

*CCRS*

Center for Corporate Responsibility  
and Sustainability

at the University of Zurich

CCRS Working Paper Series

Working Paper No. 03/05

**Transnational Corporations and Human  
Rights: The Business Implications**

Franck Amalric, Peter Buomberger, Alexander Seidler

March, 2005

In Cooperation with

Zurich University of Applied Sciences Winterthur

# TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

## THE BUSINESS IMPLICATIONS

Franck Amalric<sup>1</sup>, Peter Buomberger<sup>2</sup>, Alexander Seidler<sup>3</sup>

March, 2005

---

<sup>1</sup> Franck Amalric is Head of Research at CCRS Centre for Corporate Responsibility and Sustainability at the University of Zurich. [Franck.Amalric@ccrs.unizh.ch](mailto:Franck.Amalric@ccrs.unizh.ch)

<sup>2</sup> Peter Buomberger was the founding Director of CCRS and is now Group Head of Government and Industry Affairs at Zurich Financial Services, Switzerland and a member of the board of CCRS. [Peter.Buomberger@zurich.com](mailto:Peter.Buomberger@zurich.com)

<sup>3</sup> Alexander Seidler is a researcher at CCRS and doctoral student at the Swiss Banking Institute at the University of Zurich. [Alex.Seidler@ccrs.unizh.ch](mailto:Alex.Seidler@ccrs.unizh.ch)

We are grateful to André Burgstaller and Cornelia Steiner for their comments and support in writing this paper.

### *Abstract*

Under the combined pressure of civil society organisations, governmental authorities, international organisations as well as engaged corporations, a debate on the human rights responsibilities of transnational corporations is now well under way. A central question corporate executives currently face, concerns the boundaries of corporate responsibilities with regard to human rights. For many years, the compliance risk emerging from violating legally binding human rights norms has been the central motive for business to deal with human rights. Today, the responsibilities of business remains no longer restricted to this narrow sphere.

Rising stakeholder expectations and prospects of new hard-law regulation have forced businesses to consider a substantial enlargement of their responsibility and to include non-binding human rights norms, as well as positive obligations such as the protection, promotion and fulfillment of human rights, in order to actively contribute to the realization of human rights while maximizing shareholder value. Against this background, it is concluded that there are strong necessities and economic incentives on the part of transnational corporations (TNCs) to adopt corporate responsibility activities with regard to human rights issues.

*Table of Contents*

1	Business and human rights .....	1
2	Human rights dimensions of relevance to business .....	3
2.1	Human rights norms of relevance to business .....	4
2.1.1	International human rights law .....	5
2.1.2	Domestic human rights law .....	7
2.1.3	Voluntary human rights initiatives and soft law .....	8
2.2	The role of business with regard to human rights .....	10
2.2.1	Respect of human rights .....	12
2.2.2	Protection of human rights .....	13
2.2.3	Promotion of human rights .....	14
2.2.4	Fulfillment of human rights .....	16
3	Shifting boundaries, from compliance to corporate responsibility .....	19
3.1	Human rights as a compliance issue .....	19
3.1.1	International human rights – lack of enforcement mechanisms .....	19
3.1.2	National enforcement mechanisms .....	20
3.2	Human rights as a corporate responsibility issue .....	21
3.2.1	Prospect of new regulation .....	22
3.2.2	Stakeholder expectations .....	25
4	Recommended business actions .....	30
4.1	Differentiation strategies .....	30
4.2	Reputation risk management .....	31
4.3	Strategic interaction with governmental regulation .....	32
4.4	Collective self-regulation processes .....	33
5	Conclusion .....	34
6	Bibliography .....	36

## 1 Business and human rights

Under the combined pressure of civil society organizations, governmental authorities, international organizations and engaged corporations, a debate on the human rights responsibilities of transnational corporations (TNCs) is now well under way. This debate is fostered by the view that human rights are no longer a matter for states alone, but are in fact in the interest of other organs of society, including TNCs.

In recent years, the international system and, as a consequence, the system of international law has changed considerably owing to the activities of non-state actors such as TNCs. This has become particularly relevant since the advent of globalization, by which the operations of TNCs have spread across national borders and grown beyond the effective legal and political control of states. Some states – mostly developing countries in which TNCs operate - are no longer willing or able to intervene in TNC operations in order to ensure that human rights norms are respected. Where states fail in this way, TNCs operate in areas where the rule of law is weak or even absent and the judicial system lacks appropriate mechanisms to enforce human rights regulations.

While the respect of legally binding human rights norms – i.e. the legal obligation to refrain from violating such norms – is seen as a compliance issue, any obligation to protect, promote or fulfill human rights norms – i.e. a positive responsibility to actively contribute to the realization of these rights – traditionally does not lie within the sphere of influence of private actors. Rather, the prevailing view tends to agree with Milton Friedman<sup>4</sup>, who said that "the business of business is business" and that a company should do no more than pursue shareholder value. Or as David Henderson – author of "Misguided Virtue" – puts it, corporate responsibility is "woolly at best and damaging at worst – it will bring higher costs with questionable social benefits and business leaders are too willing to appease non-governmental organization (NGOs)" (Henderson (2001)). However, a closer look at the rapidly changing role and growing importance of the private sector indicates that business might not only have the means, but also a fundamental business interest in protecting, promoting and fulfilling human rights norms, particularly since efforts to advance the issue of human rights promise to be more ef-

---

<sup>4</sup> See Milton Friedman's classic description of this view "there is one and only one 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, 1970

fective if they are incorporated by the private sector rather than imposed by new structures of public authority.

From this perspective, in this paper we examine why it is in the interests of business not only to comply with legally binding human rights norms but also to respect non-binding human right norms and participate in the protection, promotion and fulfillment of these norms. Our aim is to present a set of motivations that are analytically convincing and firmly anchored in the real world, yet at the same time in line with the primary objective of business, which is shareholder value maximization. In fact, there are a number of good economic reasons that TNCs should not only have a legal compliance motive to respect binding human rights norms, but also a direct business interest in actively contributing to the realization of human rights norms.

Firstly, violating legally binding human rights norms creates a compliance risk – which may be described as the risk of legal or regulatory sanctions and consequent financial loss, or the loss to reputation that a firm may suffer. Once a TNC understands that, irrespective of prevailing levels of existing national or international enforcement mechanisms, a legally binding human rights norm creates a legal obligation, which may attract retroactive sanction when enforcement becomes available at some future point in time, an immediate compliance motive emerges.

Secondly, private sector initiatives to protect, promote or fulfill legally binding or pre-legal human rights norms can be defined as a corporate responsibility activity that leads business to contribute to society beyond the goods and services it produces, the employment it provides and the return on investments it generates<sup>5</sup>. The corporate responsibility benefits that companies may derive from respecting extra-legal norms and protecting, promoting and fulfilling human rights arise from two sources. The first source is the prospect that the state will impose binding hard-law regulations on companies where self-regulation turns out to be ineffective.

---

<sup>5</sup> In this context, corporate responsibility represents a company's commitment to explore and seize opportunities to enhance its overall contribution to society and sustainability while pursuing its core objective, which is value maximization. Corporate responsibility is fulfilled by the development and implementation of a portfolio of corporate responsibility activities, which are efforts to manage corporate responsibility issues in a way that takes into account the side-effects of corporate behaviors – with the intent of reducing negative and/or increasing positive effects. Owing to the existence of institutional failures (or of unresolved societal problems) companies' contribution to society is affected not only by their traditional economic activities but also by the way they manage corporate responsibility issues. (CCRS Business Report: Challenges and Opportunities for a Swiss Private Banking Firm and Asset Manager, 2004)

Corporate responsibility must be clearly distinguished from two other concepts that are sometimes confused with it. In particular, corporate responsibility differs from compliance with the rule of law – an imperative for business and not a matter of management decision – as well as from the concept of corporate societal performance (CSP) that represents the overall contribution that a company makes to society.

The second source regards the expectations of responsible corporate conduct that are held by the immediate stakeholders of a company – its consumers, employees and, especially investors.

The present paper aims to be part of the ongoing discourse in business literature and other disciplines on the changing scope of human rights responsibilities of business. We argue that in the context of a firm's corporate responsibility strategy, there is no escape from assuming a broader concept of responsibility for human rights issues. The private sector should not only have a business interest in respecting legally binding human right norms, but also a direct business interest in respecting non-binding norms and in protecting, promoting and fulfilling human rights in general.

In the following section, the paper first outlines the two main difficulties that business faces with regard to its human rights responsibilities. Section three gives an indication of the shifting boundaries in the debate on the responsibilities of business towards human rights, highlighting business risks and opportunities that arise for TNCs from legal developments, the activities of civil society and changing stakeholder expectations. We first look at the issue of compliance with human rights norms and then bring in the corporate responsibility debate on human rights. The paper concludes by issuing specific recommendations to TNCs on how to develop private-sector human rights activities.

## **2 Human rights dimensions of relevance to business**

“Does a company's responsibility extend beyond the workplace? Is responsibility limited to clear issues such as workers' rights and the non-use of child labor? Should large companies use their influence to reform oppressive laws or government practices? Should companies apply the same standards in such areas as health and safety in the workplace wherever they operate, or is it sufficient to comply with national law? Is there a point at which a government's human rights record is so poor that foreign companies should not invest in the country concerned?” (The International Council on Human Rights Policy (2002)). These questions illustrate some of the difficulties businesses currently face when dealing with human rights issues. The difficulties originate in two dimensions: First, business actors must be aware of which human rights norms are relevant to them<sup>6</sup>. Second, business actors must know how far their

---

<sup>6</sup> By relevance we mean recognized standards that businesses must comply with and standards that businesses might have to take into account owing to stakeholder pressure or direct business interests.

business interest extends, considering not only the value of respecting human rights norms but also the business rationale in protecting, promoting and fulfilling these norms.

The debate on the responsibilities of corporations is no longer restricted to the respect of legally binding human rights norms alone. Business will increasingly have to go beyond them and actively contribute to the realization of human rights. Without answering these questions, businesses and human rights organizations will increasingly come into conflict. Such conflicts risk to be costly for the company, both in terms of its reputation and the success of future operations abroad.

## **2.1 Human rights norms of relevance to business**

A first difficulty to be confronted when trying to draw clear boundaries of the human rights responsibilities of business originates in the complexity of the legal concept of human rights itself. Human rights encompass a wide range of different norms originally aimed at states. They extend from relatively well-subscribed civil and political human rights<sup>7</sup> to much less precise and thus much more controversial notions of economic, social and cultural rights<sup>8</sup>, including the right to an adequate standard of living, environmental rights or the right to development. This extension of the norms that are relevant to business has important implications for the boundaries of the latter's responsibilities.

A compliance-based approach would define the nature of a corporation as follows: "The debate about the inherent nature of the corporation is essentially no different than a debate about what rights and obligations society will choose to impose upon it. The corporation is ... a right and duty-bearing unit with those rights and duties which the law ascribes to it. [...] Either way, the state can impose limits on corporate behavior, including accountability for

---

<sup>7</sup> Civil and Political Rights are defensive rights and aim to prevent state interference with individual freedoms. Covered by the UDHR and the International Covenant on Civil and Political Rights (ICCPR), they include such rights as freedom from discrimination (UDHR Article 2), right to life and to liberty and security of person (UDHR Article 3), freedom from forced labor (UDHR Article 4), freedom from torture, cruel, inhuman or degrading treatment or punishment (UDHR Article 5), right to a fair trial and to recognition as a person before the law (UDHR Articles 6, 7, 10, 11), right to privacy (UDHR Article 12), freedom of movement (UDHR Article 13), freedom of opinion, expression, thought, conscience and religion (UDHR Articles 18, 19), right to take part in government (UDHR Article 21), right to peaceful assembly and freedom of association (UDHR Articles 20, 23(4)).

<sup>8</sup> Economic, social and cultural rights are positive rights that require the material support of the state and govern the relationship between the government and a person's economic, social and cultural activity. Introduced in the UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), they include rights such as the right to family life (UDHR Article 16), right to own property (UDHR Article 17), right to work and to just and favourable conditions at work (UDHR Articles 23, 24, 25), right to an adequate standard of living (UDHR Articles 22, 25), right to adequate health (UDHR Article 25), right to adequate housing (UDHR Article 25), right to adequate food (UDHR Article 25), right to education (UDHR Article 26), right to participate in cultural life (UDHR Article 27), right to intellectual property (UDHR Article 27(2)).

harm caused to others” (Stephens (2002)). A severe delimitation of this concept is that people confuse human rights with “consequences of legal systems, which give people certain well defined rights, with pre-legal principles that cannot really give one a justiciable right” (Sen (1999)). This is particularly true considering that there may be a significant gap between the human rights expectations of stakeholder groups and legally binding human rights norms. Hence a corporation is a right and duty-bearing unit with not only those rights and duties which the law ascribes to it, but also with those pre-legal norms that are ascribed to it by society. In concrete terms, one could argue that corporate executives that exclusively focus on legal constraints while ignoring the normative expectations of their stakeholders will not be able to run a successful business.

Today, the obligation to respect human rights may well extend beyond the justiciable right to respect individuals’ physical integrity or labor rights and include, for example, pre-legal norms such as people’s rights to water, food or shelter in the localities where a corporation operates. Hence, in terms of their binding nature on business, these norms range from legally binding norms that all organs of society must respect to more pre-legal moral precepts that “can hardly be seen as giving justiciable rights in courts and other institutions of enforcement” (Sen (1999)). However, since society expects business to observe them, they may well develop into legal norms at some future point in time. As the influence of global companies grows and as their impact on the societies in which they work deepens, it is becoming evident that their license to operate and their reputation depend not only on the legal requirements imposed by states but also on their acceptability to society at large. Taking into account a broader concept of human rights norms is thus central to this acceptability. Without a firm commitment to upholding human rights norms in general, companies are constantly exposing themselves to the risk of legal and regulatory sanctions, or reputational loss and consequent financial loss.

In the following section, we briefly discuss the various sources of human rights norms. They are contained within international customary law, treaty obligations, and so-called soft-law codes of conduct or guidelines.

### **2.1.1 International human rights law**

The starting point in defining human rights norms that are relevant to business are international human rights treaties and international customary law. Within these treaties directed at states and by state practice, the international community has determined that certain state actions are prohibited and constitute violations of international law. By signing international treaties, states agree to enforce the norms upon other organs of society within their jurisdic-

tion. In contrast, obligations arising from international customary law are peremptory norms that all states must observe regardless of whether or not a particular state is party to a treaty that outlaws certain acts. The clearest example is genocide, others include piracy, summary execution, torture, slavery or slave trading.

The international human rights norms that originate from these international treaties and from international customary law are aimed primarily at states, calling on them to enforce norms upon other organs of society. Although the term human rights can mean different things to different people and organizations, a set of core or universal human rights is given by the norms that all states joining the United Nations organization must accept. The Universal Declaration of Human Rights (UDHR) combines these basic international human rights norms such as civil and political rights (the right to life, to free speech, to freedom of religion and to take part in government) with economic and social rights (such as the right to health, to social security and to education). While the UDHR is a declaration and not a treaty, it has become binding customary international law through the repetition of its content and its actual practice.

Inspired by the UDHR, numerous international treaties dealing with human rights issues have defined the scope and content of international human rights standards in greater detail<sup>9</sup>. These conventions have been accepted by almost every state in the world – or at least by a solid majority. The two key covenants are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural and Social Rights (ICECPR). These covenants, together with other international human rights treaties, represent the most widely accepted codification of human rights standards in international law.

Since international human rights law has been drafted by states, for states, it has been debated to what extent the boundaries of its legal subjectivity extend to natural and legal persons to impose direct legal obligations on businesses, their officers and the persons working for them. With the advent of globalization and the proliferation of various new non-state actors, such as intergovernmental organizations, NGOs, individuals and transnational corporations, the state-centric view of international human rights law has started to change. Today,

---

<sup>9</sup> The main UN human rights treaties are the following: International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD – 1965); International Covenant on Economic, Social and Cultural Rights (ICESCR – 1966); International Covenant on Civil and Political Rights (ICCPR – 1966); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW – 1979); etc. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT – 1984); Convention on the Rights of the Child (CRC – 1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW – 1990), etc.

non-state actors have become an important factor in international relations and play a vital role in almost every field of international law. Although their formal status as legal subjects of international human rights law is still under debate<sup>10</sup>, TNCs are becoming increasingly involved in the formulation, implementation and enforcement of international human rights norms to no lesser extent than other non-state actors. In a similar manner, the UDHR is aimed at all organs of society, calling also upon the private sector to observe the same human rights obligations that states themselves are required to respect.

However, the view that TNCs are bound to respect these principles is challenged by many private-sector actors including individual companies and business associations in particular. While seeing a moral and social obligation to respect the human rights enshrined in the UDHR, they generally do not agree that a company should be obliged under international law to comply with these norms. Consequently, the private sector has traditionally treated “documents like the UDHR more as a reference point for inspiration and guidance rather than as a source of direct legal obligations. Advocacy groups (at least at the international level) and many intergovernmental organizations have generally reinforced this tendency” (The International Council on Human Rights Policy (2002)).

### **2.1.2 Domestic human rights law**

While the above question of direct obligations for business under international human rights law is still debated, states create indirect human rights obligations for business by ratifying international treaties. By inserting human rights norms into international treaties, governments accept them as binding norms in international law and therefore have to ensure that their own laws are fully consistent with the treaties. Hence, an indirect obligation for business arises as governments pass the international human rights norms down to the domestic level, making sure that as an organ of society, business uphold its rights and norms. Today, it is primarily through such national law, regulation and jurisdiction that firms are held liable for their human rights violations.

In most cases, state authorities impose human rights regulations on companies through instruments that are not considered to be human rights legislation as such. They are often part of criminal law, company law, consumer protection, employment standards or many other areas relevant to their business operations. “For example, company law might require the

---

<sup>10</sup> Legal experts came to the conclusion as early as the 1980s that when the objectives of established international human rights treaties are undermined by multinational corporations, human rights law should extend to cover private action (Meron, 1989: 165).

disclosure of information relevant to determining whether the company is responsible for abuses carried out by subsidiaries. Consumer protection laws might demand that companies comply with procedures to ensure the safety of their products, while laws on advertising might guard against discrimination. Environmental regulations should ensure that production processes do not endanger human life and health, and in some cases criminal law will proscribe offences of corporate manslaughter” (The International Council on Human Rights Policy (2002)). Since these norms represent directly binding legal regulations in places where firms operate, TNCs ultimately have to comply.

### **2.1.3 Voluntary human rights initiatives and soft law**

Difficulties in making a case for submitting TNCs to direct obligations under international human rights law, as well as a lack of appropriate mechanisms of enforcement and regulation in countries where businesses operate, have led multilateral organizations to focus on encouraging companies to commit themselves to voluntary principles. The UN Global Compact (2000), the Organization for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises (1976, revised in 2000) and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) are examples of this voluntary tendency. In addition, numerous governments have worked together with representatives from the private sector such as the extractive industry (e.g. Voluntary Principles on Security and Human Rights for the Extractive and Energy Sector, the Kimberley Process Certification Scheme or The Extractive Industry Transparency Initiative)<sup>11</sup> or the apparel industry (e.g. Worldwide Responsible Apparel Production, WRAP) to set up industry-specific codes of conduct<sup>12</sup>. Private efforts include codes developed by corporations themselves, sector-wide business initiatives (e.g. Equator Principles) or cross-sector business initiatives (e.g. Business Leaders Initiative for Human Rights, BLIHR) and those drafted by a wide range of independent NGOs.

Many of these initiatives vary considerably in scope and lack specificity with regards to the human rights norms under consideration: “The ILO Tripartite Declaration specifically includes workers’ human rights, but not other, while the Global Compact refers to human rights generally without going into any specificity of which human rights are relevant (Commission on

---

<sup>11</sup> For details on these codes see [http://www.business-humanrights.org > Company policy/steps > Policies > Codes of conduct \(corporate\) or see <http://www.natural-resources.org/minerals/csr/volinitiative.htm>](http://www.business-humanrights.org > Company policy/steps > Policies > Codes of conduct (corporate) or see http://www.natural-resources.org/minerals/csr/volinitiative.htm)

<sup>12</sup> Codes of conduct often range from vague company-specific declarations of business principles applicable to international operations to more substantive efforts of self-regulation by association, multi-stakeholder or inter-governmental organizations.

Human Rights (2005)). Similarly, the voluntary Guidelines for Multinational Enterprises drafted by the OECD calls on corporations to “respect the human rights of those affected by their activities” and to “contribute to the effective elimination of child labor” and “forced and compulsory labor in their operations”, without indicating the relevant norms in more detail.

Traditionally, business has focused exclusively on the norms that are legally binding. But human rights have always been an evolving subject and have long meant more than just that. The voluntary initiatives – although not legally binding instruments – also include norms that society expects business to observe. In this context, a key issue in current human rights talks is the extension of legal procedures to cover not only classic civil and political rights but also economic and social rights, rights to development and environmental norms.

Although all individuals and organs of society are expected to work towards the universal respect and support of political and civil rights, the obligation to realize economic, social and cultural rights has long been seen as the exclusive role of the state. While business already contributes in many ways to economic welfare and the common good, the private sector has not been seen as a relevant actor that has to observe these rights.

In addition, the UN member states have drafted and agreed to dozens of texts dealing with human rights matters. These range from “principles for investigating arbitrary killings to guidelines for the use of force and firearms by law enforcement officers. These documents called declarations, guidelines, principles, rules, etc., although not legally binding, they set out how states are expected to act on specific human rights matters” (The International Council on Human Rights Policy (2002)). Furthermore, declarations, resolutions, guidelines, principles and other high-level statements issued by multilateral organization such as the UN, ILO or OECD that are neither strictly binding norms nor ephemeral political promises do have some legal significance or effect as soft law<sup>13</sup>. They often reflect the compromise reached when states wish to bring some stability and order into an area of international affairs and to structure behavior around a set of norms, but when not enough states are prepared to create a legally-binding treaty. This way, they may have some anticipatory effect in judicial or quasi-judicial decision-making and in shaping binding new international norms. They may acquire considerable strength in serving as a benchmark for national legal frameworks, and may

---

<sup>13</sup> In the context of international law soft law, the term “soft law” refers to quasi-legal instruments which do not have any binding force, or whose binding force is “weaker” than the binding force of traditional law, often referred to as “hard law”. It consists of non-treaty obligations and certain types of resolutions, declarations and guidelines of international organizations which are non-enforceable.

shape international behavior and affect government and corporate conduct in the development of binding laws.

The continuous debate on the binding nature of human rights norms for TNCs and the vast proliferation of codes developed by governmental and multilateral authorities, civil society groups and by companies themselves make it difficult for companies to determine which norms law and society regard as being relevant to them.

As new international human rights issues and concerns are continuously emerging, and as TNCs and other business enterprises are increasingly involved, further clarification of the relevant norms for business is required. In this regard, the new "U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights in August 2003, can be seen as a major step forward in clarifying the human rights responsibilities of TNCs. "The document has been drafted in consultation with governments, NGOs, the business community and other experts and is based on existing international standards such as UN treaties, the UN Global Compact, the Geneva Conventions, ILO conventions and the OECD Guidelines for Multinational Enterprises" (Amnesty International (2002))<sup>14</sup>. It aims to clarify the relevant norms for business, compiling into one document an array of existing international human rights laws, standards and best practices. In this way, the document is intended to help companies to identify human rights norms throughout their operations and integrate human rights principles into their decision-making processes.

Similarly, the meeting of the UN Commission on Human Rights on April 20, 2004 – which had the issue of corporate responsibilities in relation to human rights on its agenda for the first time – commissioned a report on the human rights responsibilities of transnational corporations and related business enterprises<sup>15</sup>. The report aims to set out the "scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, and aims to identify outstanding issues" (Commission on Human Rights (2005)). Although neither a legally binding document, the report and the U.N. draft norms both serve as useful indicators of the growing expecta-

---

<sup>14</sup> Amnesty International, New draft UN norms provide guidelines for business - the human rights responsibilities of companies, <http://www.amnesty.org.uk>

<sup>15</sup> See Report of the Sub-Commission on the Promotion and Protection of Human Rights under item 16 of the 61st session of the Commission on Human Rights <http://www.ohchr.org/english/bodies/chr/sessions/61/lisdocs.htm>

tions of stakeholders such as consumers groups, investors, employees and civil society organizations with regard to the human rights responsibilities of business.

## 2.2 The role of business with regard to human rights

Another difficulty in trying to grasp the complexity of human rights matters for business originates in the question of how far the role of business extends with regards to human rights. For many years, the role of business has been a negative obligation to respect human rights norms, which implies that corporations should not impede anyone's access to those rights and refrain from directly violating human rights by their activities.

Today, corporate executives are increasingly confronted to the question how far business might have a role in extending their influence beyond the negative obligation to respect legally binding human rights norms and to positively contribute to their realization by promoting human rights or taking action to prevent their violation by others. We argue that, as a matter of prudence rather than a matter of morality, business should have an interest in extending its role well beyond this primary obligation to respect human rights and actively contributing to the realization of human rights. Such an extension of the role of private actors would require businesses to provide services which have traditionally been attributed to the state. All in all, "using a traditional dissection of human rights law applied to states, human rights may give rise to four complementary obligations to business: respect, protect, promote and fulfill human rights" (Danish Institute for Human Rights (2002))<sup>16</sup>. Similarly, the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights stipulate<sup>17</sup>: "States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, TNCs and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups".

---

<sup>16</sup> See [http://www.humanrightsbusiness.org/resp\\_6.htm](http://www.humanrightsbusiness.org/resp_6.htm)

<sup>17</sup> Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

The claim that TNCs should positively contribute to the realization of human rights – including the protection, promotion and the fulfillment of human rights – has been expressed repeatedly not only by various human rights activists and the committees<sup>18</sup> that oversee and interpret the six basic international human rights treaties<sup>19</sup>, but also within the debate on corporate responsibility.

While the “respect” of core human rights norms refers to a matter of direct compliance for business, any attempt to make a case for business involvement in human rights protection, promotion or even fulfillment may initially appear odd. Conventional wisdom has it that profit-oriented competitive actors such as TNCs are ill-suited to playing an active role in the protection, promotion and fulfillment of human rights and thereby providing services which fall under the functions of the state. Generally, this is not seen as one of the core domains or interests of corporations, and business actors are not expected to have the appropriate tools for or the interest in providing such public services, or in actively contributing to the efforts of the public and the civil society sector.

We argue, however, that any company that has an interest to protect their shareholder value can not stop at the respect of universal human rights alone but must go further, directly addressing the obligations of human rights protection, promotion and fulfillment. This is particularly true in the case of weak and failing states, where state authorities no longer fulfill these functions appropriately. It is important to note that as part of a corporate responsibility strategy, this positive responsibility should not – as David Henderson puts it – lead to higher costs with questionable social benefits that business leaders choose in order to appease NGOs – but should rather be led by considerations of self-interest.

### **2.2.1 Respect of human rights**

“In contrast to the extensive human rights responsibilities incumbent upon governments, businesses as well as individuals have their human rights duties framed primarily in negative terms; that is, to refrain from violating the rights of others through their activities” (Danish

---

<sup>18</sup> Human Rights Committee; Committee on Economic, Social and Cultural Rights; Committee against Torture; Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women; Committee on the Rights of the Child

<sup>19</sup> International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC) – where applicable, including the respective additional protocols.

Institute for Human Rights (2004))<sup>20</sup>. The obligation to respect human rights is the flipside of a negative obligation that a corporation should “not impede anyone’s access to a specific right and avoid violating the right” (Danish Institute for Human Rights (2004)). Hence, if it is accepted that private entities such as TNCs are capable of bearing obligations under international human rights law they must, at the very least, have the primary obligation to respect and therefore not to violate human rights.

The obligation to respect human rights covers cases of direct perpetration of human rights norms. Examples include the use of slave or child labor, causing deaths in local communities or forcibly evict local people. “In such cases, the company has a straightforward and immediate responsibility to do whatever is necessary to mitigate, or stop the violations” (Danish Institute for Human Rights (2000)).

It is important to note that, since legal requirements may well differ from the expectations of the stakeholders concerned, the respect of human rights norms may well extend beyond the respect of legally binding norms such as individuals’ physical integrity or established labor rights and include, for example, pre-legal norms such as the respect of people’s rights to water, food or shelter in the localities in which a corporation operates. Examples of violations of non-binding human rights norms include Coca Cola’s bottling plant in Plachimada (India), where severe water shortages have occurred and groundwater polluted as a result of the firm’s operations in the area<sup>21</sup>. Other examples include the case of the Denver-based mining company Newmont Mining Corporation – the world’s biggest gold producer – which is accused of having illegally disposed of waste containing arsenic and mercury in the ocean near its mine site in Buyat Bay Beach, Indonesia. The company has run into trouble before, with grave allegations of pollution from mining operations in developing or emerging nations, such as Indonesia, Peru and Turkey, exploiting these countries’ allegedly weak regulatory systems (International Herald Tribune (9. September 2004))<sup>22</sup>.

### **2.2.2 Protection of human rights**

More controversial than the obligation to respect human rights are suggestions that private entities need to prevent others from violating human rights, and therefore protect them. The responsibility to protect human rights implies using whatever influence one has “to intervene

---

<sup>20</sup> [http://www.humanrightsbusiness.org/pdf\\_files/defining.pdf](http://www.humanrightsbusiness.org/pdf_files/defining.pdf)

<sup>21</sup> India Resource Center: <http://www.indiaresource.org>

<sup>22</sup> See <http://www.globalpolicy.org/socecon/tncs/2004/0908newmont.htm> or <http://www.business-humanrights.org> under Newmont

to help prevent or stop specific abuses of groups and individuals” (International Council on Human Rights Policy (2002)). Applied to the traditional role of the state, this requires state authorities to protect or shield individuals from human rights violations by other actors in society. This is, indeed, one of the traditional roles of the state. In cases of failing, weak or corrupt states, where a regime either fails to recognize its primary responsibility to respect international human rights law or fails to undertake measures which delegate that responsibility to other members of society, private actors such as TNCs might have a role in fulfilling this function instead. In such a situation, it would require business to ensure that other entities or individuals do not violate the rights of their employees or the communities in which they operate. “Many inter-governmental organisations have concluded that businesses should respect principles designed to protect human rights. Some existing standards already refer explicitly or by interpretation to companies, including the preamble of the Universal Declaration, the OECD Guidelines more general support for the claim that human rights standards should apply to private business accumulated during the 1990s, when heads of state and ministers meeting at UN world conferences took for granted that businesses share responsibility with government for the protection of certain classes of rights” (The International Council on Human Rights Policy (2002)).

The protection of human rights sheds light on a particular dimension of corporate responsibility – the concept of corporate complicity.<sup>23</sup> Although many definitions exist<sup>24</sup>, the term complicity concerns the relationship between corporations and public authorities that do not ensure respect for human rights. The range of activities linked to this complicity in human rights abuses is well described by Jungk (1999): “Regrettably, multinationals are sometimes guilty of complicity in human rights violations perpetrated by governments. There are many cases where businesses have, for example, promoted the forcible transfer of populations from land which they required for business operations. At other times, by simply “doing business” with the national government, companies have unintentionally aggravated human rights disputes, for example, in cases where minority groups have claimed autonomy over an area. Even where a company’s operations do not directly impact upon human rights issues, the company may nonetheless be called upon to speak out or act when an oppressive government violates its citizen’s rights”.

---

<sup>23</sup> UN Global Compact, Principle 2: ensure that they are not complicit in human rights abuses.

<sup>24</sup> For a more detailed elaboration of corporate complicity see Clapham 2004, Categories of Corporate Complicity in Human Rights Abuses

Complicity may include benefiting directly or indirectly from human rights violations committed by other actors, or remaining silent while a company enjoys regular contact with the authority that has allowed the violations to take place. Particularly exposed to this line of argument are private financial institutions in their intermediate role as lenders, investors and financial backers. A number of recent campaigns have showed that other sectors are equally exposed to the accusation of complicity in human rights violations: Shell in Nigeria<sup>25</sup>, companies doing business with South Africa during the apartheid regime, companies such as Unocal doing business in Burma<sup>26</sup>, etc.

### **2.2.3 Promotion of human rights**

A further controversial human rights issue for business regards their role in actively promoting human rights. As the Universal Declaration of Human Rights states in its preamble: "The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance..." (UDHR (1948)). Applied to corporations, it would require business to contribute actively to a positive improvement in human rights in the area of their operations and advance the acceptance and understanding of the meaning and importance of these values. In practical terms this might involve the issue of political lobbying.

In many cases, TNCs are economically and politically so powerful that they have become influential in national decision-making processes. This is particularly true in cases of weak governmental regimes. Simultaneously, there are growing expectations that corporations should do everything in their power to promote human rights norms, especially in situations where governance structures do not exist. This raises the question of whether a corporation can be expected to influence government policies concerning human rights and the rule of law (Clapham (2004)), and abstain from supporting government policies that conflict with human rights norms. In this context, in order to promote human rights TNCs might have a role in using their influence to reform oppressive laws or government practices.

---

<sup>25</sup> For more details see <http://www.business-humanrights.org> > Law & lawsuits > Lawsuits & regulatory action > Lawsuits: Selected cases > Shell lawsuit (re Nigeria)

<sup>26</sup> For more information see <http://www.business-humanrights.org> > Law & lawsuits > Lawsuits & regulatory action > Lawsuits: Selected cases > Unocal lawsuit (re Burma) or <http://homepages.uc.edu/thro/doe/complicity.html>

In this context, Martha Nussbaum connects the idea of human rights with the idea of capabilities, and argues that human rights may be interpreted as implying the following moral principle: "the capabilities of human beings should not be permitted to fall below a certain floor, in so far as nation states and the international community are able to produce that minimum threshold for everyone. What we are actually capable of doing is primarily a matter of [...] capabilities, which depend [...] in different ways upon external conditions, and it is these that political and public action can modify or improve. (It is, alas, also true that badly chosen government action can degrade these conditions and thus degrade combined capabilities.) To the extent that "private" citizens affect the actions of their governments and public agencies, they are responsible for these units' implementation or failure to implement the conditions that promote a fair level of capabilities for everyone. In principle, human rights are everyone's business" (Garrett (2004))<sup>27</sup>. This concerns corporations, in particular, since corporate executives that aim to increase shareholder value have an interest in promoting public policies that favor their industry, or even better, their own companies (see 4.3). Ever since Adam Smith's denunciation of the merchants' political influence in the late eighteenth century, this participation by business in the process of policy-making has been criticized (Amalric, 2004). In the context of human rights, this might bring corporations into a situation in which they promote public policies that negatively affect citizens' human rights.

Examples include health policies and programs that can promote or violate human rights in their design or implementation (e.g. freedom from discrimination, individual autonomy, rights to participation, privacy and information)<sup>28</sup>. In concrete terms, it may include corporate executives not supporting public policies that favor an international patent system which restricts the production of generic equivalents of patented drugs, and thereby limiting access to generic drugs by parts of the marginalized populations within a country. Stakeholders such as investor groups are increasingly putting pressure on those involved with the major pharmaceuticals companies to make them understand that promoting public policies that respond to the challenges of HIV/Aids are not only the right thing to do morally and ethically, since they commute Aids from a death sentence into a chronic disease, but that it might also make business sense.<sup>29</sup>

---

<sup>27</sup> Retrieved from Garrett, Jan (2004), Martha Nussbaum on Capabilities and Human Rights at <http://www.wku.edu/~jan.garrett/nussbaum.htm>

<sup>28</sup> Retrieved from <http://www.who.int/hhr/en/>

<sup>29</sup> Example of stakeholders include the UUSC (<http://www.uusc.org/>) or the case of the Pharmaceutical Shareowners Group (PSG). "PSG is an international grouping of fourteen institutional investors that have significant exposure to

### 2.2.4 Fulfillment of human rights

On the part of the government, a right entails an obligation not just to respect, promote and protect but also to ensure the ultimate fulfillment of the right. According to Amartya Sen (1999) we can not talk coherently about rights without specifying whose duty it is to guarantee their fulfillment. Hence, “a person’s right to something must [...] be coupled with another agent’s duty to provide the first person with that something” (Sen (1999)). The responsibility to fulfill human rights is primarily one of the roles of the state, since it is largely dependent upon the existence of appropriate social conditions<sup>30</sup>. This implies that the state must take the necessary measures to put into effect appropriate social conditions and engage in activities which strengthen people’s capacity to access and utilize resources in order to fulfill their rights.

In cases where state authorities are unwilling or unable to provide these requisite conditions – for example owing to a low level of development – other actors might have a role to play by having a direct self-interest in providing those conditions and thereby fulfilling people’s human rights. In this respect Sen (1999) argues: “While it is not the specific duty of any given individual to make sure that the person has her rights fulfilled, the claims can be generally addressed to all those who are in a position to help. Indeed Immanuel Kant characterized such general demands as “imperfect obligations” and went on to discuss their relevance for social living. The claims are addressed generally to anyone who can help, even though no particular person or agency may be charged with bringing about the fulfillment of the rights involved.”

In concrete terms, a right such as the right to health<sup>31</sup> may be denied because the state is unwilling or unable to provide adequate facilities. Every country in the world is now party to at least one human rights treaty that addresses health-related rights, including the right to health and a number of rights related to conditions necessary for health. In addition numerous countries have included the right to health as part their national constitutions. Hence, state authorities have an obligation to fulfill these rights which might range from the very broad, such

---

the pharmaceutical sector (see [www.pharmashareownersgroup.org](http://www.pharmashareownersgroup.org)). PSG is concerned that the sector has faced extensive public criticism over the last five years, with potential negative impacts on its reputation and licence to operate. While this criticism has spanned many issues, including drugs pricing in the USA and allegations of misconduct in areas such as clinical trials and marketing, a key issue has been the sector’s response to the HIV/Aids pandemic and wider public health crisis in emerging markets.”

([http://www.usshq.co.uk/downloads/pdf/all\\_sections/ri/PSG\\_REPORT\\_SEPT04\\_SUM.pdf](http://www.usshq.co.uk/downloads/pdf/all_sections/ri/PSG_REPORT_SEPT04_SUM.pdf))

<sup>30</sup> Retrieved from <http://spartan.ac.brocku.ca/~cburton/247%202004%20Lecture%207.ppt>

<sup>31</sup> “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being...” - Preamble to the WHO Constitution (<http://www.who.int/about/en>)

as the general availability of health care, to the very specific, such as the provisions of anti-retroviral therapy (ART) at reasonable prices, the provision of safe drinking water or adequate sanitation.

An example of a private actor substituting state authorities in fulfilling human rights includes the London-based mining giant Anglo American plc. Anglo American has become the first multinational corporation to provide its South African staff with free anti-Aids drugs in a bid to tackle the growing pandemic. Nearly a quarter of its 90'000 gold and diamond mining workers are believed to be suffering from the disease, costing a huge amount a year in absences, early pension payouts and the need to recruit staff to replace those too ill to work. Anglo now provides ART to all staff who are HIV-positive or suffering from Aids and are not covered by any government medical aid scheme (The Guardian (7 August 2002)).<sup>32</sup>

Toni Trahar, Chief Executive of Anglo American plc, explained although they have no clarity about the short to medium-term financial impact of their ATC program, they owe it to their staff and to the society of which they are part. But most importantly Trahar claims that "they have realised – and other business will realise too – that there will also be an escalating cost from not managing the epidemic. Companies have a crucial role to play in fighting the HIV/Aids pandemic in terms of preserving sustainable business and of being an active part of a viable and stable society." (SustainAbility Radar (2004)) In similar terms, shareholder groups like the Interfaith Center on Corporate Responsibility regards HIV/Aids a business issue, rather than a philanthropic issue.

Repeatedly, civil society groups such as ActionAid, a charity with HIV/Aids projects in southern Africa, stress the important role of the corporate sector in addressing health treatment issues particularly in a country that has such a devastating epidemic and that seems to be unable to cope with this burden alone (The Guardian (07.08.02)).

In conclusion, let us remark that the two difficulties laid out in section two – assessing the potential role business can play and the wide array of norms to be considered – compound one another. Indeed, the wider the concept of human rights under consideration and the wider the role set for business, the broader the corresponding human rights responsibilities of business.

---

<sup>32</sup> Further information [www.angloamerican.co.uk/hivaids/](http://www.angloamerican.co.uk/hivaids/)

Far from providing clear-cut criteria, these concepts create controversy where questions about the specific responsibilities of a company are raised in a particular case. However, at the end of the day the question of how far businesses' responsibilities extend beyond compliance with and the respect of legally binding norms is a strategic decision based on assessing the risks of inaction and the opportunities arising from a company's commitment to enhancing its overall contribution to society while pursuing shareholder value maximization.

Motives for expanding businesses' responsibilities are diverse. Rising financial and reputational costs originating from consumer boycotts, new governmental regulations, difficulties in attracting and retaining talented staff and difficulties in securing employees' motivation and identification, as well as moral and ethical concerns or opportunities arising from differentiation, or direct business interests such as increasing costs of labor as in the aforementioned case of Anglo American.

In the following section we aim to analyze in more detail three dominant motives that determine businesses' focus on human rights matters in the perspective of shareholder value maximisation. First, we focus on the legal compliance motive which determines the traditional scope of responsibility – the respect of legally binding human rights norms. Second, we concentrate on two prevailing motives that help to explain the extension of the boundaries of the responsibilities of business towards the area of corporate responsibility. We aim to show how stakeholder expectations and the prospect of new regulation help to stop transnational firms engaging in regulatory arbitrage and transform them into actors of human rights protection, promotion and fulfillment.

### **3 Shifting boundaries, from compliance to corporate responsibility**

For many years, the compliance risk emerging from legally binding norms has been the central motive for business to deal with human rights concerns, and it has defined a correspondingly narrow sphere of responsibility on human rights matters. Today, rising stakeholder expectations and prospects of new hard-law regulation governing overseas activities have forced businesses to consider a substantial enlargement of their sphere of responsibility and to include non-binding human rights norms such as economic, social and cultural rights, as well as the role of business to contribute to the realization of these rights by the protection, promotion and fulfillment of human rights. As these boundaries have been enlarged, human rights have evolved from a pure issue of compliance to a matter of corporate responsibility.

While the traditional sphere of responsibility – to respect legally binding human rights norms – has been defined by the delimitations of the law, the enlarged concept of human rights responsibilities for business represents a wider and more controversial area that must ultimately be delimited by business actors themselves. Although this enlargement a company's sphere of responsibility might initially appear odd, there are a number of good economic reasons that firms should be aware of.

### **3.1 Human rights as a compliance issue**

Violating a legally binding human rights norm creates a compliance risk for business which may be described as the risk of legal or regulatory sanctions and consequent financial loss, or the loss to its reputation that a firm may suffer. Once a TNC understands that, irrespective of prevailing levels of existing national or international enforcement mechanisms, a legally binding human rights norm creates a legal obligation which may attract retroactive sanction when enforcement becomes available at some future point in time, an immediate compliance motive emerges. This view is fostered by legal developments at the international level and particularly in national jurisdictions where the transnational application of existing laws, on the basis of tort law and corresponding damage payments, has climaxed.

#### **3.1.1 International human rights – lack of enforcement mechanisms**

A central problem with seeing human rights as a matter of compliance is that international human rights law is generally difficult to enforce. There is still no international court of human rights or any other international enforcement mechanism to hold TNCs accountable for human rights violations. This is true not only for international human rights matters, but also for other fields of international law.

The fact that no effective international mechanism yet exists to hold companies accountable for their breaches of human rights norms does not mean that international human rights law does not exist. In fact, "the lack of a procedure to enforce a right should not be confused with whether or not a right or obligation exists. This will be an important point with regard to many of the emerging international legal responsibilities of companies. As domestic court cases increasingly rely on international standards, creative lawyers are likely to argue in court that the preamble is the principal statement of a company's internationally recognized responsibility to respect human rights" (The International Council on Human Rights Policy, 2002). Therefore TNCs should not be blinded. Once international legal provisions have been created and the legal personality of TNCs clarified, enforcement measures might emerge at any time.

At that stage, at the latest, the question of the past responsibilities of TNCs will surface. Since, in specific cases, international law allows for the retroactive application of legal provisions it might be that human rights violations that take place today give rise to future liability.

For these reasons, it is advisable for TNCs to consider their legal accountability under international human rights law in order to avoid future liability and the resulting financial loss and reputational damage.

### **3.1.2 National enforcement mechanisms**

Since international law is aimed primarily at states, which enforce the rules, it is up to state authorities to make sure that companies respect these human rights norms. "In cases where companies abuse these rights and neither redress nor accountability is available, this indicates mainly a failure of national law" (The International Council on Human Rights Policy (2002)). Hence, the existence of binding international or national human rights law for business is one thing, its effective enforcement another. It is here that large gaps exist between countries, many of them traceable to differences in levels of economic development and the corresponding differences in the quality and quantity of public goods provision by the state. It is such national differences in the degree of enforcement, rather than the presence or absence of legally binding human rights norms, which are one of the central ingredients in contemporary human rights debates.

Legal gaps and the lack of effective enforcement mechanisms at the international level have already produced a wide variety of changes to national jurisdictions to remedy impunity for human rights violations by TNCs. At the domestic level, two principal developments have surfaced over the last couple of years: the transnational application of existing domestic laws and the drafting of entirely new corporate responsibility regulations. The increasing number of civil litigation cases and the consequent compensation payments by TNCs, as well as the pending draft laws, serve as strong indicators of the growing sensitivity to human rights issues.

#### **Transnational litigation**

Given the lack of relevant international enforcement mechanisms and the weakness of judicial systems in some developing countries, victims of human rights violations by TNCs are increasingly seeking compensation through the courts of the firm's home base – most often developed countries. In common law countries, in particular, this trend towards transnational human rights lawsuits under ordinary principles of tort shows that courts in Australia, the UK,

Canada and the US are increasingly willing to hear complaints against domestic TNCs with regard to their actions or the actions of their subsidiaries abroad (Joseph and Kinley (2002)).<sup>33</sup>

According to Joseph (2002), common law countries not only recognize more easily that the state can exercise transnational jurisdiction over wrongs committed abroad by its own nationals, but also that common law systems allow judges to be more creative and influential in solving legal problems. This is an important advantage for plaintiffs seeking to bring novel legal arguments, and there is therefore nothing to prevent lawyers finding ways of suing TNCs over alleged human rights abuses. Given recent trends, it seems likely that transnational legal pressure on TNCs to respect human rights will continue to increase in the near future. And of course, any successful litigation will have a positive signal effect for plaintiffs targeting corporations that do not respect human rights.

Despite these developments, transnational litigation has its own limitations, and non-governmental organizations question whether it represents an effective way forward. Cases of transnational litigation are usually very time-consuming and costly, and rarely an option for the victims. Most importantly, its deterrent effect may provide only limited protection to the victims since litigation only takes place after human rights violations have occurred.

### **3.2 Human rights as a corporate responsibility issue<sup>34</sup>**

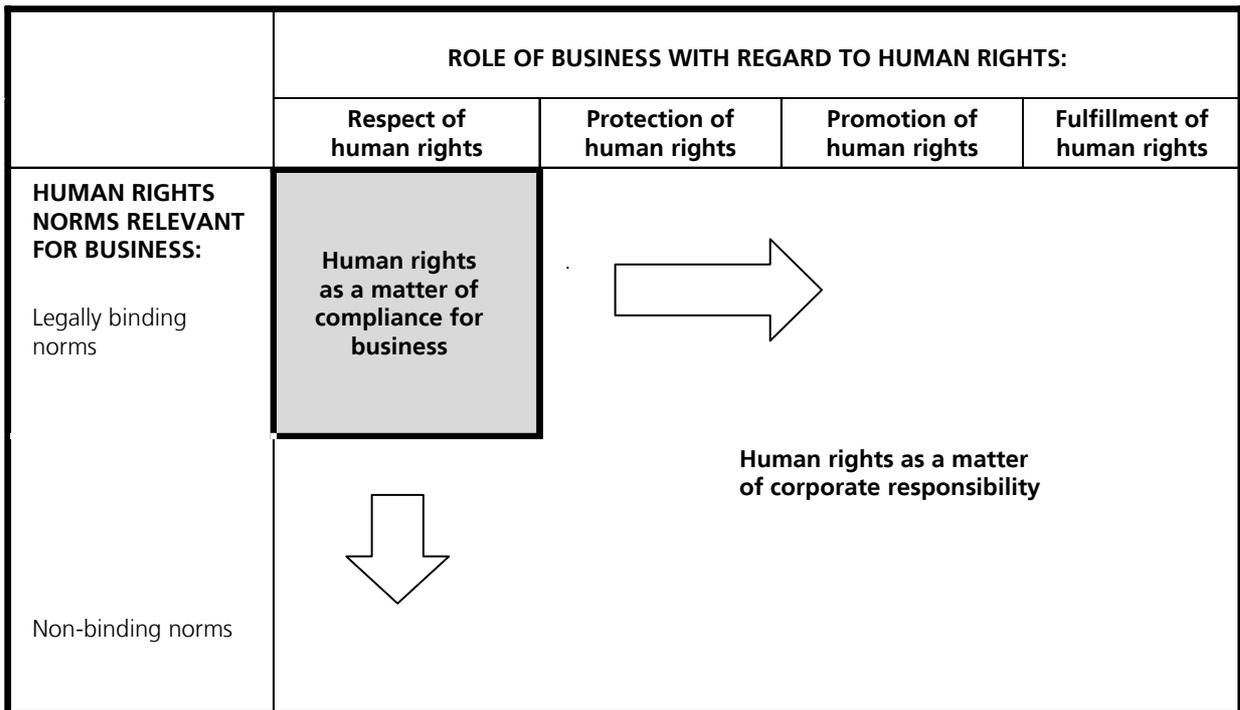
The two prevailing motives for seeing human rights as an issue of corporate responsibility concern the prospects of new regulation and rising stakeholder expectations. First, efforts towards self-regulation may head off the adoption of international or domestic hard-law regulations. Once a TNC understands that private-sector mechanisms exist which, in many instances, are less costly and more effective than their public counterparts, it will be inclined to work towards their adoption. Second, rising stakeholder expectations mean that a transnational firm will identify the business opportunities afforded by meeting a human rights benchmark or by becoming a human rights best-practice firm. Equally, it will recognize the business risks of being perceived as a free-rider on global public goods such as human rights.

#### **Figure 1: Shifting boundaries, from compliance to corporate responsibility**

---

<sup>33</sup> In the United States, foreign litigants have successfully used the Alien Tort Claims Act (ATCA) to gain redress in US courts for tortious acts committed abroad.

<sup>34</sup> Amalric Franck, Hauser Jason, Micro-Economic Foundations of Corporate Responsibility Activities, October 2004. [http://www.ccrs.unizh.ch/publications/workingpapers/wp01/WP02-FAJH\\_0410.pdf](http://www.ccrs.unizh.ch/publications/workingpapers/wp01/WP02-FAJH_0410.pdf)



### 3.2.1 Prospects of new regulation<sup>35</sup>

Recently, political consultation processes on the human rights responsibilities of TNCs, as elements of corporate responsibility policies, have been launched in the US and Australia (in 2000) as well as in the UK (in 2003)<sup>36</sup> and have fostered the prospect of new regulation. The common goal of these draft codes of corporate responsibility or codes of corporate conduct is to impose legally binding human rights obligations and other responsibilities on TNCs that are headquartered in the legislating countries. Similarly, in 1999 the European Parliament adopted a resolution on EU standards for European enterprises operating in developing countries as a step towards a European Code of Conduct. It calls for human rights obligations and other responsibilities for European TNCs operating in developing countries<sup>37</sup>. The rapid implementa-

<sup>35</sup> The argument presented in this section is discussed more in detail in Amalric and Hauser (2004). It is based on their line of argument.

<sup>36</sup> As an example, the UK Corporate Responsibility Bill is aimed at setting corporate responsibility regulations for business in order to help the government to meet its sustainable development targets. It asks companies to publish an annual Operating and Financial Review (OFR), in which they have to report on the impacts of their social and environmental policies and performance. Furthermore, the bill asks for an expansion of directors' duties, including a 'duty of care' with regard to the social and environmental impacts of the company's activities and to the interests of all their stakeholders.

<http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/145/2002145.pdf>

<sup>37</sup> The European code of conduct is aimed at providing a legal base for a statutory European framework governing companies' operations worldwide. It is aimed at contributing to the greater standardization of voluntary codes of conduct and promoting the establishment of a European monitoring platform, including provisions on complaint

tion of a European Code of Conduct does not seem conceivable, however, and a statement by the EU Commission on a future EU-wide corporate responsibility framework is still pending.

The looming prospect of new hard-law regulations to align corporate behaviors with the pursuit of social welfare is one of the main determinants of corporate responsibility activities that make TNCs respect non-binding norms and contribute to the protection, promotion and fulfillment of human rights.

Classic liberal theory states that the functions of the state are to put in place the institutional framework necessary for the proper functioning of a market economy, to resolve market failures when it is socially efficient to do so, and to undertake redistributive policies to foster social justice. Among its specific tasks are defining property rights, enforcing contracts, regulating externalities (directly or through the market mechanism), intervening to produce public goods, regulating monopolies, reducing information asymmetries and ensuring the proper redistribution of resources in line with principles of social justice.

Reality diverges from this ideal framework in two ways that concern us here. First of all, the state may not act as a disinterested Leviathan concerned solely with the promotion of social welfare. Instead, economic theories of regulation (public choice theory) propose that regulation be considered a commodity that is sold by state regulators to competing social groups (see Stigler (1971), Posner (1974)). With this perspective, the passing of regulation depends on the relative capacities of different social groups to promote regulation in their interest, i.e. on their relative capacity to capture the attention of regulators. Regulation will promote social welfare if – and only if – the interests of the social group which captures the attention of regulators are aligned with the interests of society at large.

In this competition for regulation, large companies may stand at an advantage over other social groups. Chang (1997), for instance, argues that they are more effective in overcoming free-rider problems and other hurdles undermining effective collective action. Lindblom (1977), meanwhile, states that companies have greater resources at their disposal to shape public opinion and influence regulators directly, and that they enjoy a privileged position because of the basic economic functions they perform – production of goods and services, creation of employment, generation of returns on investment and payment of taxes.

---

procedures and remedial action. For further information on the European Code of Conduct, see <http://www.europa.eu.int> : EUROPA > European Commission > Employment & Social Affairs > Corporate Social Responsibility.

One possible scope for corporate responsibility activities is thus the following. Suppose that once a company has adopted a higher standard of corporate conduct it is able successfully to promote a new regulation that imposes the standard on the industry, and that in abiding by the standard the company holds a competitive advantage over its competitors. In this situation, a company may be able to increase its corporate value and simultaneously promote social welfare by adopting a higher standard of corporate conduct.

The other departure from the ideal classic liberal framework that is relevant to us is that state intervention is generally costly. The costs of regulation are the costs of the various activities involved: the definition of standards, changes in economic actors' behaviors, monitoring and enforcement. Thus, an assessment of the gains to society reaped from the introduction of a regulation must consider not only the effectiveness of the regulation in addressing a particular issue, but also its cost efficiency.

Attention to the costs of regulation opens up further scope for corporate responsibility activities. If corporate self-regulation is less costly for companies than the equivalent state regulation, they have an incentive to adopt the self-regulatory approach and prevent the passing of new state rules. If corporate self-regulation is also equally effective and less costly for society than the equivalent state regulation, then corporate self-regulation would qualify as a corporate responsibility activity<sup>38</sup>: it is voluntary, enhances corporate value and increases social welfare (by reducing the social cost of regulation). Under these conditions, the credible threat of state intervention provides an incentive to develop corporate responsibility activities. Note that companies face a lose-lose situation: corporate responsibility activities (i.e. self-regulation policies) are costly, but state regulation would be even costlier.

To sum up, the prospect of new regulations enlarges scope for corporate responsibility activities in two different ways. Firstly, some companies may promote state regulations that are socially desirable when they can derive a competitive advantage from them<sup>39</sup>. Secondly, companies may self-regulate to prevent the passing of new regulations that would be more costly for themselves and for society at large.

---

<sup>38</sup> The private-sector (or mixed private/public-sector) mechanisms in question are soft-law regulations, created by intergovernmental constructs but enforced through voluntary compliance, public disclosure and the acceptance of monitoring or review mechanisms or codes of conduct which are self-imposed by TNCs that operate within a particular industry or sector.

<sup>39</sup> Companies might have an interest in sharing a common understanding of what constitutes a level playing field – i.e. one devoid of free-riding and regulatory arbitrage by competitors; it is an environment in which all companies in a given market must follow the same rules and are given an equal ability to compete.

A note of caution is in order here, however. In practice, it will be difficult at times to distinguish between genuine corporate responsibility activities – i.e. the voluntary adoption of standards of corporate behavior over and above statutory requirements that enhances both corporate value and social welfare – and similar voluntary corporate initiatives that would actually undermine social welfare, for instance when they serve to restrict competition unduly (for a discussion of this topic, see for instance Garvin (1983)). In assessing corporate behaviors, one should keep in mind that, in most if not in all circumstances, regulatory capture is not in the interests of society, and state regulation is more effective than self-regulation in enhancing social welfare.

### **3.2.2 Stakeholder expectations<sup>40</sup>**

“The increasing scrutiny of corporate behavior by the media, consumer groups, community organizations, local and international NGOs, and the immediacy of global communication leave companies with little, if any, hiding place. Corporate reputation, license to operate, brand image, employee recruitment and retention, share value – all these key commercial concerns are affected by society’s perception of a company’s behavior with regard to human rights. This growing public awareness is focusing more and more on TNCs operating in countries where governments do not comply with internationally accepted standards of human rights. Hence TNCs operating in countries with repressive and corrupt governments are at particular risk of criticism from a vast array of stakeholders for complicity, tacit or active, in human rights abuses perpetrated by the state. Without an explicit human rights policy and implementation strategy which can be independently monitored and verified, companies are leaving themselves exposed to such criticisms, whether justified or not. The experience of TNCs operating in countries such as Nigeria, Colombia and Burma proves that it is naïve and risky for companies not to take stakeholder expectations very seriously”<sup>41</sup>.

Once business leaders understand the business significance of stakeholder expectations, a firm will recognize the business opportunities afforded by meeting a human rights benchmark or by becoming a human rights best-practice firm, and will also recognize the business risks of being perceived as a free-rider on global public goods like human rights.

---

<sup>40</sup> The argument presented in this section is discussed more in detail in Amalric and Hauser (2004). It is largely based on their line of argument.

<sup>41</sup> Retrieved from the Corporate Social Responsibility Forum at <http://www.csrforum.com/csr/csrwebassist.nsf/content/a1a2a3a4.html>

Classic liberal theory posited that individuals held two separate identities at the same time, those of citizen and economic actor. As citizens of a nation, individuals participate in defining what Rawls calls the basic institutional framework of society, i.e. the rules of the game that all actors in society must respect and abide by. In this role, they are guided by normative considerations about the social good and social justice. By contrast, as economic actors, i.e. as consumers, employees and investors, they freely interact with other actors in the pursuit of their own self-interest, within the limits defined by law. In doing so, they are, and indeed should be, free from ethical considerations.

Yet real-life individuals often behave in ways that are at odds with the simple dualistic model posited by classic liberal theory<sup>42</sup>. Many individuals, when they purchase goods and services, choose an employer, or invest their money are concerned about the societal performance of the firm with which they decide to interact. These individuals feel uneasy with the idea of interacting with companies that behave in ways they would condemn on ethical grounds, or they wish to support companies that adopt high standards of socially responsible behavior<sup>43</sup>. The expression of these concerns and preferences is often hampered by a lack of information among stakeholders about corporate societal performance. However, when companies or pressure groups provide them with credible information, stakeholders' behavior in the economy (i.e. as economic actors) will, in part, be influenced by their opinion about what constitutes responsible corporate behavior, even when doing so may have a financial cost.

Human rights are increasingly seen by individuals as of the same moral significance for personal and group conduct as, for example, the injunction not to tell lies, not to break promises,

---

<sup>42</sup> Economists are often uneasy with the idea that stakeholders bring ethical concerns into the economy, because this raises a possible tension with the economic concept of rationality on two levels. First, some economists, starting with Adam Smith, argue that the import of ethical concerns into the economy would lead to sub-optimal outcomes (in the Pareto sense) at the macro level, thereby defeating the very purpose that stakeholders were pursuing (i.e. to improve social welfare). Second, even if ethical concerns could improve the societal outcome, each individual would have an incentive to "free ride", i.e. to rely on others' efforts while economizing on one's own. In this context, we shall simply note that there is ample anecdotal and statistical evidence to show that individuals do indeed bring ethical concerns in the economy.

<sup>43</sup> A further exploration of stakeholders' expectations of responsible corporate conduct would need to distinguish between different conceptions of ethics and different scopes of ethical concerns. From deontological ethics stems the moral duty not to hurt others, and related to it, the duty not to be associated with actions that hurt others. From there originates the obligation not to be complicit with actions that are harmful to others. In the economy, complicity may include being a consumer or employee of or an investor in a company that behaves in an ethically reprehensible manner. Teleological ethics, in contrast to deontological ethics, focus on the consequences of specific actions. In this perspective, one is concerned to act in a way that leads to better outcomes.

Deontological and teleological ethics do not fully determine ethical expectations, however, as they leave unanswered the scope of the information to be considered in assessing corporate behavior. Thus: what are the specific corporate misbehaviors that deontologically oriented stakeholders do not want to be associated with? And: to which objectives would teleologically oriented stakeholders like companies to contribute?

and not to inflict unnecessary suffering, etc. As such they tend to become integrated into economic preferences. In practice, then, when there is a conflict between material self-interest and the fulfillment of a basic moral injunction, the individual in question will opt for the latter, even if it is at a cost to material well-being. In brief, modern social and economic progress seems to have generated a tendency for human rights to be transformed from norms addressed to states into individual ethical preferences which also guide behavior in the marketplace. Interestingly Adam Smith foresaw this development well before today's NGOs. Seeking to bridge the gulf between his Theory of Moral Sentiments and The Wealth of Nations, he insisted that it is wrong to view man as driven by narrow self-interest – man's thirst for esteem from others permits enlightened self-interest only<sup>44</sup>.

This departure from the model of classic liberal theory has important implications for the theory and practice of business management. Basic economics and management textbooks, which implicitly position themselves within the classic liberal framework, suggest that in a context of perfect competition, a company needs only to consider market prices for its inputs and products to develop a corporate value-maximizing strategy. Furthermore, in doing so the company also maximizes its contribution to society. Thus, in this idealized context, additional information regarding a company's impact on society is irrelevant – from the perspectives both of maximizing profits and of aligning business strategies and operations with the enhancement of social welfare<sup>45</sup>.

Yet when the stakeholders of a firm form expectations regarding what constitutes responsible corporate behavior and are ready to act in accordance with these expectations under a variety of market conditions, a company that does not meet these expectations will fail to maximize its total value. In this context, responding to stakeholder expectations can be instrumental in corporate value maximization – what Jensen (2001) calls "enlightened value maximization"<sup>46</sup> –

---

<sup>44</sup> One particular area that has shown the gradual integration of changed ethical convictions into economic preferences relates to environmental issues. "Green" ideas which emerged in the 1970s first successfully entered the political spectrum and, by the 1990s, had been translated into consolidated stakeholder demands. Today, organic produce is one of the fastest-growing segments of the food retail market in Switzerland, with the ecological principle spreading to further sectors such as trade and international travel.

<sup>45</sup> In the context of perfect competition, information about how a company impacts on society may even be counterproductive: if this would tempt managers to direct more resources towards social activities than total value maximization would imply, they would actually destroy social welfare by foregoing valuable opportunities and thus misallocating scarce resources.

<sup>46</sup> This point must be distinguished from the alternative view put forth by proponents of stakeholder theory, i.e. that a firm's ultimate objective should be to satisfy stakeholders' expectations. Phillips, Freeman and Wicks (2003) note that, in stakeholder theory "[...] attention to the interests and well-being of some non-shareholders is obligatory for more than the prudential and instrumental purposes of wealth maximization for equity shareholders. While there are still some stakeholder groups whose relationship with the organization remains instrumental (due largely

because it leads to new business risks and opportunities. More precisely, and as we shall see below, stakeholder expectations produce a shift in demand, open opportunities for the development of differentiation strategies, raise reputation and regulatory risks and may even put pressure on the profitability of entire industries.

Individual stakeholder expectations of responsible corporate conduct may also generate other effects throughout the economy. As an indirect consequence of consumers' expectations, Eisner (2003) points out that other stakeholders also demand higher standards of corporate behavior. Thus, some corporations now demand that their suppliers adopt higher standards of responsible corporate behavior as part of their own corporate responsibility strategy<sup>47</sup>. Individual expectations are also gradually affecting government procurement practices, by requiring administrations to engage in "responsible" purchasing.

In the context of human rights, since the 1970s NGOs have increasingly insisted that TNCs embrace the corresponding responsibilities in their sphere of influence. Today, public perceptions of companies as good corporate citizens demand that business effectively addresses human rights and labor standards in their worldwide operations. If companies do not respond to these expectations, they increasingly risk scrutiny from human rights groups internationally and damage to their reputation by vigorous public campaigns<sup>48</sup>. Such campaigns have already had detrimental effects on a number of TNCs<sup>49</sup>, leading some to withdraw from projects and even countries. In addition, such conduct may result in costs such as consumer boycotts, new government regulations, increased insurance premiums or difficulties attracting and retaining talented staff.

In this context, one relevant group of stakeholders that is becoming increasingly sensitive to campaigns by NGOs is shareholders<sup>50</sup>. Tellingly, socially responsible investments (SRI) are becoming more and more popular, with a special focus on ethical and environmental issues. The

---

to the power they wield) there are other normatively legitimate stakeholders than simply equity shareholders alone." Despite this note, throughout this paper we focus on those stakeholders whose relationship with the organization remains instrumental, i.e. those groups who can impact on a company's bottom line.

<sup>47</sup> For instance, Ford has requested from its suppliers that all the manufacturing sites supplying products to Ford be ISO 14001-accredited by July 1, 2003. Example taken from Eisner (2003).

<sup>48</sup> Companies that have suffered reputational damage because of real or perceived mismanagement on human rights issues include BP (Colombia), Rio Tinto (Indonesia), Balfour Beatty (Ilisu Dam, Turkey), Premier Oil (Burma) and Shell (Nigeria), etc.

<sup>49</sup> Examples include Shell, Talisman Energy, Nike, Unocal, Coca Cola or Union Carbide. See <http://www.business-humanrights.org> > Law & lawsuits > Lawsuits & regulatory action > Lawsuits: Selected cases

<sup>50</sup> Other groups of stakeholders which are increasingly aware of human rights issues are trade unions (focusing attention on issues such as labor standards) and consumers groups.

number and importance of specialized ethical investment funds has increased significantly. In 2001 scoris<sup>51</sup> counted 280 European SRI funds, which corresponded to an increase of 78 per cent compared to 1999. In the same period, the total volume of SRI assets in the UK increased from GBP 23 billion in 1997 to GBP 225 billion in 2001 – an increase of over GBP 200 billion in just four years. According to the UK Social Investment Forum, this huge increase reflects the explosive growth and rapidly changing nature of SRI in the UK<sup>52</sup>. Similar trends have been observed in other European countries such as Sweden, the Netherlands, Germany and Switzerland.

Some investors apply negative screening<sup>53</sup> in order not to invest in companies that have a record of human rights violations or that are accused of being complicit in human rights abuses (such as companies which have operations that strengthen governments or other groups that systematically abuse human rights). Others engage<sup>54</sup> directly with companies in which they invest through the active use of their shareholder voting rights. In particular, institutional investors such as pension funds in the US and the UK play an increasing role here. Although it is still disputed whether issues such as human rights are linked with the determinants of a company's long-term economic performance<sup>55</sup>, pension funds have started engagement-based strategies, "raising human rights issues with companies and encouraging them to integrate human rights considerations into their business principles, codes of conduct and operational

---

<sup>51</sup> <http://www.scoris.de>

<sup>52</sup> Retrieved from [www.uksif.org](http://www.uksif.org)

<sup>53</sup> *Negative screening* consists of reducing investment universes by excluding companies, sectors and/or countries on the basis of specific ethical criteria that reflect the concerns of the fund's members, sponsor, or both. This "negative" screening approach is the direct heir of the SRI practices pioneered in the early 1970s, and is still followed by a number of large pension funds in the US and Europe. For instance, the Swedish 7th AP Fund (national premium pension fund) excluded 27 companies from its portfolio in 2001 on purely ethical grounds (Amalric, 2004).

<sup>54</sup> *Engagement* refers to influencing corporate behavior through various channels of contact inherent in the investment and ownership relationship (e.g. shareholder voting rights). Engagement can have different motivations. Some ethically-motivated investors use it to influence companies in relation to the immediate consequences of their actions. Other investors use it for purely financial reasons, when they believe that higher standards in specific corporate behaviors, e.g. environmental management in the production process, can improve the long-term performance of a company. The California Public Employees' Retirement System (CalPERS), for instance, has an impressive record of engaging with companies on issues of corporate governance under this rationale. See CalPERS's dedicated website to the issue at [www.calpers-governance.org](http://www.calpers-governance.org) (Amalric, 2004).

<sup>55</sup> The only corporate responsibility issue that relates to human capital and for which the responsibility of companies is clearly established, and evidence of the impact on long-term economic performance is sufficiently solid, is that of on-the-job training. See Amalric, (2004). Based on the argument - that companies that take human rights issues seriously are more likely to perform better in the long-term - a legal view is emerging that pension fund trustees could be considered to be in breach of their fiduciary duty if they do not take such issues into account when investing in companies that could suffer reputation damage through human rights or environmental scandals. Amnesty International <http://www.amnesty.org.uk/business/pubs/hrqp.shtml>

policies, and the implementation, internal monitoring and independent verification of these policies" (Amnesty International, 2000).

#### **4 Recommended business actions<sup>56</sup>**

The previous two sections showed that human rights entail legal risks for TNCs, that there exists a risk of new regulations being introduced, and that stakeholders are beginning to factor human rights into their economic preferences when acting in the marketplace. Against this background, it is concluded that there is a significant need and economic incentive on the part of TNCs to adopt human rights policies.

Based on the approaches introduced in the previous sections (the compliance-based approach and the corporate responsibility-based approach) business leaders mainly have two basic options, namely, to focus on the respect of legally binding human rights norms or to develop a corporate responsibility strategy – which demands active contribution from the private sector toward the realization of human rights norms.

The challenge of the first strategy mainly involves clarifying which human rights represent legally binding norms, in order to ensure compliance with hard law obligations. TNCs are recommended to approach the issue within a comprehensive company-wide compliance framework to be able to control legal developments.

In response to the changing expectations of stakeholders or the new regulations imposed by the state, the following sections outline what corporate responsibility strategies executives can adopt in order to maximize enterprise value. These options outline ways to address the challenges that come with the greater human rights responsibilities of business.

##### **4.1 Differentiation strategies**

One way a company may derive net benefits from human rights activities is by using its human rights policy to distinguish itself from its competitors. "If consumers hold preferences regarding product quality [including quality of the production process], and if they are ready to pay a price premium for higher quality, then companies have an interest to respond to this demand if they can recover the additional costs of production from an increase in the price of their products" (Amalric and Hauser, 2004). For example, the success of the fair and ethical

---

<sup>56</sup> The arguments presented in this section are discussed in more detail in Amalric and Hauser (2004).

trade movements is based on changes in consumer preferences with respect to responsible corporate conduct, which have led to shifts in consumer demand.<sup>57</sup>

While in the strict sense it may be hard to find a specific example of differentiation based on a human rights policy, successful cases of companies differentiating themselves through their corporate responsibility policies usually include human rights considerations. A prominent example is that of Max Havelaar, which commercializes fair trade certified products such as coffee. What is important here is that by differentiating their products with a "fair trade" label, Max Havelaar not only succeeded in attracting "first-world consumers" that are willing to pay a little extra for products which carry a fair trade guarantee, but also helped to bring about certain rights such as a decent wage for farmers, the right to unionize or the non-use of child labor.

## **4.2 Reputation risk management**

Another way companies can derive net benefits from a human rights policy is when such a policy helps them to manage reputation risk effectively. Being involved in human rights violations in one way or the other, even remotely, poses a significant latent risk for companies. NGOs randomly select and campaign on particular products and generate information about them. The risk here is that the company may be found to be engaged in conduct that its stakeholders find ethically reprehensible, and that the NGOs actively and credibly communicate this information to its stakeholders. A consequent decline in workers' morale, and possibly in their productivity, a decrease in sales or an increase in employee departures may cause substantial costs for business.

One way that companies can manage this reputation risk is to adopt voluntary guidelines or codes of conduct in line with stakeholders' expectations (going further than the legal requirements if the expectations themselves go beyond these requirements) in order to reduce the probability of incurring heavy losses in the future. This might involve the development of firm-specific initiatives, adhering to initiatives established by a group of companies (e.g. Equator Principles) or codes developed by intergovernmental organizations such as the UN Global Compact.

---

<sup>57</sup> Other examples include satisfaction of employees' expectations arising from companies human rights activities that lead to increased employee productivity or retention rates and thereby to lower labor costs. Increased attractiveness of the company for potential new clients may lead to increased sales. Similarly, increased customer loyalty may result in higher retention rates.

Another way that companies may manage reputation risk is to show an interest in developing human rights impact assessment methodologies in order to gauge the effects of their operations on the enjoyment of human rights by local communities (e.g. Human Right Compliance Assessment tool developed by the Danish Institute for Human Rights). According to the Commission on Human Rights (2005) “there is a significant need to develop “tools” to assist business in implementing their responsibilities, in particular through the development of training materials and of methodologies for undertaking human rights impact assessments of current and future business activities.”

In terms of managing reputation risk, neither of these examples represents the kind of differentiation strategy outlined above, but rather a precautionary approach. In response to the heavy costs inflicted by public campaigns, numerous companies have adopted corporate responsibility activities in this direction. Prominent cases include Shell in the aftermath of the Brent Spar and Nigeria affairs or Nike in the aftermath on the NGO-led campaign on adequate labor standards in their supply chain. More recently, the banking sector is facing reputation risks as it has come under scrutiny for its role in financing projects that may involve human rights abuses (e.g. Citigroup following the Rainforest Action Network’s campaign against the induced environmental impact of its financing policies).<sup>58</sup>

Back to the case of Coca Cola’s bottling plant in India (see 2.2.1): Following the shutdown of Coca Cola’s largest facility in Plachimada after the local village council refused to issue a new license to operate, Coca-Cola became the target of numerous other campaigns across India that are demanding that the company shuts down its bottling facilities because of the water shortages and pollution they create. Repeatedly, campaigners are asking for the revocation of Coca-Cola’s license to operate because of the severe hardships it creates for their communities. While the company denied that the shortages have anything to do with its use of water from the underground aquifer, the question could be raised whether the risk of being exposed to the possibility and costly consequences of damage to its reputation should have led the company to comply with non-binding environmental rights - such as the right to water.

### **4.3 Strategic interaction with governmental regulation**

As a third option, a company may be able to gain an advantage over its competitors by promoting the adoption of new regulations that would impose on all companies a standard of

---

<sup>58</sup> <http://www.banktrack.org>

corporate conduct in which it enjoys a cost advantage. Above all companies that bear a greater reputation risk owing to their particular exposure to campaigners might have an inherent interest in imposing their relatively well developed human rights standards on their competitors as part of new hard law regulations. Such a strategy would allow companies that face higher reputation risk to restore a level playing field with their less exposed competitors, since such standards would then address all members of the industry (Amalric (2005)).

Firms that are exposed to high reputation risks therefore benefit in that they prevent less exposed competitors from gaining a competitive advantage. It is evident that such binding standards will only create a minimum level of protection and thus leave ample room for more dedicated and proactive corporate actors wishing to make a difference as regards changes in stakeholder expectations as outlined in section 4.1.

Within the context of the human rights debate, the discussion around the adoption of the UN draft norms has shown that corporations are generally against any form of new hard law regulations. However, in other fields, companies strategically interacted with governmental regulation in order to benefit from the development of new hard law, thereby gaining an advantage over their competitors. The most prominent example includes the case of the DuPont Company, which has been a leader in promoting regulatory change with regard to the use of chlorofluorocarbon (CFC) and the development of non-ozone-depleting alternatives as CFC replacements.

#### **4.4 Collective self-regulation processes**

Finally, many corporate responsibility activities are carried out in the context of collective self-regulation processes with various forms and objectives. Some of these processes involve other actors in the same industry (industry self-regulation), some involve a variety of stakeholders concerned about a specific corporate practice (e.g. World Commission on Dams), and still others involve a variety of stakeholders concerned about a specific societal issue at the global level (e.g. the public-private partnership to improve Global Road Safety) or a specific territory.

The economic rationale of corporate responsibility activities carried out in the context of collective self-regulation processes differs markedly from the rationale of similar activities carried out by a company independently (see 4.1.-4.3.). There are two different elements behind this first-named rationale: (1) the benefits a company derives from providing a public (or club) good that the collective self-regulation process aims to produce, such as maintaining a high level of profitability in the industry, and (2) the benefits of participating in the collective self-

regulation process, such as the capacity to shape new regulation or to influence the actions of other companies.<sup>59</sup>

Following this rationale, 'The Equator Principles' could be seen as being among the most visible and concrete sector-wide self-regulation initiatives at the global level, based on the understanding that the financial services industry has 'significant opportunities to promote responsible environmental stewardship and socially responsible development'. The underlying motives of the participating banks - in the light of their overarching aim to maximize firm value - are developed in detail in Amalric (2005)<sup>60</sup>. They include: (1) the objective of leveling the playing field in the industry among players facing different reputation risks, (2) the objective of efficiently addressing the problem of screening for the social and environmental risks of projects, and (3) the objective of preserving the profitability of the industry against critics of large development projects.

The participating banks have come to an agreement that borrowers must conduct an environmental assessment of projects in which banks have foremost to comply with the laws of a host country. In addition, reference is also made to non-binding standards and guidelines covering such human rights issues as the protection of human health and cultural properties, occupational health and safety, land acquisition and land use, involuntary resettlement, impacts on indigenous peoples and communities, pollution prevention and controls and waste minimization.<sup>61</sup> The example shows that by engaging in a collective self-regulation process, firms not only follow an economic rationale but also actively contribute to the realization of certain human rights.

## **5 Conclusion**

As discussed in the paper, there are different developments that push companies to take responsibility for human right issues. While the multiplication of cases of transnational litigation may represent an important trend to raise awareness about compliance with international and domestic human rights law, other developments such as increased stakeholder involvement

---

<sup>59</sup> Another economic rationale for collective self-regulation processes is when a company is powerful enough in its industry to use collective self-regulation as a way to entrench a competitive advantage over its competitors, in a way similar to the case of strategic interaction with governments discussed in 4.3. For a more detailed elaboration of the business rationale of collective self-regulation processes, refer to Amalric and Hauser (2004)

<sup>60</sup> Amalric, Franck, *The Equator Principles: A Step Towards Sustainability?*, CCRS Working Paper Series, Working Paper No. 01/05, January 2005

<sup>61</sup> The "Equator Principles": <http://www.equator-principles.com/principles.shtml>

and the threat of future regulation will perhaps be more effective in contributing to the realization of human rights in the long run.

The conclusion for companies is that there is no escape from assuming more responsibility for these issues. Primarily, corporations will have to ensure that they do not breach – directly or indirectly – human rights. Furthermore, they will increasingly have to help address some of the deeper societal problems, the resolution of which is a requirement for the full realization of human rights. In terms of engagement, the choice is between the exercise of corporate leadership in developing appropriate company policies, or being forced by the public to bring corporate policy into line with the values of society. The questions that corporate executive have to answer, are: Which, and under what circumstances do human rights activities increase the value of the firm, and what is the possible scope of a companies portfolio of such activities that increase the value of the firm?

Inaction is not an option. Some corporations may find action costly in the short-term, but in the long-term they will benefit as well, as fulfillment of human rights is the basis on which free societies strive and business flourishes. As Mary Robinson, then United Nations High Commissioner for Human Rights, put it, beyond short-term bottom-line considerations, business should also care about business rights “because business needs human rights and human rights need business”.<sup>62</sup>

---

<sup>62</sup> Mary Robinson: The Business Case for Human Rights, Visions of Ethical Business, 1998, <http://www.unhchr.ch/hruicane/hurricane.nsf>

## 6 Bibliography

- Amalric, F., Hauser J., (2004), Micro-economic foundations of corporate responsibility activities, CCRS Working Paper Series, Working Paper No. 02/04, October, 2004, <http://www.ccrs.unizh.ch/publications/>
- Amalric, F., Hauser J., (2004), CCRS Business Report: Challenges and Opportunities for a Swiss Private Banking Firm and Asset Manager (unpublished), 2004
- Amalric, Franck, (2005), The Equator Principles: A Step Towards Sustainability?, CCRS Working Paper Series, Working Paper No. 01/05, January 2005, <http://www.ccrs.unizh.ch/publications/>
- Amnesty International., Human Rights Guidelines for Companies, <http://www.amnesty.org.uk/business/pubs/hrqc.shtml>
- Amnesty International, (2000), Human Rights Guidelines for Pension Fund Trustees, <http://www.amnesty.org.uk/business/pubs/hrqp.shtml>
- Amnesty International, (2002), The Human Rights Responsibilities of Business, [http://www.amnesty.org.uk/images/ul/U/JN\\_norms\\_Business\\_final\\_aw.pdf](http://www.amnesty.org.uk/images/ul/U/JN_norms_Business_final_aw.pdf)
- Amnesty International and The Prince of Wales Business Leaders Forum, (2000) Human rights: is it any of your business?, <http://www.amnesty.org.uk/business/pubs.shtml>
- Anderson, M. (2002), Transnational Corporations and Environmental Damage: Is Tort Law the Answer?, <http://washburnlaw.edu/wlj/41-3/articles/ande.pdf>
- Bernauer, T. and Caduff, L., 2004, Interest Group Politics and Industrial Competition as Drivers of Environmental and Consumer Regulation, Journal of Public Policy forthcoming.
- Chang, H.-J., (1997), The Economics and Politics of Regulation, Cambridge Journal of Economics, 21, 703-28.
- Clapham, A., Jerbi, S., (2004), Categories of Corporate Complicity in Human Rights Abuses Based on a background paper for the Global Compact dialogue on the role of the private sector in zones of conflict, New York, 21-22 March 2001
- Commission on Human Rights, (2005), Report of the Sub-Commission on the Promotion and Protection of Human Rights, 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, E/CN.4/2005/91, 15. February 2005

- Danish Institute for Human Rights, Human Rights Compliance Assessment,  
[http://www.humanrightsbusiness.org/compliance\\_assessment.htm](http://www.humanrightsbusiness.org/compliance_assessment.htm)
- Eisner, M. A., (2003), Corporate Environmentalism, Regulatory Reform, and Industry Self-Regulation: Toward Genuine Regulatory Reinvention in the United States, *Governance* 17, 145-67.
- Friedman, M., (1970), The Social Responsibility of Business is to Increase its Profits, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32.
- Garvin, D., (1983), Can Industry Self-Regulation Work?, *California Management Review* 25, 37-52
- Global Policy Forum, Alien Tort Claims Act,  
<http://www.globalpolicy.org/intljustice/atca/atcaindx.htm>
- Jensen, M. C., (2001), Value Maximisation, Stakeholder Theory, and the Corporate Objective Function, *European Financial Management* 7, 297-317.
- Joseph, S., Kinley, D., (2002), "TNCs and Human Rights. Questions About Their Relationship", *Alternative Law Journal*. Vol 27, No. 1.
- Jungk, M., (1999), A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad, *Human Rights Standards and the Responsibility of Transnational Corporations*, Michael K. Addo (ed.), The Hague: Kluwer Law International, pp. 171-186.
- Jungk, M., (2000), Defining the Scope of Business Responsibility for Human Rights Abroad, Danish Human Rights and Business Project, the Confederation of Danish Industries, The Danish Institute for Human Rights and The Industrialization Fund for Developing Countries, The Human Rights & Business Project,  
[http://www.humanrightsbusiness.org/resp\\_6.htm](http://www.humanrightsbusiness.org/resp_6.htm)
- Kinley, D., Tadaki, J., (2003-04), From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, Vol.44(4) *Virginia Journal of International Law*, pp.931-1024
- Leipziger, Deborah (2003), *The Corporate Responsibility Code Book*. Sheffield.
- Lindblom, C., (1977), *Politics and Markets: The World's Political Economic Systems* (Basic Books, New York).

- McBeth, A., (2004), The role and responsibilities of the finance industry in relation to human rights: A legal analysis, Castan Centre for Human Rights Law
- McInsey&Company, (2004), Assessing the Global Compact's Impact, May 11, 2004, [http://www.unglobalcompact.org/content/NewsDocs/Summit/imp\\_ass.pdf](http://www.unglobalcompact.org/content/NewsDocs/Summit/imp_ass.pdf)
- Meron, T. (1989), Human Rights and Humanitarian Norms as Customary Law, Oxford
- Phillips, R., Freeman, R. E. and Wicks, A. C., 2003, What Stakeholder Theory Is Not., Business Ethics Quarterly (Philosophy Documentation Center).
- Posner, R. A., (1974), Theories of Economic Regulation, The Bell Journal of Economics and Management Science 5, 335-58.
- Portmann, J., Seidler, A., (2003), The Human Rights Responsibilities of Transnational Corporations - Why Transnational Corporations Should Care, CCRS Pavilion Lecture. (PDF)
- Rory, S., (2003), Business and Human Rights - Dilemmas and Solutions, Insight Investment, UK, November 2003, Greenleaf
- Scherer, A.-G., (2003), Multinational Unternehmen und Globalisierung. In: Ethische Ökonomie. Beiträge zur Wirtschaftsethik und Wirtschaftskultur. Heidelberg.
- Sen, A., (1999), Development as Freedom, Anchor Books, New York
- Steiner, C.M.R., (2000), Die UNO-Menschenrechtskommission. Entstehung - Eigenschaften - Effekte. Ein Normativ-theoretischer Beitrag zur Regimeforschung. Zürich.
- Stephens, B., (2002), The Amorality of Profit: Transnational Corporations and Human Rights , Berkeley Journal of International Law, Volume 20, pp. 45-90
- Stigler, G. J., (1971), The Theory of Economic Regulation, The Bell Journal of Economics and Management Science 2, 3-21.
- SustainAbility Radar Dec.03/Jan.04, <http://www.sustainability.com/news/radar/default.asp>
- The International Council on Human Rights Policy, (2002), Beyond Voluntarism, Human rights and the developing international legal obligations of companies, [www.ichrp.org/ac/excerpts/41.pdf](http://www.ichrp.org/ac/excerpts/41.pdf)
- Verdross, A., Simma, B., (1984), Universelles Völkerrecht. Theorie und Praxis. Berlin.
- Ward, H., (2001), Governing Multinationals: The Role of Foreign Direct Liability. In: The Royal Institute of International Affairs Briefing Paper Series. No. 18.

World Bank (1998), *Assessing Aid. What Works, What Doesn't and Why*. Oxford.

<http://www.worldbank.org/research/aid/aidtoc.htm>

### **Instruments**

International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*,

<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>

Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises*,

[http://www.oecd.org/department/0,2688,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,2688,en_2649_34889_1_1_1_1_1,00.html)

United Nations Global Compact, *The Nine Principles*: <http://www.unglobalcompact.org/>

United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, <http://www.unhchr.ch/pdf/report.pdf>

United Nations High Commissioner for Human Rights, *International Human Rights Instruments*

<http://www.unhchr.ch/html/intlinst.htm>

United Nations Universal Declaration of Human Rights. 10 December 1948, (A/RES/217/A(III)),

<http://www.unhchr.ch/udhr/>

United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. 13 August 2003

[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument), (E/CN.4/Sub.2/2003/12/Rev.2)