisms, generally based on dialogue, aimed at more clearly defining human rights responsibilities and giving those responsible for action the required space for carrying out their obligations. Moreover, many of the rights protected by the Norms have already been given relatively clear interpretations in existing treaties and through the interpretation machinery of the United Nations human rights system.⁶⁸

In some respects, both the emerging (if contentious) right to development and obligations relating to environmental protection have the benefit of greater elaboration on the international stage than some of the rights formulated under either the ICESCR or the ICCPR, prior to their formulation in 1966, which relied for a large part on the moral authority of the *Universal Declaration of Human Rights*.

A *Declaration on the Right to Development* was adopted by the United Nations General Assembly in 1986.⁶⁹ Given the non-binding nature of the Declaration and the vagueness of its text, the precise meaning and status of the right to development are still far from defined. However, the 1993 affirmation of the right to development as a ‘universal and inalienable human right and an integral part of fundamental human rights’⁷⁰ at the Vienna World Conference on

65 Alan Rosas, ‘The Right to Development’ in Asbjørn Eide (ed), *Economic, Social And Cultural Rights: A Textbook* (2001) 119. Rosas cites the Secretary General of the United Nations, Mr Boutros-Ghali, at the 1993 Vienna World Conference on Human Rights: ‘As an historical synthesis, human rights are in their essence, in constant movement’.

66 Opened for signature 16 December 1966, ATS 5 (entered into force 3 January 1976).

67 Opened for signature 16 December 1966, ATS 23 (entered into force 23 March 1976).

68 General comments adopted by the Committee on Economic, Social and Cultural Rights (‘CESCR’) are of great assistance in further interpreting the obligations that arise in respect of implementing the rights. See, eg, *The Right to Adequate Housing*, CESCR General Comment No 7, 16th sess, UN Doc E/1998/22, Annex IV (1997); *The Right to Adequate Food*, CESCR General Comment No 12, 20th sess UN Doc E/C.12/1999/5 (1999).

69 It was adopted by a vote of 146 to one (the United States) and eight abstentions: *Declaration on the Right to Development*, GA Res 41/128, Annex, UN GAOR, 41st sess, 97th plen mtg UN Doc A/41/53 (1986).

70 World Conference on Human Rights: Vienna Declaration and Program of Action, UN Doc A/CONF.157/23, part I [10].

Human Rights confirms its ongoing relevance, if not its clarity. The right to development is premised in part on the need to develop greater equality of opportunity for individuals in accessing basic resources, education, health services, housing and food.⁷¹ Given the pre-eminent position of many transnational corporations in the global economy and the nexus of these aspects of the right to development to business practices, it is feasible that non-state actors, such as business, should assume a role in helping to clarify the content of the right.

The accompanying Commentary to the Norms also assists in further refining the nature of some of the duties which the Norms seek to impose on corporations.⁷² For example, the Norms outline rather broad obligations imposed on business with respect to environmental protection.⁷³ Business practices should be carried out 'in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment', and operations should have regard to the precautionary principle and the 'wider goal of sustainable development'. However, the accompanying Commentary provides clearer guidance as to exactly what businesses are being asked to respect and implement in relation to responsible environmental practices. The Commentary highlights the relationship between human health and the environment, particularly with respect to the packaging, transportation and the by-products of the manufacturing process. In doing so, it provides business with guidance as to one of the key human rights issues for which they are accountable.⁷⁴ Emphasis is also placed on the importance of business conducting credible impact assessments of their activities on, amongst others, children and Indigenous peoples.⁷⁵ The Commentary also advocates respect for the prevention and precautionary principles when dealing with activities that may have unacceptable effects on health or the environment.⁷⁶ The Norms acknowledge the source of these environmental rights as stemming from both 'soft law' standards as well as the established human rights conventions.⁷⁷

There are a number of non-binding international declarations concerning environmental rights and sustainable development, for example, the Declaration

71 Rosas, above n 65, 128.

72 *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003) ('Commentary'). Paragraph 9 of the Preamble of the Norms states that the Commentary is a 'useful interpretation and elaboration of the standards contained in the Norms'.

73 Norms, above n 2, [G, 14].

74 Commentary, above n 72, [G, 14(b)].

75 Ibid [G, 14(c)].

76 Ibid [G, 14(e)].

77 In the Preamble of the Norms, for example a variety of soft and hard law standards combine to give meaning to environmental obligations, including the *International Covenant on Economic, Social and Cultural Rights*; the *International Covenant on Civil and Political Rights*; the *Convention on Biological Diversity*; the *International Convention on Civil Liability for Oil Pollution Damage*; the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*; the *Declaration on the Right to Development*; the *Rio Declaration on the Environment and Development*; the *Plan of Implementation of the World Summit on Sustainable Development*; and the *United Nations Millennium Declaration*.

of the United Nations Conference on the Human Environment⁷⁸ and the *Rio Declaration on Environment and Development*.⁷⁹ However, their potential to guide is undermined because they all lack any binding universal standard. Guidance can also be found in a number of regional and multilateral plans which, taken together, can be said to represent a global consensus of states,⁸⁰ such as *Agenda 21*,⁸¹ the *Monterrey Consensus*⁸² and the *United Nations Millennium Goals for Development*. While not legally binding, and thus capable of being characterised as more aspirational than obligatory, these documents explicitly acknowledge the role that companies, along with governments, have in promoting environmental and human rights.⁸³ Environmental duties, in the context of human rights law, are more likely to be gleaned from the existing international human rights covenants.⁸⁴ While the *ICESCR* and the *ICCPR* are primarily directed at delineating basic human rights obligations, the fulfilment of several of these rights is intrinsically linked with environmental rights. For example, the right to an adequate standard of living⁸⁵ and the right to health⁸⁶ are both dependant, in a large part, on the provision of a healthy environment.⁸⁷ Viewed in this dual context in which both emerge from soft and hard law

78 UN Doc A/CONF.48/14/Rev.1 (1972).

79 UN Doc/A/CONF.151/5/Rev.1 (1992).

80 ICHRP, above n 25, 65.

81 *Agenda 21*, the *Rio Declaration on Environment and Development*, and the *Statement of Principles for the Sustainable Management of Forests* were adopted by more than 178 governments at the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil, 3 to 14 June 1992. 'Agenda 21 is a plan of action to be taken globally, nationally and locally by organisations of the United Nations System, governments, and major groups in every area in which human impacts on the environment': United Nations Division for Sustainable Development, *Documents: Agenda 21* (2004) <<http://www.un.org/esa/sustdev/documents/agenda21/index.htm>> at 29 September 2005.

82 See *Monterrey Consensus* (2002) <http://www.un.org/esa/sustdev/documents/Monterrey_Consensus.htm> at 6 November 2005, which focuses on financing for development.

83 See *Agenda 21*, ch 30, Strengthening the Role of Business and Industry, UN Doc/A/CONF.151/5/Rev.1 (1992). See also, *Beijing Declaration and Platform for Action*, which was adopted by the Fourth World Conference on Women, Beijing, 4–15 September 1995. This Declaration places specific responsibilities on the private sector with respect to preventing violence against women: [125], [126]; strengthening women's economic capacity: [177]; and promoting work and family compatibility: [180].

84 See generally Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands International Law Review* 171. Joseph notes that egregious environmental damage can be characterised as a breach of civil rights to life, liberty and security of the person, privacy, and the right of minorities to enjoy their culture.

85 *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), opened for signature 16 December 1966, ATS 5 (entered into force 3 January 1976), art 11.

86 *Ibid* art 12.

87 *The Right to Health*, CESCR General Comment No 14, UN Doc E/C.12/2000/4 (2000) notes that the right to health embraces a wide range of socio-economic underlying determinants of health, such as safe and healthy working conditions and a healthy environment. See also *The Right to Adequate Housing*, CESCR General Comment No 4, UN Doc E/1992/23 (1991).

standards, and given the clear nexus between business and the environment,⁸⁸ a strong case can be made for the inclusion of environmental rights in the Norms.

Despite the 'catch all' nature of paragraph 12 of the Norms demanding that business respect 'economic, social and cultural rights as well as civil and political rights', there is an implied hierarchy of rights which provides business with guidance as to which rights they must first focus on respecting. These rights – to development, adequate food and drinking water, health, housing, privacy, education, freedom of thought, conscience and religion, and freedom of opinion and expression – bear a clear connection to business activities and should not be disregarded simply because their content is still developing and because they pose problems of implementation. Non-state actors, such as business, have a crucial role to play in their development. The formulation of international human rights law is a dynamic process and while it would be less radical to restrict the Norms to certain 'core' rights, which are reasonably well formulated and have a clear nexus to business, such as labour rights, this would be adopting an overly restrictive and negative approach.⁸⁹ The gradual development of soft law standards in the last 35 years has led to a broadening of the scope of rights applicable to business. Whether evidenced by declarations, guidelines or other means such as widely adopted codes of conduct, they are indicative of a gradually evolving consensus that business has obligations to human rights that extend beyond labour rights. The Norms represent a comprehensive approach to human rights and suffer less from the problems of the self selection of standards,

88 Corporations are increasingly facing scrutiny for the effect of their operations on the environment, and in the United States the *Alien Torts Claims Act* 28 USC §1350 (1789) ('*ATCA*') has been used to emphasise this link in the public arena. However, so far environmental claims have not been successful under *ATCA* as courts have generally held that there is a lack of clarity concerning the international legal status of environmental laws, and these laws are, therefore, not part of the 'law of nations', one of the threshold requirements for the application of *ATCA*. The question of legal liability however may be distinct from the liability of companies in the court of public opinion. See Terry Collingsworth, 'Separating Fact from Fiction in the Debate of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations' (2003) 37 *University Of San Francisco Law Review* 563, 566–8. Cases exemplifying allegations of environmental damage include *Flores v Southern Peru Copper Corporation* WL 1587224 (South District New York, 2002) where the company was charged with despoilment of the air, land and water through copper mining. Plaintiffs alleged violations of the right to life and the right to health, amongst others, but the claims under the *ATCA* with respect to environmental torts were dismissed. See also *Dagi v BHP Co Ltd (No 2)* (1997) 1 VR 428, where claims were brought against BHP in Australia for its alleged negligence with respect to its operation in Papua New Guinea. It was alleged that the company's negligence caused pollution that resulted in loss of amenity and enjoyment of the land. The case was settled and the settlement included monetary compensation for the damage to the environment and lifestyle of the Ok Tedi river community. See also *Sarei v Rio Tinto* 221 F Supp 2d 1116 (Cal 2002), currently pending appeal to the United States 9th Circuit.

89 However, there is still disagreement even with respect to more accepted rights, such as labour rights. Some groups argue that the Norms do not go far enough in resolving existing ambiguities about remuneration standards. The Norms call on business to pay a fair and reasonable remuneration that ensures an adequate standard of living for workers and their families and that such remuneration shall take due account of their needs for adequate living conditions with a view towards progress improvement: Norms, above n 2, [D, 8]. But this broad statement still leaves the meaning of an 'adequate' standard of living and a 'just' wage open to interpretation. See The Jus Semper Global Alliance, 'Submission to the UN Office of the High Commissioner for Human Rights in respect of the Norms' (2003) (unpublished, copy on file with author).

which is commonly associated with codes of conduct and previous intergovernmental efforts. They provide a common basis from which companies can work to improve their relations with workers, community and consumers, and enhance the opportunity for a more transparent process on which to compare corporate protection and promotion of rights.⁹⁰ As with all the rights contained in the Norms, there is and should be a practical limit as to how far a company's responsibility extends.

D Issues of Apportionment of Responsibility and Status

The Norms do not envisage an endless attribution of rights to business. States bear the primary responsibility for promoting, respecting and protecting these human rights (thus maintaining the traditional state based structure for apportioning human rights responsibility) *and* the accountability of business is clearly limited by the extent of its sphere of activity and influence.⁹¹ These two limitations have been largely overlooked in the rush to criticise the overreaching nature of the Norms. Prior to the consideration of the Norms by the Commission on Human Rights, in 2004, the United States Council for International Business ('USCIB') argued that it was 'totally inappropriate' for the Norms to transfer responsibility for protecting human rights from governments to companies.⁹² The International Chamber of Commerce also argues that the Norms are 'an extreme case of privatisation of human rights'.⁹³ States too, argue for the primacy of legal responsibility for human responsibility resting with national governments, while ignoring that this notion is actually supported by the Norms.⁹⁴ This notion of *direct* responsibility being placed on corporations with respect to human rights is limited in two fundamental ways, and the argument advanced by the business bodies, that the Norms privatise human rights, can be characterised more as the reactions of alarmists than realists.

First, as noted above, the Norms stay within the traditional mode of apportioning responsibility for human rights by asserting upfront that:

States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights.⁹⁵

90 International Business Leaders Forum, *Statement on the UN Norms on the Responsibilities for Transnational Corporations and Other Business Enterprise with Regard to Human Rights* (2004) <<http://209.238.219.111/IBLF-statement-April-2004.htm>> at 29 September 2005.

91 Norms, above n 2, [A, 1]. See also Norms, above n 2, [19], which contains a savings clause according to which: '[n]othing in these Norms shall be construed as diminishing, restricting or adversely affecting the human rights obligations of States under national or international law'. The concept of 'sphere of influence' is also specifically noted as needing further study in the Commission on Human Rights 2005 Resolution, discussed above n 18.

92 USCIB, above n 17.

93 IOE and ICC, above n 5.

94 See the stakeholder submission of the Australian Government to the UN Office of the High Commissioner for Human Rights, 13 September 2004 <<http://www.ohchr.org/english/issues/globalization/business/docs/australia.pdf>> at 29 September 2005.

95 Norms, above n 2, [A, 1].

However, paragraph 1 of the Norms goes on to state that:

within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognised in international as well as national laws ...

Thus, the Norms acknowledge the somewhat radical notion that TNCs and other business enterprises do have some type of parallel *direct* responsibility to protect human rights. While the notion of direct responsibility being placed on corporations appears radical, it is not the first time duties have been placed on them in international law. Kinley and Tadaki note that TNCs also have direct duties under some multilateral conventions.⁹⁶ For example, both the *International Convention on Civil Liability for Oil Pollution Damage* and the *Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment* directly impose liability on legal persons including corporations. However, the Norms do not attempt to oust the jurisdiction of States for this primary responsibility. It does not follow that by assigning a portion of responsibility to corporations with respect to human rights results in a corresponding reduction of the State's obligations to protect such rights. The obligations of companies as set out in the Norms should supplement and not replace State obligations and as such, it appears that the liability of corporations will most likely continue to be framed in an indirect manner through the *direct* liability that the Norms intend to place on states.⁹⁷

Secondly, the Norms limit such responsibility to a business respective sphere of activity and influence. The definition of 'sphere of activity and influence', a term also used but not defined in the Global Compact,⁹⁸ is likely to be the subject of great attention in the coming years. The first step in refining the term is to start with the definition of a transnational corporation and 'other business enterprise' as set out in the Norms. Both are defined broadly. 'Transnational corporation' refers to

an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.⁹⁹

The phrase 'other business enterprises' is also defined expansively to include

any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise

96 David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2003–04) 44 *Virginia Journal Of International Law* 931, 944–7.

97 Ibid 947. Also note that the Norms envisage the possibility of imposing direct liability on corporations by allowing for monitoring by international or national tribunals. See Norms, above n 2, [H] (General Provisions of Implementation).

98 The UN Global Compact asks 'companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption': above n 26.

99 Norms, above n 2, [I, 20].

has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security ...¹⁰⁰

By adopting these expansive definitions the Norms confirm that business has an obligation to ensure that the relevant rights are adhered to throughout their supply chains. This contemporary approach deliberately circumvents a more traditional corporate approach to liability based on the fundamental principle (or legal fiction) of a separate legal identity existing between different limited companies and thus limiting the liability of a parent company for actions of its subsidiaries.¹⁰¹

Precisely what falls within the sphere of activity and influence of a corporation is debatable and may be influenced by both moral and legal responsibilities that will help determine if a company is complicit in human rights violations.¹⁰² In attempting to more firmly confine the sphere of activity and influence concept, the nature of the obligation should be considered, as should the question of to whom that obligation is owed. The obligations placed on business via the Norms are to 'promote, secure the fulfilment of, respect, ensure respect of and protect human rights'. The terminology used suggests that business is seen as having an obligation to do more than simply refrain from acting in a way that constitutes a violation of rights: they are also seen as having a positive duty to prevent violations of rights and to play a proactive role in promoting the specified rights. For example, the Commentary accompanying the Norms notes that a company should not contribute directly or indirectly to human abuses, nor directly or indirectly benefit from abuses of which they were aware or ought to have been aware.¹⁰³ Clapham and Jerbi, in examining the notion of corporate complicity,

100 Ibid [I, 21].

101 For further discussion on this see Richard Meeran, 'Accountability of Transnationals for Human Rights Abuses' (1998) 148 *New Law Journal* 1686, 1686:

the English Court (and also, but less so, the courts of the US, Australia and India) have refused to 'lift the veil of incorporation', making rare exceptions only, when the subsidiary is shown to be a 'sham' or the agent of the parent. Thus TNCs in particular have been able to shield the central parent company from the activities of its overseas subsidiary companies. (*Adams & Others v Cape Industries plc and Another* 1 Ch [1990] page 433 to 572). The geographical distancing of the TNC base from its local operations has also enabled UK (and US) TNCs to deploy the principle of forum non conveniens against any attempt to sue them in their home courts.

However recent UK cases involving British-based TNCs have signalled a willingness by the courts to relax the traditional doctrine and protect human rights in the face of opposing commercial interests. See *Connelly v RTZ Corp Plc (No 2)* [1997] All ER 335; *Lubbe and Others v Cape Plc (No 2)* [2000] 4 All ER 268. In March 2005, the European Court of Justice, in *Owusu v Jackson & Others* (C-281/02) [2005] ECR 75, effectively ruled out the application of forum non conveniens in British courts, but it remains to be seen the extent to which the ruling will affect other cases or whether it will be confined to the facts of the particular case.

102 ICHRP, above n 25, 136.

103 Commentary, above n 72, [A, 1(b)]:

distinguish between direct complicity (positively assisting), beneficial complicity (benefiting indirectly from human rights violations committed by someone else, for example, government) and silent complicity (silence or inaction in the face of human rights violations: to do nothing is not an option).¹⁰⁴ Whether a company could be held legally responsible for all such forms of corporate complicity is a different question from whether they will be judged morally responsible by the public at large.¹⁰⁵

The question of who falls within the sphere of activity and influence of a corporation, that is, to which stakeholders the obligations to protect, promote, respect and secure the fulfilment of human rights are owed, will probably not turn on legal principles alone. A restrictive, legalistic interpretation could limit a company's sphere of activity and influence to those with whom it has a direct relationship, such as employees and shareholders. However, a more contemporary view may be to look beyond a company's contractual relationships in defining its stakeholders and consider those with whom it has a particular political, economic, geographical *or* contractual relationship.¹⁰⁶ The expansive definitions of transnational corporations and other business enterprises, along with the accompanying Commentary, tend to support this broader view.

However, limits should be placed on the assumed extent of a company's influence. It is not the role of a company to act as a substitute for government and much depends on the closeness of the connection between a company and its stakeholders. Taking a 'bottom up' approach, a strong case could be made for a

Transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware. Transnational corporations and other business enterprises shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights. Transnational corporations and other business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses. The Norms may not be used by States as an excuse for failing to take action to protect human rights, for example, through the enforcement of existing laws.

104 Andrew Clapham and Scott Jerbi, 'Categories Of Corporate Complicity In Human Rights Abuses' (2000–01) 24 *Hastings International and Comparative Law Review* 339, 341.

105 For example, public pressure led in part to the filing of a claim against Royal Dutch Petroleum Co under the *ATCA* alleging complicity in gross human rights abuses, *Wiwa v Royal Dutch Petroleum Co* 96 Civ 8386 (Unreported, State District of New York, 25 September 1998, Kimba Wood J). See also Charles Woofson and Matthais Beck, 'Corporate Social Responsibility Failures in the Oil Industry' in Rory Sullivan (ed), *Business and Human Rights* (2003).

106 ICHRP, above n 25, 136. An expanding definition of stakeholder is also being discussed in company law reforms in the United Kingdom. See, eg, Department of Trade and Industry, *Guidance on the Operating and Financial Review and Changes to Director's Reports* (2005) which notes that, subject to Operating and Financial Review ('OFR') disclosure requirements, directors of a company should consider the impact of their business' operation on a variety of stakeholders including employees, customers, suppliers and society more widely, 'to the extent necessary' to comply with the relevant regulations. In July 2003, the UK government announced its intention of requiring certain business to produce OFRs. This followed the work of the Company Law Review and *Modernising Company Law*, White Paper (2002). The OFR is designed to improve the disclosure of information by companies. The UK *Companies Act 1985* (*Operating and Financial Review and Directors Report etc*) Regulations 2005 (UK) [S.1. 2005/1011] came into force on 22 March 2005. See also Department of Trade and Industry, *Company Law Reform*, White Paper (2005) <<http://www.dti.gov.uk/cld/review.htm>> at 29 September 2005.

relevant connection existing between a company and its workers (not just direct employees, but including workers in its supply chain who may have no direct contractual relationship to the company), consumers and its host community (those who live near, or are directly impacted by, its operations, such as those living downstream from a mining operation). Looking at it from the 'top down', a company could also have a relevant connection (based on political, economic, geographical or contractual factors) with business partners (including, but not limited to, its contractors, subcontractors, suppliers, licensees and distributors), the company's host or home government or with armed militia who exert control over the territory in which they operate.¹⁰⁷ Clearly there is a sliding, and at this point in time still largely undefined, scale of responsibility between a company and the victim or violator of the human rights abuses. The more direct the connection, the greater the responsibility placed on the company to prevent or protect from such abuse.¹⁰⁸

Defining the scope of a company's 'sphere of activity and influence', the ensuing obligations and to whom they attach will clearly be among the important topics of discussion as work proceeds on the Norms, but it is appears that their intended reach goes well beyond a more restrictive legalistic interpretation of the interconnections between human rights and business.

Another criticism levelled at the Norms by the USCIB suggests that the Norms 'create a legal no man's land' and blur the distinction 'between voluntary and legal actions [making] corporate compliance virtually impossible'.¹⁰⁹ Indeed, the Norms have been characterised as the 'first non-voluntary initiative accepted at the international level' in this field, by David Weissbrodt, one of the members of the Sub-Commission on the Promotion and Protection of Human Rights and a main driving force behind the development of the Norms.¹¹⁰ This is an issue that is distinct, but follows on, from the question of apportionment of responsibility. Assuming business has some responsibility, what is the nature of that responsibility – can it choose to voluntarily comply with standards or is such compliance required? This dichotomous debate is artificial as the distinction has long been blurred between voluntary and mandatory compliance in this field. Even *pure* voluntary approaches to corporate responsibility take effect in a legal context.

The soft law standards discussed above, such as the *OECD Guidelines*, are not binding in international law but are politically binding on participant countries who agree to establish national contact points to deal with contentious issues. As

107 ICHRP, above n 25, 139.

108 See generally Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility?' (2001) 111(2) *Yale Law Journal* 443.

109 USCIB, above n 17.

110 David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law* 901, 903.

is illustrated by the recent *Kasky v Nike*¹¹¹ case, voluntary approaches, such as codes of conduct, can influence the standard of care to which an adopting company will be held legally accountable.¹¹²

The Norms also fuel this debate further by introducing the notion of corporate liability for reparations where persons, entities or communities have been adversely affected by corporate violations of rights, as set out in the Norms.¹¹³ The provision of this remedy clearly contemplates the Norms operating in the future as a mandatory instrument at the national level.

On the one hand, it is clear that the Norms are not 'black-letter law', but rather a work in progress that will be refined if and when they make their way through the United Nations system. The Norms were debated before the United Nations Commission of Human Rights Commission in Geneva in April 2004, considered again in 2005 and now remain in a holding pattern. In its initial consideration of the Norms the Commission confirmed 'the importance and priority it accords to the question of the responsibilities of transnational corporations and related business enterprises with regard to human rights' and requested the Office of the High Commissioner for Human Rights to continue an examination into the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations. It also specifically noted that 'as a draft proposal [the Norms] have no legal standing and ... the Sub-Commission should not perform any monitoring function in this regard'.¹¹⁴ The Office released its report

111 123 S Ct 2554 (2003). This case, which was settled 12 September 2003, alleged that Nike's reports on its labour practices in its supplier factories constituted a misrepresentation, an unfair business practice and false advertising under Californian law. The Supreme Court, in not deciding the question of whether Nike's statements were constitutionally protected free speech, left standing the conclusion of the Supreme Court of California that Nike's statements were in fact 'commercial speech' and, therefore, subject to the limitations under California's unfair competition laws. See Lisa Girion, 'Nike Settles Lawsuit over Labor Claims', *Los Angeles Times* (Los Angeles) 13 September 2003, C1.

112 See also the class action complaint filed on 13 September 2005 against US retailing giant Wal-Mart alleging that Wal-Mart failed to meet its contractual duty to ensure that its suppliers paid basic wages, forced workers to work excessive hours seven days a week with no time off for holidays; obstructed their attempts to form a union; and, made false and misleading statements to the American public about the company's labour and human rights practices. The claim alleges Wal-Mart made false representations regarding compliance with its code of conduct. Wal-Mart maintains a Supplier Standards Agreement with its foreign suppliers that incorporates adherence to its corporate code of conduct as a direct condition of supplying products to Wal-Mart. The claim argues that by incorporating the code of conduct into the supply agreement, it creates a contractual obligation enforceable by the workers supplying to Wal-Mart, who are the intended beneficiaries of the code's worker rights provisions. The claim is being pursued under California's *Unfair Business Practices Act* § 1720. See International Labor Rights Fund, *Stop Wal-Mart Sweatshops Globally* <<http://www.laborrights.org/projects/corporate/walmart/>> at 29 September 2005. For further discussion on the voluntary vs mandatory debate, see Halina Ward, *Legal Issues In Corporate Citizenship*, Swedish Partnership for Global Responsibility Report (2003) <<http://www.regeringen.se/content/1/c6/02/18/54/46e90176.pdf>> at 29 September 2005.

113 Norms, above n 2, [18]:

Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

114 Commission on Human Rights, Agenda Item 16, UN Doc E/CN.4/2004/L.73/Rev.1 (2004).

in February 2005 and, in this report, the Commissioner underlined not only the importance of this issue, but also the need for the Commission of Human Rights 'to act expeditiously to build upon the significant momentum that currently exists to define and clarify the human rights responsibilities of business entities'.¹¹⁵ The 2005 decision of the Commission on Human Rights requesting the appointment of a Special Representative to further investigate the intersection of business and human rights issues seems indicative of a growing consensus that this debate will not go away and business cannot simply turn its back on the relevance of human rights standards to corporate activities. The Norms are more authoritative than other current or prior attempts to develop guidelines for business and will no doubt be of continuing and increasing relevance for companies in the future.¹¹⁶

The reason that the Norms blur the line between voluntary and mandatory is not so much because of the nature of the Norms themselves, but because of the process of development from which soft law standards have begun to consolidate and solidify into a more unified base from which to assess the human rights responsibilities of corporations. At the international level, the corporate form is barely recognised, still less directly bound, whether in respect of human rights or any other field. As noted by Kinley and Tadaki, transnational corporations have been able to operate in a legal vacuum because international human rights law imposes no direct legal obligations on transnational corporations.¹¹⁷ The traditional application of international human rights law is to bind states because states have long been regarded as the most prominent potential violators of human rights. However, the influence, particularly of transnational corporations, on the economic and political scene in most countries has increased greatly in recent decades. International human rights law has barely responded to this growing imbalance of power but other mechanisms, particularly soft law standards, have continued to evolve. The Norms are the latest product of this evolution and while care needs to be taken to further refine the precise nature of the standards set out in the Norms they should be used now as a definitive base for assessing the responsibility of business with respect to human rights.

III IMPLEMENTING THE NORMS: THE WAY FORWARD

Both the standards and the proposed mechanisms contained in the Norms will continue to evolve. Like the standards themselves, the implementation mechanisms run the gauntlet from the specific to the general, and incorporate

115 'Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with regard to Human Rights', UN Doc E/CN.4/2005/91 (2005) <<http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.91.doc>> at 30 September 2005.

116 See, eg, Mary Robinson, Letter to the Editor, *Financial Times* (London), 19 December 2003, 12.

117 In most countries there exists a substantial body of domestic legislation that regulates corporate activities which affect human rights, such as anti-discrimination, health and safety at work, environmental protection, labour rights, but, except in certain exceptional circumstances, these domestic human rights laws are designed to operate intra-territorially only: Kinley and Tadaki, above n 96, 937–8.

requirements for companies, the United Nations and governments to integrate the Norms into their practices and monitor their implementation. The comprehensive nature of the standards espoused by the Norms is of great value in levelling the playing field to determine what standards are applicable to business, but the standards are meaningless if they are not implemented. Credible procedures for their monitoring and verification are crucial. Yet, there is no single way to do this and the Norms offer a multiplicity of possible approaches. Recent experience with monitoring efforts of codes of conduct (particularly in the apparel and footwear sectors) by groups as diverse as NGOs or commercial auditing firms are a relatively recent phenomenon and the social monitoring industry is still in the early stages of evolution.¹¹⁸ By contrast, United Nations monitoring of human rights violations by states has existed (informally and formally) for a much longer period but is in serious need of reform.¹¹⁹

One of the common criticisms of earlier soft law standards, such as the *OECD Guidelines* and the *ILO Tripartite Declarations*, has been that their mechanisms for enforcing corporate compliance with their espoused standards have been generally ineffective. The Norms address the issue of implementation by offering a number of suggested means of ensuring compliance with the Norms, but still fall short, at this stage, of developing a definitive mechanism for regulating corporate activity with respect to human rights. This is likely a deliberate attempt on the part of the drafters to leave the door open to innovation and experimentation to see which of the multiplicity of methods offered proves the most effective.

The challenges to monitoring and enforcement in this emerging field where business and human rights concerns intersect are immense and there are substantial methodological questions involved, such as who should do the monitoring? The Norms propose a variety of parallel mechanisms.¹²⁰ One way is for business to internally monitor its compliance from its headquarters through to its contractors and suppliers. Such self regulation would be backed up by monitoring by trade organisations, NGOs and ethical investors. In essence, this is what is already occurring with mixed success in several sectors.¹²¹ The degree of credibility associated with such regulation can be directly linked to the level of transparency offered by the company in disclosing its practices.¹²² One of the key aspects of establishing a credible monitoring and verification system is to require a high degree of transparency in reporting and the Norms emphasise this. While it is not clear to whom and how often transnational corporations and other

118 For an example of a recent monitoring report, see the Fair Labor Association, *Year Two Annual Report* (2004) <<http://www.fairlabor.org/2004report/>> at 29 September 2005.

119 See generally Anne Bayefsky, *The United Nations Human Rights Treaty System: Universality at the Crossroads* (2001).

120 The general provisions regarding implementation are set out in the Norms, above n 2, [15], [16], [17].

121 This is exemplified by monitoring efforts in the apparel and footwear sectors where groups such as the Fair Labor Association, Social Accountability 8000 and the Ethical Trading Initiative aim to hold companies accountable for compliance with various human rights standards.

122 Commentary, above n 72. See also Norms, above n 2, [H, 16(a)]–[H, 16(i)], which contain a commentary emphasising the importance placed on a high degree of disclosure and transparency in implementing the Norms.

business enterprises should report, the Commentary attached to the Norms suggests they should, amongst other things, disclose 'timely, relevant, regular and reliable information regarding their activities, structure, financial situation and performance', and should make known the location of their offices, subsidiaries and factories.¹²³ Public disclosures along these lines alone would greatly enhance the efficiency and reliability of monitoring by third parties such as trade organisations, NGOs and ethical investors of the compliance track record of business.

Another method is for the United Nations to incorporate assessment of compliance with the Norms into its current periodic reporting regime which assesses state compliance with existing human rights standards. Paragraph 18 of the Norms specifically defines a role for national courts and/or international tribunals to be involved in the monitoring of human rights abuses by corporations. Various suggestions are offered in the Commentary as to which bodies in the United Nations might be involved in assessing corporate compliance ranging from the Commission on Human Rights, thematic or country rapporteurs, the Sub-Commission on the Promotion and Protection of Human Rights or a designated working group.¹²⁴ Bayefsky's recent review of the UN treaty system clearly outlines the challenges faced by an already overburdened United Nations reporting system and it is not clear that further additional reporting requirements will be welcomed.¹²⁵ Despite this, the United Nations system does need to urgently recognise the changing balance in power between states and business and understand that establishing consensus on the standards without mechanisms to monitor implementation will only solve part of the ongoing accountability dilemma.¹²⁶ However, it is difficult to envisage, at least in the short term, the creation of a new body within the United Nations that would have the capacity to deal with all the potential violations by business of the standards set out in the Norms. Given the potential range of abuses and the number of businesses that could potentially fall within its ambit, it is more likely in the immediate future that enforcement of the Norms will rely on national rather than international mechanisms.

While the proposed implementation mechanisms are clearest in their application to business and perhaps most controversial and unresolved in respect of the United Nations system, they offer the most immediate relevance to governments. The Commentary to the Norms envisages a process whereby the Norms are used by governments as a model for legislation for regulating corporate behaviour. The Commentary specifically refers to use of the Norms to guide inspections by labour inspectors, by ombudspersons, national human rights commissions or other national human rights mechanisms.¹²⁷ However, the Norms shy away from tackling directly the enforcement difficulties posed by the

123 Ibid [H, 15(d)].

124 Ibid [H, 16 (a)], [H, 16(b)].

125 Bayefsky, above n 119.

126 Joseph, above n 1, 1.

127 Commentary, above n 72, [H, 17(a)].

conundrum of home State, where the company is headquartered, versus host State, where the operations, for example, a mine are housed.¹²⁸

Beyond these specific examples, the guidance provided by the Norms offers governments an opportunity to mainstream human rights issues into the corporate arena. The standards espoused in the Norms could be linked to corporate public reporting requirements whether in annual reports or in respect of specific legislation.¹²⁹ Corporate responsibility has become very closely associated with public reporting. Disclosure is a theme of the modern corporate regulatory system and involves the provision of information by companies to the public in a variety of ways.¹³⁰ It is suggested that public disclosure of corporate practices can lead to increased community empowerment, better corporate accountability, increased management attention to social issues and ultimately, improved environmental and social performance.¹³¹ By integrating non-financial information into the realm of mandatory financial reporting, social data will be more readily available to investors and, in theory, subjected to the same types of rigor, enforcement and verification afforded to financial reporting.¹³²

128 TNCs will have one home State, where their headquarters are based and major policy decisions made, and often many host States, where operations are conducted around the world. Under the doctrine of horizontality, States have duties under international human rights law to control private entities within jurisdiction. Therefore, it is the 'host State' that has the obligation to restrain the activities of TNCs. Host States should consequently adopt measures, such as environmental laws, labour laws, anti-discrimination laws, anti-trust laws, occupational health and safety laws, and criminal laws, to restrain the conduct of TNCs, and indeed all businesses. However, host States are sometimes unwilling or unable to appropriately constrain MNC activities within jurisdiction. See Joseph, above n 1, 4.

129 Recent legislative initiatives in the United Kingdom, France and South Africa indicate a willingness of corporate regulatory agencies within these jurisdictions to adopt a more expansive view of what issues are considered material to a corporation's short and long-term performance, thus requiring disclosure and increasing corporate transparency in a company's public reports. Superannuation legislation in the United Kingdom, Australia, Belgium and Germany has incorporated reporting requirements with respect to certain human rights. Also, France has introduced mandatory annual disclosure and reporting requirements for the largest corporations under French law (the New Economics Regulations were adopted in May 2001 by the Parliament and came into force on January 2002: Law No 2001-420). In South Africa, the Johannesburg Securities Exchange adopted a 'Code of Corporate Practices and Conduct' that requires all publicly listed corporations to disclose non-financial information in accordance with the Global Reporting Initiative Sustainability Reporting Guidelines. For a discussion of these examples see Ward, above n 112. Attempts to expand corporate reporting requirements have also featured in Corporate Code of Conduct Bills introduced in the United States, the United Kingdom and Australia. No such bills have yet been enacted. For a discussion of each of these Bills, see Adam McBeth, 'A Look at Corporate Code of Conduct Legislation' (2004) 33 *Common Law World Review* 222.

130 See, eg, Australian Stock Exchange ('ASX') Listing Rule 3.1 (given legislative force by the *Corporations Act 2001* (Cth) s 674) is the foundation of the 'continuous disclosure' regime for public companies. It requires that once an entity 'becomes aware of any information concerning it that a reasonable person would expect it to have a material effect on the price or value of the entity's securities, the entity must immediately tell the ASX that information' (subject to certain exceptions).

131 For example, this is much of the reasoning behind the International Right to Know legislation being pursued in the United States that would require businesses incorporated in the United States or listed on the United States' stock exchanges to publicly report on their overseas environmental, human rights and labour practices. See, eg, Earth Rights International, *International Right to Know Campaign* (2004) <<http://www.earthrights.org/irtk/index.shtml>> at 29 September 2005.

132 See generally Carol Adams, 'The Ethical, Social and Environmental Reporting – Performance Portrayal Gap' (2004) 17 *Accounting, Auditing and Accountability* 731.

This means, in many cases, replacing ‘single bottom line’ (that is, profit based) thinking and practices with ‘triple bottom line’ (that is, social, environmental, economic) thinking.¹³³ Company reporting would then reflect this broader process by finding meaningful ways of weighing short-term tangible economic factors with more elusive factors, such as human rights and environmental sustainability concepts. A link needs to be established in the corporate decision-making process that illustrates the significance or materiality of both tangible and non-tangible issues, and the Norms can provide valuable guidance on the issues that should be reported. Traditionally, the principles governing corporate disclosure have been cached in terms of ‘what the reasonable investor would want to know’. For example, Cooke J, in *Coleman v Myers*,¹³⁴ refers to the United States decision of *TSC Industries v Northway Inc*¹³⁵ in seeking guidance in defining materiality. While highly context specific (dealing with proxy solicitation), it nevertheless gives a general normative approach as to how materiality has traditionally been considered in corporate law.¹³⁶ *TSC Industries v Northway Inc* noted that:

An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote ... [If there is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.¹³⁷

The emphasis in this instance of defining materiality is on the reasonable investor whose concerns are generally interpreted narrowly as being focused primarily on the financial aspects of corporate performance. However, it is logical to assume that the ‘reasonable investor’ may also have an interest in the social performance of the company and thus the requisite materiality of facts should be interpreted more expansively.¹³⁸ This narrow approach might also be open to review given the more expansive and arguably contemporary notion of stakeholder that is being discussed in some jurisdictions.¹³⁹ Recent legislation in

133 The ‘triple bottom line’ concept was first widely disseminated by John Elkington, Chairman of the London-based consultancy Sustainability Ltd.

134 (1977) 2 NZLR 225, 336.

135 426 US 438 (1976).

136 Milton Friedman’s classic statement also supports this narrow view, which focuses only on the interests of the shareholder: ‘there is one and only social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game’: Milton Friedman, ‘The Social Responsibility of Business is to Increase its Profits’, *Magazine, New York Times* (New York), 13 September 1970, 32.

137 *TSC Industries v Northway Inc*, 426 US 438, 449 (1976).

138 Cynthia Williams, ‘The Securities and Exchange Commission and Corporate Social Transparency’ (1999) 112 *Harvard Law Review* 1197, 1277. Williams argues that it is unlikely that people are either pure economic investors or pure social investors as a company’s financial position can be affected by its social and environmental performance.

139 See discussion above n 106; above n 129. See also Operating and Financial Review Working Group on Materiality, ‘A Consultation Document’ (2003) 16 <<http://www.dti.gov.uk/cld/ofrwgcon.pdf>> at 3 November 2005, which, in considering the notion of materiality in the context of an OFR noted that:

the United Kingdom, France, South Africa and Australia requires companies, under limited circumstances, to report on aspects of their human rights performance.¹⁴⁰ Logically, issues that are of significant interest to customers, to employees, to suppliers of a business, and to society more widely are, or very likely will become, matters of concern for shareholders too. The difficulty of reporting on human rights violations may in part be related to difficulty in first defining what issues are relevant or material – the Norms help alleviate this obstacle. The difficulty of quantifying and reporting on human rights abuses does not disqualify the need for such disclosure.¹⁴¹

In addition to regulatory changes, materiality and the question of who is a relevant stakeholder are also being redefined on the ground. Pressure on business from wider civil society and through precedents established by company practice and reporting processes are extending these concepts to encompass information beyond simply traditional financial information.¹⁴² Non-financial aspects, it could be argued, are implicitly being taken to be material.¹⁴³ The challenge lies in

Information will be material to the OFR if failure to disclose it clearly, fairly and unambiguously might reasonably be expected to influence member's assessment of the company and hence the decisions they may take, either directly or indirectly as a result of the significance that the information has for other stakeholders and thus the company. Information that is material to the OFR may be quantitative or qualitative; and may relate to facts or probabilities, and to past, present or future events and decisions.

¹⁴⁰ See discussion above n 129.

¹⁴¹ An expanded concept with respect to the materiality of relevant human rights issues may also impact the breadth with which a director's duties to act in the best interests of a company can be interpreted. While the duties imposed on directors could be used to prevent issues of social responsibility intruding on directors' decisions, arguably they could equally be used to promote respect for human rights in the corporate sphere. If a director of a company has a general duty to act with reasonable care and diligence in making an objective decision as to what they rationally believe to be in the best interests of the company then a director must first inform themselves about the subject matter of the decision. Therefore, it may be argued that by not obtaining adequate information about 'material' environmental and human rights concerns, a director is not acting in the best interests of the company and is in breach of their duties and potentially subject to litigation. These types of issues may be more easily attributable to those companies where brand is core to activities and thus the reputation and therefore value of these companies are in greater danger by any association with human rights or environmental violations. This type of approach is one being considered by the Australian government's Companies and Market Advisory Committee ('CAMAC') in examining the issue of directors' duties and considering whether or not the *Corporations Act 2001* (Cth) should be amended to require directors to take account of the interests of groups other than shareholders when making corporate decisions. CAMAC is a statutory advisory committee that was established to provide advice to the Australian government on issues that arise from time to time in corporations law and practice. Also, on 23 June 2005 the Parliamentary Joint Committee on Corporations and Financial Services of the Australian Parliament announced that it will conduct an inquiry into corporate responsibility, including the appropriateness of broadening reporting requirements associated with these issues. It will also consider whether regulatory, legislative or other policy approaches in other countries could be adopted or adapted in Australia. This issue has become particularly pertinent recently in Australia in the wake of the James Hardie Special Commission of Inquiry. See David Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004).

¹⁴² An example of an expanded and re-shaped company report that reflects the needs of customers and the community to understand the wider impact of the company on society is the *Shell Report* (2003).

¹⁴³ See statement by Michele Chan Fishel, Friends of the Earth, cited in William Baue 'Members of Congress Consider Social and Environmental Disclosure in SEC Filings', *Institutional Shareholder*, 11 July 2003 <<http://www.ishareowner.com/news/article.cgi?sfArticleId=1170>> at 29 September 2005:

folding the emerging consensus on human rights as evidenced in the Norms into a broader understanding of issues that are material to a company and thus require public disclosure.¹⁴⁴

A key question arising from these regulatory and groundswell initiatives, which are incrementally broadening reporting requirements to include human rights issues relevant to stakeholders, is the extent to which such definitions are adopted globally, either in a formal regulatory sense or informally through voluntary corporate reporting. Clearly, the evolution of the corporate accountability movement in the United States will be important. While the recent passage of the *Sarbanes-Oxley Act*¹⁴⁵ did not create any specific new social disclosure obligations, the increased care and attention now given to Securities and Exchange Commission reporting may increase the quality of reporting generally, and thus indirectly promote better environmental and social disclosure. This increased care comes from both heightened corporate sensitivity in the aftermath of the accounting scandals¹⁴⁶ and particular high-level requirements created by the Act, such as CEO sign-off on financial reports.¹⁴⁷ Adoption of the Norms as the global measure for what corporate reporting should encompass at a macro level would at least assist in standardising public disclosure requirements across jurisdictions and entrench the relevance of human rights issues to business.

However, reporting alone is not a panacea.¹⁴⁸ Given the relatively recent passage of these corporate reporting initiatives in mainstreaming a limited set of human rights issues, many questions still remain as to the value and effectiveness of mandatory corporate reporting of non-financial issues as a means of promoting

what a reasonable investor would need to know about a company to make financial and voting decisions won't change ... but what reasonable investors and the public at large find important over time does change, so issues like global warming ... human rights etc can be included in the purview of what's 'material' ...

144 See Corporate Sunshine Working Group, *Proposed Expanded SEC Disclosure Schedule* (2002) <<http://www.corporatesunshine.org/proposeddisclosure.pdf>> at 29 September 2005, for an example of a list of 20 proposed expanded corporate disclosure items, which have been selected for their financial value-relevance, as well as their ability to enhance corporate governance and responsibility. For models of expanded disclosure, see Cynthia Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1999) 112 *Harvard Law Review* 1197, Appendix I.

145 *Sarbanes-Oxley Act* (2002) HR3763.

146 Ted Barrett, 'Enron CEO Warned about Accounting Scandals', *CNN.Com/Lawcenter*, 14 January 2002 <<http://www.cnn.com/2002/LAW/01/14/enron.letter/>> at 29 September 2005; see also a listing of various 'accounting scandals' 1998–2005 at *Accounting Scandals*, Wikipedia <http://en.wikipedia.org/wiki/Corporate_accounting_scandals> at 29 September 2005.

147 *Sarbanes-Oxley Act* (2002) HR3763, Title III (Corporate Responsibility), s 302, and see generally, Title IV (Enhanced Disclosures).

148 The Norms shy away from dealing directly with the enforcement difficulties posed by the home state (in which the company is headquartered) versus host state (in which the operations, for example, a mine are housed) conundrum. For such reporting obligations to be effective, a company's reporting obligations should be broadly construed to include the operations (both in the home and host states) of not only the parent company, but also relevant subsidiaries and supply chain actors. Reporting regulations need to incorporate a broad intent to pierce the corporate veil and trace responsibilities back to the parent corporation.

greater corporate accountability and how it can be best enforced.¹⁴⁹ However, greater conformity in reporting, using the Norms as guidance as to what issues require disclosure could, at least as a first step, ensure a more balanced approach to disclosing the human rights performance of companies.

IV CONCLUSION

Voluntary efforts, ranging from intergovernmental efforts to corporate codes of conduct, have to date been the overwhelming *modus operandi* chosen to ensure that companies assume appropriate responsibility for various human rights obligations. Such efforts undertaken by business, in collaboration with non-governmental organisations and at the behest of government and intergovernmental organisations, along with an emerging limited set of regulatory initiatives have served as precursors to the development of the Norms. The development of the Norms has been evolutionary rather than revolutionary, relying in large part on the soft law standards which have preceded it. Today, the Norms represent the most authoritative and comprehensive compilation of rights applicable to business. The Norms, which may in time morph into 'hard law' (by progression through the UN and adoption as a treaty), are a welcome and necessary addition to this ever expanding body of standards governing corporate behaviour.

The Norms will almost certainly be a key element in future United Nations activities regarding the human rights impact of transnational business and will continue to be used by civil society to define their very public expectations of business with respect to human rights. Attention given to particularly egregious cases of human rights violations by corporations can only be expected to increase in the future. A legally binding global compliance framework may be many years off, as too might be the development of an international tribunal to monitor corporate abuses of human rights. However, national enforcement of human rights standards on companies could accelerate positive change, for example, in the short term by requiring more rigorous corporate reporting. It will now be very

¹⁴⁹ For example, the French New Economics Regulations, above n 129, do not contain any substantial penalties for non-compliance; however, it is too early to assess its effectiveness in changing corporate behaviour with respect to enforcing the particular rights detailed in that legislation. Consider, however, the enforcement provisions of Proposition 65 in the USA. In 1986, California voters approved an initiative to address their growing concerns about exposure to toxic chemicals. That initiative became the *Safe Drinking Water and Toxic Enforcement Act of 1986*, better known by its original name of Proposition 65. Proposition 65 requires the state to publish a list of chemicals known to cause cancer or birth defects or other reproductive harm. This list, which must be updated at least once a year, has grown to include approximately 750 chemicals since it was first published in 1987. Proposition 65 requires businesses to notify Californians about significant amounts of chemicals in the products they purchase, in their homes or workplaces, or that are released into the environment. In judging the effectiveness of enforcing the reporting requirements, the penalties are, in part, the key, because they are potentially heavy (zero to \$2500 per offence, at the discretion of the jury or judge; each single unit of product sold without a required warning can constitute a separate offence), and also because they can be enforced by citizen suit. See David Roe, 'An Incentive-Conscious Approach to Toxic Chemical Control' (1989) 3 *Economic Development Quarterly* 179–87.

important to begin to give more precision to the content and limits of corporate human rights obligations, as set out in the Norms, and provide the predictability required in legal obligations.