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# The UN Human Rights Norms for Corporations: The Private Implications of Public International Law

David Kinley\* and Rachel Chambers\*\*

## Abstract

Though many years in the making, the UN Human Rights Norms for Corporations only registered on the radars of most states, corporations and civil society organisations in August 2003 when they began to move up the ladder of the United Nation's policy-making processes. Since then they have been subject to intense, and sometimes intemperate, debate, scrutiny and controversy. A particular legal feature of the deliberations has been the focus on the closely related questions of the legal standing of the Norms in their present format (namely, an imperfect draft, and therefore, of no direct legal force), and what they might become (possibly—though not likely soon—a treaty that speaks to corporations but binds states). A potent mix of distrust and suspicion, vested interests, politics and economics has given rise to a great deal of grand-standing

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\*\*Barrister, Cloisters Chambers, London (rch@cloisters.com). Research for this article was enabled through a three-year Linkage Grant from the Australian Research Council for a project researching human rights and multinational corporations. For details and the outcome of the project, see Castan Centre for Human Rights Law, 'Multinational Corporations and Human Rights' (Projects) available at: <http://www.law.monash.edu.au/castancentre/projects/mchr/>. Themes in, and earlier versions of, the article were aired at a US Congressional Human Rights Caucus hearing in November 2004; at a session on the Norms at the Business for Social Responsibility Conference in New York, November 2004; and at a number of Human Rights and Global Economy graduate seminars at Monash University and Sydney University Law Schools and at Washington College of Law, American University in 2004 and 2005. In addition to the two anonymous referees of the article and the editorial board of the *Human Rights Law Review*, the authors would like especially to thank Chris Avery, Eric Biel, Scott Jerbi, Sarah Joseph, Richard Meeran, Justine Nolan, John Ruggie, John Sherman, Sune Skadegard Thorsen and Natalie Zerial for their insightful constructive criticisms, comments and suggestions, and also the last-named for her peerless editorial and research assistance.

and cant concerning these questions and how they might be answered. In this article, the authors explore the history of the Norms and the form and content of the debate that surrounds them, in their attempt to disentangle the legal from the rest. That said, the article also focuses on the real politicking of the circumstances in which the Norms now find themselves and it seeks to offer some guidance as to where the Norms—or at least their substance, if not their form—might go from here.

## 1. Introduction

That leaves business having to blow the whistle on something that aims to subject firms to criticism and liability for abusing human rights. It is quite wrong to suggest that firms are generally involved in widespread abuse of human rights—where is the evidence?

John Cridland, Deputy Director-General of the Confederation of British Industries (CBI).<sup>1</sup>

We have been down this path many times in the UN, and it is both sad and undeniable that the anti-business agenda pursued by many in this organization over the years has held back the economic and social advancement of developing countries.

US Government Statement, 20 April 2005.<sup>2</sup>

Both of these statements were made in respect of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ('Norms').<sup>3</sup>

In the opening months of 2004, the prospect of an international regulatory framework under which companies might be subject to criticism or, worse, actually held liable for abusing human rights, sent shockwaves through business communities in Europe, the United States and the rest of the world. Particularly objectionable was the idea that companies might be liable for the ill deeds of

1 Letter to government trade and foreign affairs ministers, as quoted in Gow, 'CBI cries foul over UN human rights code', *Guardian*, 8 March 2004.

2 Available at the website of the US Government Delegation to the 61st Session of the UNCHR: <http://www.humanrights-usa.net/2005/0420Item17TNC.htm>. The purpose of the statement was to explain the Administration's decision to vote against the Commission on Human Rights Resolution 2005/69 requesting the Secretary-General appoint a Special Representative on the issue of human rights and transnational corporations (on which see *infra* n. 51). The only other state to vote against the resolution on similar grounds was Australia. South Africa also voted against the Resolution, but did so on the ground that it did not go far enough in promoting the importance of the issue. 49 states voted in favour of the Resolution. The Resolution was co-sponsored by 38 states: 30 from Europe, 4 from South America, as well as Canada, Ethiopia, India and Nigeria.

3 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev.2 ('Norms').

their suppliers, joint venture partners and other groups, including governments, from whose activities they benefited.<sup>4</sup> Whilst expressly acknowledging the undoubted capacity of corporations 'to foster economic well-being, development, technological improvement and wealth',<sup>5</sup> the essential focus of the Norms and the movement behind them has been on addressing the equal and opposite capacity of corporations 'to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities'.<sup>6</sup> This 'negative' focus has been prompted by the apparently increasing instance, and certainly visibility, of such examples of human rights abuse as sweatshop labour in the footwear and apparel industries; environmental, health and cultural degradation in the extractive industries; and personal integrity and freedoms abuses by security forces guarding infrastructure, factories and other installations of corporations in various fields of enterprise.

In response to the promulgation of the Norms, business leaders were quick to reiterate and highlight both the benefits that corporate enterprise bring to all societies, and their voluntary efforts to regulate the few instances where corporations are responsible for bad business practices and human rights abuses. It was on these bases that business leaders mounted critiques, not only of the Norms document itself, but also of any expansion of the concept of corporate liability for human rights responsibilities that went beyond the current model of self-regulation through codes of conduct, social responsibility policies and the like.

The corporate lobby made some headway. When the Norms came before the UN Commission on Human Rights, at its 60th Session in 2004, they encountered a frosty reception from member states already primed with the concerns of the corporate sector. The Norms were then effectively put on hold by the Commission, and, at its 61st session in 2005, the Commission recommended that the UN Secretary-General appoint a Special Representative (SRSG) to review the whole matter of corporations and human rights. That recommendation was duly acted upon, and an appointment was made in July 2005.<sup>7</sup>

4 Gow, *supra* n. 1, states: 'Among the CBI's particular concerns are proposals to make firms legally accountable for the actions of others, including suppliers, users of their products—and governments.' The article goes on to quote one of Mr Cridland's aides, "You can imagine a demonstration in a difficult part of the world against a company's product that prompts a violent government response and protesters get killed". . . . "The company would be seen as complicit."

5 Preamble, Norms.

6 *Ibid.* For a comprehensive and regularly updated catalogue of types, instances and trends in human rights abuses by corporations, see the 'Business and Human Rights Resource Centre' website available at: <http://www.business-humanrights.org/Categories/Issues/Abuses>.

7 See *infra* n. 52 and accompanying text.

The SRSG published an Interim Report in February 2006,<sup>8</sup> which dealt in part with the Norms, ultimately concluding that they should be abandoned rather than pursued. In this article we critically analyse this finding, together with the many other views, both complementary and contradictory, as to the worth and future of the Norms.

Integral to the aforementioned focus of the Norms on the abuses of corporate power is the particular concern over the activities of transnational corporations (TNCs)—that is, those corporate entities that undertake a significant proportion of their business in countries outside the state in which they are domiciled. In the face of the quantum and continued expansion of corporate power, as well as the persistent revelations of corporate human rights abuses, particularly in developing countries,<sup>9</sup> an important element of the project to curtail human rights abuses by companies will be missing without a common, enforceable set of international standards to which transnational corporations are required to adhere, whether through domestic law or directly under international law. This is a gap that the Norms seek, in part, to fill. The fundamental question addressed in this article is whether the Norms are the right vehicle through which to develop a framework for corporate accountability for human rights abuses at the international level. We will argue that the Norms do have this potential and ought to be supported as a viable first step in the establishment of an international legal framework through which companies can be held accountable for any human rights abuses they inflict, or in which they are complicit. It is in this respect that such an instrument of public international law can and will have private implications.

Following this introduction (Part 1), the article is divided into four parts. In Part 2, we describe what the Norms are and where they have come from. We also consider some of the peculiar and more controversial features of the Norms. In Part 3, we examine the arguments for and against the Norms, and discuss some of the recommendations that have been made for their amendment and improvement. In Part 4, we address in detail the legal implications of the Norms, both at the international and domestic law level, as well exploring

8 Interim Report of the Secretary-General's Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 22 February 2006, E/CN.4/2006/97 ('Interim Report'). The SRSG's Final Report is due mid-2007 at the end of his two-year tenure.

9 Weissbrodt and Kruger suggest that a number of human rights abuses by corporations 'disproportionately affect developing countries... and other vulnerable groups', Weissbrodt and Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights', (2003) 97 *American Journal of International Law* 901 at 901. For ongoing documentation of human rights abuses by corporations in developing countries, see Human Rights Watch, 'Business and Human Rights', available at: <http://www.hrw.org/doc/?t=corporations>, which includes their reports on child labour in Ecuador, war crimes and gold mining in the Congo and the violations associated with oil companies in Sudan and Nigeria. Amnesty International has similarly documented violations in this area, see Amnesty International, 'Economic Globalization and Human Rights', available at: <http://web.amnesty.org/pages/ec-index-eng>.

how the connections between these two legal spheres will impact on the implementation and efficacy of the Norms and the standards contained therein. In Part 5, we draw out our conclusions, underscoring the importance of what the Norms have achieved and what we see as their continuing relevance and value.

## **2. The Norms**

### ***A. Basic Provisions***

The Norms and their accompanying Commentary<sup>10</sup> were compiled and drafted by the UN Sub-Commission on the Promotion and Protection of Human Rights as a statement of the human rights obligations of transnational corporations.<sup>11</sup> Based on key international human rights instruments, the Norms attempt to take up the human rights obligations most relevant to companies and apply them directly to TNCs and other business enterprises, within their respective spheres of activity and influence. That said, the Norms make clear that states retain primary, overarching responsibility for human rights protection. The rights covered by the Norms are, broadly, equality of opportunity and non-discriminatory treatment; the right to security of persons; labour rights; respect for national sovereignty and human rights, including prevention of bribery and corruption; consumer protection; economic, social and cultural rights; and environmental protection.<sup>12</sup>

### ***B. Particularities***

In most respects, the Norms follow a standard international law format: they are presently in draft form; accompanied by an explanatory commentary; comprise relatively broad principles presented as open-ended provisions, whose precise implementation in practice will vary according to circumstances; directed at states (though not solely so); and are the product of an international

10 Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, E/CN.4/Sub.2/2003/38/Rev.2 ('Commentary').

11 The term 'transnational corporation' is defined in para. 20, Norms, as 'an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively'. The reference to TNCs in this article is adopted purely as a form of representation used in the Norms and within UN circles. This article does not address the different definitions of the term transnational enterprise or of other terms such as multinational corporation and multinational enterprise.

12 See paras 2–14, Norms.

law-making organ (the United Nations). However, they also possess a number of particular features. We will be analysing these features in detail throughout this article, but we here provide a brief outline of each as a departure point for the discussion.

(i) Duty-bearers

The Norms use the duty-bearer (i.e. corporations) as their central organising theme. This is unusual among human rights instruments which are typically centred on particular sets of human rights (e.g. civil and political; or economic, social and cultural), or rights holders (e.g. refugees; prisoners; women; racial groups; children or migrant workers) or types of rights violation (e.g. torture, genocide or war crimes). Drawing on the premise that corporations can and do violate international human rights standards, the Norms first identify corporations as duty-bearers and then ask what rights might, could or should corporations be expected to respect and protect. It is the very idea of an international instrument apparently speaking directly to non-state entities, as well as to states, which has caused consternation in some quarters.

(ii) 'Sphere of influence'

The notion of a state or corporation's 'sphere of influence', and the use of this notion to demarcate respective spheres of responsibility, although familiar to those in the corporate social responsibility movement, is not found in other human rights instruments. Its definition and application—especially its legal connotations—have been the subject of heated debate and some confusion.<sup>13</sup>

(iii) Enforcement mechanisms

The Norms are framed in mandatory terms, backed up by mechanisms for implementation and enforcement. Such terms are commonplace in relation to state obligations found in human rights treaties, such as the International Covenant on Civil and Political Rights,<sup>14</sup> but the Norms seek to extend implementation and enforcement obligations to non-state entities and provide novel mechanisms for ensuring that these obligations are met. The general provisions

13 See para. 52(e), 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, 15 February 2005, E/CN.4/2005/91.

14 1966, 999 UNTS 171.

of implementation require TNCs and other business enterprises to adopt, disseminate and implement internal operational rules in compliance with the Norms and also to incorporate the Norms in contracts with other parties.<sup>15</sup> There are provisions for the internal and external monitoring and verification of companies' application of the Norms, including the use of either a new or an existing UN monitoring mechanism.<sup>16</sup> In addition, states are called upon to establish and reinforce a legal framework for ensuring that the Norms are implemented,<sup>17</sup> although the wording of the relevant paragraph ('should' rather than 'shall') suggests that this is not an obligatory or normative provision. The monitoring and verification is backed up by a reparation provision, which obliges companies to provide prompt, effective and adequate reparations to those affected by a company's failure to comply with the Norms.<sup>18</sup>

(iv) Moving outside traditional human rights law

While many of the rights contained within the Norms are found in the Universal Declaration of Human Rights<sup>19</sup> and/or are part of customary international law, there are some provisions which are at the outer boundary of what are normally accepted as human rights. By way of example, rights associated with consumer protection, the environment and corruption are covered by different areas of law,

15 Para. 15, Norms provides that:

As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

For a good overview of the scope of the enforcement mechanisms for the Norms, see Lucke, 'States' and Private Actors' Obligations Under International Human Rights Law and the Draft UN Norms', in Cottier, Pauwelyn and Bürgi (eds), *Human Rights And International Trade* (Oxford: Oxford University Press, 2005) 148 at 159–60.

16 Para. 16, Norms.

17 Para. 17, Norms.

18 Para. 18, Norms. Campagna notes that the duty of reparation has been a standard duty of international law since Grotius, and that 'prompt, effective and adequate reparation' is the standard owed by a host government which violates the property rights of a US corporation. See Campagna, 'United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers', (2004) 37 *John Marshall Law Review* 1205 at 1251–2.

19 GA Res. 217A (III), 10 December 1948, A/810 at 71.



and some would argue that their presence in a human rights instrument is duplicative.<sup>20</sup>

While the Norms were originally drafted as a code of conduct for TNCs, and they still retain that focus, the net they cast is intentionally wider. Whereas other existing codes<sup>21</sup> carefully define the transnational nature of the corporations whose conduct they seek to regulate and are limited in their application to TNCs only, the Norms are also directed at 'other business enterprises', a catch-all phrase covering businesses that have relations with TNCs, or which have impacts that are not entirely local, or, more specifically, ones which undertake activities that involve violations of the right to security.<sup>22</sup> Thus a TNC's suppliers, joint venture partners and others with whom it does business are not exempt from the Norms' provisions.<sup>23</sup> A component of this new approach is that the Norms introduce the notion of liability for complicity in serious human rights abuses. The primary obligations in the Norms are that TNCs and other business enterprises promote, secure the fulfilment of, respect, ensure respect of and protect human rights;<sup>24</sup> although, paragraph 3 of the Norms, which covers the right to security of persons, goes further by prohibiting TNCs from engaging in or benefiting from certain serious human

20 The question is what value is gained by including these rights in a human rights instrument when provisions already exist in respect of each: national tort law for consumer protection, national and international environmental law and laws on bribery and corruption. The answer may be that given the inadequacy of national protection in many states, and the interrelation between the enjoyment of these rights and 'mainstream' human rights, TNCs should be held to clear international standards with respect to these rights.

21 For example: the OECD Guidelines and the ILO Tripartite Declaration, see *infra* n. 31 and n. 32, respectively.

22 The term 'other business enterprise' is defined in para. 21, Norms as including

any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.

23 The importance of this is noted in Deva, 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?', (2004) 10 *ILSA Journal of International and Comparative Law* 493 at 500–1. In many situations the apparent violator is not a TNC but its subsidiaries, contractors or suppliers.

24 Para. 1, Norms provides that: 'Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment 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.' Para. 1(b), Commentary states that: 'Transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware.'

rights abuses.<sup>25</sup> The difficult question of the nature of liability for complicity (beneficial or otherwise) in the wrongdoings of a third party is outside the scope of this article.<sup>26</sup> While the enforcement provisions provide that TNCs should include the Norms in contracts with suppliers and other business partners, thus establishing contractual liability within a company's supply chain,<sup>27</sup> the depth (or length) of liability for paragraph 3 violations further up or down the supply chain is not detailed (for example, what if the supplier to the TNC's supplier commits grave human rights abuses?). It is clear that a 'belt and braces' approach has been taken, in which other entities that do business with TNCs are themselves required to adhere to the standards in the Norms, and, in addition, TNCs have a responsibility to ensure this adherence.<sup>28</sup> However, a less clear and comprehensive approach is provided in terms of a TNC's liability for the actions of third parties, which is the real issue given that this is where the power and leverage of TNCs generally lies.

### C. *The Position of the Norms in Relation to Other Initiatives*<sup>29</sup>

The Norms are not the first attempt by the United Nations to create international standards applicable to corporate entities. In the 1970s, at the instigation of developing nations, a Centre for Transnational Corporations was established in the United Nations, and codes were drafted which were completed in 1983 and 1990. The codes focussed on the need for foreign investors to obey host country law, follow host country economic policies and avoid interference with host countries' domestic affairs.<sup>30</sup> However, with the end of the Cold War and the growth of the free trade and investment movement, the emphasis began to shift away from the demands of host countries to their need to attract foreign companies

25 Para. 3, Norms provides that: 'Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.'

26 It is noted in para. 52(e), Report of the United Nations High Commissioner on Human Rights, supra n. 13, that 'complicity' is one of the concepts which would benefit from further clarification and research. For more on complicity see infra n. 90–2 and accompanying text.

27 Para. 15, Norms provides that: 'Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.'

28 What Upendra Baxi characterises as the 'network conception of corporate governance and business conduct'. See Baxi, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights', (2005) 5 *Human Rights Law Review* 1 at 6 *et seq.*

29 For a useful compendium of such codes and associated materials, see Leipziger, *The Corporate Responsibility Code Book* (Sheffield: Greenleaf Publishing, 2003).

30 Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) 111 *Yale Law Journal* 443 at 457.

and thus to deregulation. The Draft UN Code was abandoned in 1990 and, with certain limited exceptions, this left a vacuum in terms of international initiatives regulating the behaviour of TNCs. The exceptions include the Organisation for Economic Cooperation and Development's (OECD) Guidelines for Multinational Enterprises ('OECD Guidelines')<sup>31</sup> and the International Labour Organisation's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises ('ILO Tripartite Declaration').<sup>32</sup> So far, these initiatives, along with various industry and regional codes,<sup>33</sup> have been unable to hold companies to account for human rights abuses, principally due to their lack of an effective enforcement mechanism.<sup>34</sup>

#### ***D. Origins, Compilation and Drafting of the Norms***

The Norms started life in the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission),<sup>35</sup> a body created by the UN Economic and Social Council (ECOSOC) in 1947 as a think-tank for the UN Human Rights Commission ('Commission'). The Sub-Commission's membership constitutes 26 independent experts who are nominated by their countries, with the remit to study cases of human rights violations, examine obstacles to human rights protection and develop new international standards.<sup>36</sup>

31 OECD Guidelines for Multinational Enterprises (Revision 2000), available at: <http://www.oecd.org/dataoecd/56/36/1922428.pdf>. The Guidelines are not legally binding and apply only to TNCs from members of the OECD plus a few other states.

32 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: Declaration adopted by the Governing Body of the ILO, November 1977, available at: <http://www.ilo.org/public/english/employment/multi/>. The Principles are internationally agreed but are only on the subject of labour rights, and the process by which they are interpreted is little utilised. Governments must request interpretation, and only if they fail to do so may workers and employers' associations make requests.

33 For example, the Equator Principles, July 2006, available at: <http://www.equator-principles.com/principles.shtml> (to which many leading financial institutions are party); the US/UK Voluntary Principles on Security and Human Rights, 20 December 2000, available at: <http://www.state.gov/g/drl/rls/2931.htm>; the European Parliament Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, A4-0508/98, 15 January 1999, [1999] OJ C 104/180; and the Fair Wear Codes (Australia) available at: <http://fairwear.org.au/engine.php?SID=1000013>. For a comprehensive list of these codes see Castan Centre for Human Rights Law, 'Multinational Corporations and Human Rights', available at: <http://www.law.monash.edu.au/castancentre/projects/mchr/>.

34 Including, and in particular, the UN Global Compact, information on which is available at: <http://www.unglobalcompact.org/>. Companies commit to adhere to 10 Principles as part of their membership. There is no enforcement mechanism. The Global Compact is a forum for dialogue, and for exchanging experiences and best practice rather than a means of holding companies to account for human rights violations. See *infra* Part 3 B ('The Need for the Norms?') of this article, where the Global Compact is addressed in relation to the Norms.

35 Originally called the Sub-Commission on Prevention of Discrimination and Protection of Minorities; the name was changed in 1999.

36 UNCHR Res. E/1371, The Prevention of Discrimination and the Protection of Minorities, Report of the Fifth Session of the Commission on Human Rights, 1949, E/CN.4/350 at para. 13(A).

In the 1990s, concern began to mount that against the background of liberalisation of trade rules and increased foreign direct investment in developing nations, some TNCs were violating human rights with impunity.<sup>37</sup> To address this concern a sessional working group was formed within the Sub-Commission to examine the working methods and activities of TNCs.<sup>38</sup> The working group was formed in 1998, initially for a three-year period;<sup>39</sup> its study was based on various background documents including a study on the connection between TNCs and human rights.<sup>40</sup> Consultation meetings were held,<sup>41</sup> and at each of the annual meetings of the Sub-Commission between 1998 and 2003 the working group's findings and outputs were debated, and comments from non-governmental observers were taken. After five years of developing, critiquing and refining the various instruments that the working group had produced, the final version of the Norms was adopted unanimously by the Sub-Commission in August 2003<sup>42</sup> and submitted, along with several recommendations for further action, to the Commission.

The Commission considered the Norms for the first time on 20 April 2004. In the lead up to this debate they had become a controversial subject facing vocal opposition from business groups such as the International Chamber of

37 Certain high profile cases gained wide publicity in the 1990s. For example, Shell was accused of grave human rights violations in the Niger Delta and similar charges were laid against BP in Colombia. It was also during the 1990s that the Bhopal case came to court following the disaster at the Union Carbide plant in 1984.

38 The power to form a working group is found in Rule 21, Rules of Procedure of the Functional Commissions of the Economic and Social Council (a fully amended version is available at: <http://www.unhchr.ch/html/menu2/2/rules.htm>). This rule allows ECOSOC to set up such committees or working groups as are deemed necessary and refer to them any questions on its agenda for study and report. See also the Guidelines for the application by the Sub-Commission of the rules of procedure of the functional commissions of ECOSOC and other decisions and practices relating thereto, annexed to Sub-Com. Dec. 1999/114, Methods of Work of the Sub-Commission, 16 August 1999, E/CN.4/Sub.2/Dec/1999/114.

39 The working group was established by the Sub-Commission in Sub-Com. Res. 1998/8, The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations, 20 August 1998, E/CN.4/Sub.2/Res/1998/8. In 2001, its mandate was extended for a further three years, see Sub-Com. Res. 2001/3, The Effects of the Working Methods and Activities of Transnational Corporations on the Enjoyment of Human Rights, 15 August 2001, E/CN.4/Sub.2/Res/2001/3.

40 Principles Relating to the Human Rights Conduct of Companies: Working paper prepared by Mr David Weissbrodt, 25 May 2000, E/CN.4/Sub.2/2000/WG.2/WP.1.

41 The meetings were held in 2000, 2001 and 2002. Representatives of TNCs, non-governmental and inter-governmental organisations and other interested parties were invited. See *infra* Part 3 A ('The Manner of their Making') for more on this.

42 Sub-Com. Res. 2003/16, Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights, 13 August 2003, E/CN.4/Sub.2/RES/2003/16.

Commerce (ICC) and the International Organisation of Employers (IOE).<sup>43</sup> These business alliances lobbied national governments, including those of the United States, the United Kingdom and Australia, with the message that the Commission should make a clear statement disapproving the Norms. In support of this standpoint, various arguments, both legal and non-legal, were tendered in a joint statement put out on behalf of the ICC and IOE.<sup>44</sup> In Part 3 of this article, we will address some of the arguments put forward in the ICC/IOE document and other sources of criticism.

A number of non-governmental organisations (NGOs), academics and human rights advocates from around the world took various opposing positions to that of the business alliances, lobbying national governments and making submissions directly to the Commission in support of the Norms. Their campaign culminated in a 194-strong joint oral statement of NGOs delivered to the Commission at its 60th Session,<sup>45</sup> which concluded by asking that the Commission, governments and business be given more time to study the Norms and urging the Commission not to take any action at the 60th Session that might prematurely undermine the Norms. The specific legal arguments put forward by the business alliances were largely not addressed in this statement.

At the 60th Session, a decision brokered and formally requested by the UK Government<sup>46</sup> was adopted by consensus.<sup>47</sup> The decision asked the Office of the High Commissioner for Human Rights (OHCHR) to consult with all relevant stakeholders<sup>48</sup> and compile a report setting out the scope and legal status of all existing initiatives and standards on business responsibilities with regard to human rights, including the Norms. While thanking the Sub-Commission for

43 Other examples of criticism of the Norms include that of the British CBI, *supra* n. 1; and Baker, 'Raising the Heat on Business over Human Rights', *Ethical Corporation*, 18 August 2003, available at: <http://www.globalpolicy.org/globaliz/law/intllaw/2003/0818unregprob.htm>. See also the comments of Thomas Niles, President of the US Council for International Business, interviewed with David Weissbrodt in 'UN Norms on Responsibility of Transnational Corporations', *Newshour: BBC World Service*, 13 August 2003; and Niles' letter to the Financial Times, 'UN code no help to companies', *Financial Times*, 17 December 2003.

44 IOE and ICC, 'Joint views of the IOE and ICC on the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights"', March 2004, available at: <http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc>. See also Thomas Niles interview, 13 August 2003, *ibid*.

45 Human Rights Council of Australia et al., 'Statement of support for the *UN Human Rights Norms for Business*', delivered at the 60th Session of the Commission on Human Rights 15 March – 23 April 2004, Geneva, available at: <http://www.escr-net.org/EngGeneral/unnorms2.asp>.

46 The decision was formally requested by the United Kingdom on behalf of Australia, Belgium, the Czech Republic, Ethiopia, Ghana, Hungary, Ireland, Japan, Mexico, Norway, South Africa and Sweden.

47 UNCHR Dec. 2004/116, Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, 20 April 2004, E/CN.4/Dec/2004/116.

48 The decision requests that the OHCHR consult with 'all the relevant stakeholders' in compiling the report, including, *inter alia*, states, TNCs, employers' and employees' associations, treaty monitoring bodies and NGOs.

its work in preparing the draft Norms, and confirming the importance of the issues they address, the decision clarified that the draft proposal has no legal standing,<sup>49</sup> and—crucially—that the Sub-Commission should not perform any monitoring function regarding the Norms, as it had laid the ground work to do in paragraph 16.

### *E. The Current Status of the Norms*

Following wide-ranging consultation and a two-day workshop on the Norms in October 2004 attended by representatives from corporate, labour and human rights organisations, a comprehensive report covering all sides of the debate was published by the OHCHR in February 2005. The report recommended that the subject of business and human rights remain on the Commission's agenda and that the 'draft Norms' be maintained amongst existing initiatives and standards, with a view to their further consideration.<sup>50</sup> However, the polarised debate regarding the Norms continued at the Commission in 2005, with certain countries, most notably the United States and Australia, adopting the approach advocated by the corporate lobby that there should be no binding human rights standards for TNCs at the international level and that the Norms should be buried. Notwithstanding such opposition, a resolution was finally adopted<sup>51</sup> which recognised that transnational corporations and other business enterprises can contribute to the enjoyment of human rights and which requested the aforementioned appointment by the UN Secretary-General of a Special Representative (the SRSG) on the issue of human rights and business. That appointment—of Professor John Ruggie of the Kennedy School of Government at Harvard University—was duly made on 27 July 2005 with the following mandate:<sup>52</sup>

- (i) to identify and clarify standards of corporate responsibility and accountability for TNCs and other business enterprises with regard to human rights;<sup>53</sup>

49 Supra n. 47 at para (c). For further discussion see *infra* Part 4 on the 'Legal Implications of the Norms', particularly Part 4 B ('International Legal Implications of the Norms') and Part 4 C ('Questions of the Legal Status of the Norms').

50 Para. 52(d), Report of the United Nations High Commissioner for Human Rights, *supra* n. 13.

51 UNCHR Res. 2005/69, Human Rights and Transnational Corporations and Other Business Enterprises, 20 April 2005, E/CN.4/RES/2005/69. The United States and Australia voted against the Resolution. South Africa also voted against because the Resolution was not strong enough.

52 The mandate is precisely as recommended by the Commission in Res. 2004/116, *supra* n. 47.

53 It was noted that the Resolution was 'intentionally left ambiguous as to whether this covered existing or new standards', Chatham House, 'Human rights and transnational corporations: the way forward', a summary of discussion at the International Law Programme Discussion Group at Chatham House on 7 June 2005, is available at: <http://www.chathamhouse.org.uk/pdf/research/il/ILP070605.doc>.

- (ii) to elaborate on the role of states in effectively regulating and adjudicating the role of TNCs and other business enterprises with regard to human rights, including through international cooperation;
- (iii) to research and clarify the implications for TNCs and other business enterprises of concepts such as 'complicity' and 'sphere of influence';
- (iv) to develop materials and methodologies for undertaking human rights impact assessments of the activities of TNCs and other business enterprises; and
- (v) to compile a compendium of best practices of states and TNCs and other business enterprises.

The Norms were not mentioned in the Resolution but this omission may be explained by the aforementioned position taken by the United States and the attempts by other nations to reach a consensus in light of this. Certainly it was unavoidable that the Norms would be very much part of the SRSG's process and as such the initial view of the supporters of the Norms was that this would be a positive step in the consultative, dialogic and recommendatory role that it was anticipated the SRSG would take.<sup>54</sup> The SRSG's Interim Report of February 2006 expressly addressed the Norms debates precisely '[b]ecause those debates continue to shadow the mandate [of the SRSG]'.<sup>55</sup> In his preparation of the Interim Report, the SRSG was conspicuously inclusive and transparent, and sought to consult across the whole range of corporate, human rights and other stakeholder sectors (albeit thus far mainly in the West).<sup>56</sup> The Interim Report acknowledges that the Norms 'contain useful elements', namely: 'the summary of rights that may be affected by business, positively and negatively and the collation of source documents from international human rights instruments as well as voluntary initiatives . . .'.<sup>57</sup> However, it is the endeavour to have the Norms reach beyond such benign achievements that the SRSG has problems with; that is, in the particular respect to their form, if not necessarily their content. He regards as fatal, the well-ventilated twin criticisms that, first, the Norms supposedly purport, by implication, to invent a new avenue of international law that speaks directly to corporations; and second, they ill-define the resulting obligations that fall, respectively, on states and corporations. These criticisms are fatal because

the flaws of the Norms make that effort a distraction rather than a basis for moving the Special Representative's mandate forward. Indeed, in the Special Representative's view, the divisive debate over the Norms

54 See website recently established by the Business and Human Rights Resource Centre, available at: [www.business-humanrights.org](http://www.business-humanrights.org), for materials posted by the Special Representative.

55 Para. 55, Interim Report.

56 Paras 3–6, *ibid.* Although at the time of writing regional consultations in the South are being held in Johannesburg, South Africa, 26–27 March 2006; and Bangkok, Thailand, 26–27 June 2006.

57 Para. 57, *ibid.*

obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect for human rights.<sup>58</sup>

As our canvassing of both the arguments for and against the Norms, in Part 3, illustrates, the Norms are hardly flawless (they are, after all, avowedly in draft form), and they have certainly excited debate and controversy. But in our view, far from seeing these characteristics as sufficient cause to kill off the project, we see them as fertile ground for future growth. To disband a project, the aim of which is to investigate the legal dimensions (both international and, impliedly, domestic) of the human rights responsibilities of corporations, largely because that investigation has revealed divisions and distractions, seems to both expect too much of such an enterprise (can any alternative really promise any less controversy?) and undervalue what the Norms have achieved thus far. We consider the SRSG's forthright dismissal of the Norms in their current form to be a backward, rather than forward, step.

The fact is that the Norms—notwithstanding their work-in-progress status within the UN human rights machinery—have, in certain respects, taken on a life of their own outside the United Nations. Thus, despite the refusal of the Commission to endorse any form of monitoring function, one group of companies have already put their names forward to ‘road-test’ the Norms in their operations.<sup>59</sup> Certain human rights NGOs are working with these and other companies in efforts to promote the incorporation of the Norms into normal business practice and to encourage the use of the Norms as one set of standards against which companies might measure their performance.<sup>60</sup> NGOs are also using the Norms when lobbying governments on what they should be doing to monitor and control the activities of companies within their jurisdiction; and lawyers are beginning to look at how the Norms may be used in the course of

58 Para. 69, *ibid.*

59 That is, under the auspices of the Business Leaders Initiative on Human Rights (BLIHR), which comprises: ABB, Barclays, Body Shop International, Gap Inc., Hewlett-Packard, MTV Networks Europe, National Grid Transco, Novartis Foundation for Sustainable Development, Novo Nordisk and Statoil. See the BLIHR website, available at: <http://www.blihr.org/>; and the Business and Human Rights Seminar website, available at: <http://www.bhrseminar.org/>. The ‘road-testing’ of the Norms is explicitly not a controlled study exercise. Rather, it is an attempt to incorporate the Norms and their standards into the real world operations of the participant companies. For instance, Barclays, Novartis, National Grid Transco, Hewlett-Packard and MTV are trying to identify their respective ‘spheres of influence’; Body Shop International is using the Norms in its annual reporting; and ABB is using the Norms in a risk management context to develop a checklist on human rights. See Miller, *infra* n. 173.

60 An example of a report criticising the actions of a TNC on the basis of the Norms is the Amnesty International report on Internet censorship in China: Amnesty International, ‘People’s Republic of China: Controls tighten as Internet activism grows’, 28 January 2004, ASA 17/001/2004. Amnesty criticises various technology companies, including Microsoft, for providing technology used to censor and control the use of the internet. See also Mathiason, ‘Microsoft in human rights row’, *The Observer*, 1 February 2004.



running a business and also in litigation.<sup>61</sup> These are undoubtedly important developments in the movement towards greater corporate accountability in the area of human rights.

Whether and how these developments would survive any abandonment of the Norms in their present form—and especially should they be abandoned as abruptly as is being suggested—is a moot point. However, in view of the fact that their substantive content has, and always will be, more important than the format in which they are expressed, we maintain that the underlying sentiment of the Norms (that corporations be held responsible for the human rights violations they commit or cause to be committed) and certain key substantive features (the subordination of corporate responsibility to state responsibility and the assignment of only those human rights obligations proximate to a corporation's business) will retain their current, derivative legal presence in, and central significance to, the wider debate on corporate social responsibility.

### 3. Arguments For and Against the Norms

The arguments for and against the Norms were discussed during the aforementioned consultation process undertaken by the OHCHR in late 2004.<sup>62</sup> For the first time, representatives of business, NGOs and academia met under the auspices of the United Nations to air their views on the subject. The debate over the Norms, then and now, revolves around the intertwined matters of the process of their development, their substantive content, and the nature of the implementation and enforcement procedures they seek to put in place.

#### A. *The Manner of their Making*

In terms of their provenance, it has been argued that the manner in which the Norms were compiled and drafted was not transparent or sufficiently consultative and was not a legitimate exercise of the Sub-Commission's and/or the sessional working group's power. Questions surrounding the procedural legitimacy of the Norms' development are now largely historical, as the Commission has already twice considered the Norms and taken a view on the

61 See, for example, McCarthy, 'Business and Human Rights: What Do the New UN Norms Mean for the Business Lawyer', (2003) 28 *International Legal Practitioner* 73, which suggests, for example, that business lawyers should be using the Norms as a checklist of issues which should be monitored by business. See also Kinley, 'Lawyers, Corporations and International Human Rights Law', (2004) 25 *Company Lawyer* 298 at 301–2; Ward, 'The Interface Between Globalisation, Corporate Responsibility, and the Legal Profession', (2004) 1 *University of St Thomas Law Journal* 813; and Meeran, 'Multinational Litigation as a Weapon in Protecting Economic and Social Rights', in Squires, Langford and Thiele (eds), *The Road to A Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Sydney: University of New South Wales Press, 2006) 183.

62 See supra n. 48 and accompanying text.

process by which they came about. The Commission, in its 2004 decision, did appear to rap the Sub-Commission over the knuckles for its over-zealousness in drafting the Norms,<sup>63</sup> which, it notes, were not requested by the Commission in the first place.<sup>64</sup> That said, such an admonition does not derogate from the legitimacy of the Norms themselves and, in any case, the rules of the Sub-Commission clearly entitle it to request the sessional working groups to compile and draft instruments such as the Norms.<sup>65</sup>

The working papers and drafts that were created and developed by the sessional working group were available online<sup>66</sup> and circulated among interest groups including TNCs, business alliances, trade unions and NGOs. Public meetings<sup>67</sup> and focussed seminars<sup>68</sup> were held in Geneva. Much of the drafting

63 The Australian Chair of 60th Session of the UN Commission of Human Rights, Mike Smith, described the 2004 decision as having 'firm words' for the Sub-Commission: notes of discussion following his address to the Castan Centre for Human Rights Law, Monash University, Melbourne, Australia, 'The UN Commission on Human Rights & Australia', 2 September 2004 [on file with author (Rachel Chambers)]. A full text of Mike Smith's address is available at: <http://www.law.monash.edu.au/castancentre/events/2004/smith-paper.html>.

64 UNCHR Dec. 2004/116, supra n. 47 at para. (c).

65 The sessional working group, as established by and reporting to the Sub-Commission, was acting under the authority of Sub-Com. Res. 1998/8, supra n. 39, which empowered it *inter alia* to 'make recommendations and proposals relating to the methods of work and activities of transnational corporations in order to ensure that such methods and activities are in keeping with the economic and social objectives of the countries in which they operate, and to promote the enjoyment of economic, social and cultural rights and the right to development, as well as of civil and political rights' (para. 4(d)). When the working group's mandate was extended for a further three years through the adoption of Sub-Com. Res. 2001/3, supra n. 39, para. 4 of the relevant resolution provided more detail of the working party's expected output:

- (b) Compile a list of the various relevant instruments and norms concerning human rights and international cooperation that are applicable to transnational corporations;
- (c) Contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights;
- (d) Analyse the possibility of establishing a monitoring mechanism in order to apply sanctions and obtain compensation for infringements committed and damage caused by transnational corporations, and contribute to the drafting of binding norms for that purpose;

It is, therefore, clear that the working group did act within its mandate in compiling and drafting the Norms and in proposing methods of enforcement of the Norms. While it is correct that the Norms were not requested by the Commission (see UNCHR Dec. 2004/116, supra n. 47 at para. (c)) this misses the point that the Norms were legitimately requested by the Sub-Commission, as it is entitled to do under the ECOSOC rules and its own guidelines.

66 The Norms working papers (and other documents on business and human rights, trade and investment and globalization) are available at: <http://www.ohchr.org/english/issues/globalization/documents.htm>.

67 The meetings took place in August 2000, 2001 and 2002. For details of the meetings, see Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Second Session, 28 August 2000, E/CN.4/Sub.2/2000/12; Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Third Session, 14 August 2001, E/CN.4/Sub.2/2001/9; and Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fourth Session, 15 August 2002, E/CN.4/Sub.2/2002/13.

68 The seminars took place in March 2001 and 2003.

of the Norms took place in March 2001 at a seminar attended by the ILO, ECOSOC, trade unions and other interest groups. Some of the Norms' detractors were invited to this meeting but did not attend.<sup>69</sup> All comments tendered to the Sub-Commission as part of the consultation and drafting process were taken into account by the working group,<sup>70</sup> including those tendered by states (as they had been encouraged to do so),<sup>71</sup> even though there was some subsequent criticism that not enough was done to consult with states at the drafting stage.<sup>72</sup> It is, therefore, difficult to criticise the sessional working party's processes as lacking in transparency or insufficiently consultative.

The following discussion outlines and critiques the principal arguments put forward by business alliances and other critics of the Norms.<sup>73</sup>

### ***B. The Need for the Norms?***

Various reasons have been put forward to support the view that there is no need for the Norms, including that they duplicate what is out there already; that they do not fit in with existing initiatives—particularly the UN Global Compact, and that their 'one size fits all' approach is inappropriate. Undeniably, the Norms do set out in a single authoritative statement all of the international human rights law applicable to companies. This is a unique endeavour, differing from the OECD Guidelines, the ILO Tripartite Declaration and other such initiatives in that it attempts to detail each duty and obligation under the umbrella of human rights and thus to provide a broader-based indicative check-list for companies to follow. While at first glance there may appear to be a lack of fit between the Norms and the UN Global Compact, and confusion may arise from the fact that there are two UN initiatives in the same area, closer examination reveals this disjuncture to be more apparent than real. The Global Compact is

69 For example, the ICC: notes taken from public seminar with David Weissbrodt (Sub-Commission Working Group member and an architect of the Norms), hosted by the Castan Centre for Human Rights Law, Monash University Melbourne, and Holding Redlich Lawyers, Melbourne, 'Business and Human Rights', 30 April 2004 [notes on file with author (Rachel Chambers)].

70 At the Working Group meeting on 8 March 2003. See Weissbrodt and Kruger, *supra* n. 9 at 906.

71 As Weissbrodt and Kruger, *supra* n. 9 at 905, note (the former being a member of the working group and the principal drafter of the Norms), 'Resolution 2002/8 of the Sub-Commission asked that the Norms and Commentary be disseminated as widely as possible, so as to encourage governments [etc] to submit suggestions, observations, or recommendations.'

72 This was the view formed by Ambassador Mike Smith, the Australian Permanent Representative to the United Nations in Geneva, after he chaired (on behalf of Australia) the 60th session of the Commission on Human Rights in 2004, during which the Norms were first formally considered by states' representatives. See notes of discussion, *supra* n. 63.

73 Arguments were raised in submissions to the Commission, submissions to the OHCHR and during the consultation (see *supra* n. 48 for consultation details). Examples of arguments which will not be addressed in this article include: that the Norms are too negative about business (only the preamble has something good to say about business) and that the word 'norm' is legal jargon. See the Joint Views of the IOE and ICC, *supra* n. 44 at 10–1.

a voluntary initiative designed to encourage companies to address human rights, labour rights and environmental and corruption concerns, and to share their experiences in implementing the Global Compact principles. Though not without its critics,<sup>74</sup> this is a different approach altogether to that of the Norms—many of the projects and case studies put forward by members of the Global Compact<sup>75</sup> go over and above the minimum standard of human rights accountability laid out in the Norms. A number of these projects are unrelated to the companies' core business and as such are add-ons in the area of corporate social responsibility—for example, an Eastern European bread and cake business has included public health messages concerning HIV/AIDS on the packaging of its baked goods.<sup>76</sup> The human rights principles contained in the Global Compact are very broadly stated, and the standards for participants are not fleshed out in any detail.<sup>77</sup> They, therefore, lack the depth and precision provided in the Norms. For this reason Amnesty International has urged the Global Compact office to indicate formally that the Norms could be viewed as an authoritative guide to the first two principles of the Global Compact,<sup>78</sup> although so far it has declined to do so. However, there has been (tentative) support from the Global Compact office for the Norms,<sup>79</sup> which, at the very least, indicates their understanding that the two initiatives complement rather than contradict or duplicate each other.

The 'one size fits all' argument holds that the Norms are an imprecise tool for guiding or regulating the activities of companies, since different industries and sectors' activities impact on different human rights. This argument is flawed because human rights, by their very nature, are universal rather than bespoke.

74 See, generally, Murphy, 'Taking Multinational Codes of Conduct to the Next Level', (2005) 43 *Columbia Journal of Transnational Law* 389 at 413; and, more specifically, the concerns voiced by Amnesty International and Human Rights First, who were both original NGO signatories to the Global Compact, 'Statement by NGO Participants in the Global Compact Summit', (June–July 2004) 1 *Civil Society Observer*, available at: <http://www.un-ngls.org/cso/cso3/statement.html>.

75 Case studies available from the United Nations Global Compact Office, 'How to Participate: Guidance Documents', available at: <http://www.unglobalcompact.org/HowToParticipate/guidance.documents/>.

76 United Nations Development Programme (Bulgaria), 'Corporate social responsibility in action in Bulgaria: Pain d'Or', details of which are available at: <http://www.undp.bg/en/gc.csr.in.action.php>. It was noted by an NGO participant at the OHCHR consultation that 'voluntary initiatives under the current corporate social responsibility model had virtues, but were not a substitute for other enforceable approaches', OHCHR Report, supra n. 13.

77 Though for various accounts of how they might be pursued in practice, see The Global Compact Office and the OHCHR, *Embedding Human Rights Principles in Business Practice* (2004), available at: <http://www.unglobalcompact.org/Issues/human.rights/index.html>.

78 Amnesty International, 'The UN Human Rights Norms for Business: Towards Legal Accountability', IOR 42/002/2004, 18 January 2004 at 14–5.

79 See the quotation from the Global Compact office reproduced in Amnesty International, *ibid.* at 14. Also there has been collaboration between the Global Compact office and the OHCHR in hosting consultations and meetings concerning business and human rights and use of the Norms in the lead up to their joint publication, supra n. 77. See also Wynhoven, 'Introduction', in The Global Compact Office and the OHCHR, supra n. 77 at 11–2.

As basic minimum standards they are universally applicable and, although their relevance to each industry and sector varies,<sup>80</sup> they remain constant and indivisible.<sup>81</sup> Companies already impose their own codes of conduct on their thousands of suppliers, without differentiating between the industries of each supplier,<sup>82</sup> demonstrating their own version of universal application in this regard. However, the company codes imposed on suppliers are likely to be tailored to the industry of the purchasing company, and this may be very different to that of the supplier (for example, a footwear company will have suppliers from the paper and cardboard industry for boxes). In effect, the application of the Norms for each business would be tailored in much the same way, while the overall Norms framework would reinforce the essential and underlying universality of human rights. A holistic approach covering those human rights most relevant to commercial enterprise is, therefore, to be preferred and this is what the Norms seek to do.

### *C. Precision and Practicability*

When considering complaints that the Norms are vague in respect of the duties they impose, the concepts they apply and in their enforcement mechanisms, one must not forget that the Norms are not, nor can they be compared with, domestic legislation. Typically of an international instrument, the Norms provide a framework designed to be used for national or international regulation. Assuming the former approach is preferred in any resulting instrument, it will be incumbent on states to articulate the specifics. In this way, the Norms are not different from any other instruments of international human rights law. The fact that they are open-ended is not only unexceptional, it is also necessary to achieve international consensus on the subject and to enable all parties to relate to the initiative.<sup>83</sup> In the fields of environmental protection and labour rights,

80 For example, Article 10, International Covenant on Civil and Political Rights (the rights of detained persons to humane treatment) is likely to be impacted by the activities of security and prison service companies.

81 At a consultation held by the OHCHR and the Global Compact Office '...several participants warned against classifying rights in terms of being fundamental or not as this could threaten the principle of the indivisibility of human rights'. OHCHR and the Global Compact Office, 'Consultation on Business and Human Rights: Summary of Discussions', 22 October 2004, at 6, available at: <http://www.unglobalcompact.org/Issues/humanrights/business.humanrights.summary.report.pdf>.

82 Thorsen and Meisling (Lawhouse.dk), 'Advice: Unfold Human Rights', Submitted for ISBEE Conference in Melbourne, 15–17 July 2004, available at: <http://www.lawhouse.dk/?ID=261>.

83 To argue that such 'vagueness' is fatal to the legitimacy and potential legality of the Norms—as does the advice tended to the CBI by Maurice Mendelson QC—is fundamentally to misrepresent the history and nature of public international law, especially international human rights law. See Mendelson, 'In the matter of the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights": Opinion of Professor Emeritus Maurice Mendelson QC', 4 April 2004, at para. 29, available as 'Report I' to CBI's stakeholder submission to the Report of the High Commissioner for Human Rights, available at: <http://www.ohchr.org/english/issues/globalization/business/contributions.htm>.

for example, states are already subject to a whole raft of international regulations, and it is their duty to take the principles from these regulations and work them into domestic legislation containing standards and concepts that are clear to all. Alternatively, should the international community come to support an international system of implementation and enforcement, then these duties would fall upon whichever international body is tasked with, or created, to implement and enforce the Norms.

Among the complaints relating to the Norms' vagueness, the most significant concern is the extent to which they apportion duties and responsibilities between states and TNCs. Beyond their provision for the state to bear primary responsibility for implementation of the Norms,<sup>84</sup> the Norms provide for the imposition of contemporaneous and complementary human rights responsibilities on corporations within their 'spheres of activity and influence'. The reasoning behind this second provision is two-fold: first, it is designed to bolster the potential for better human rights protection where the state's responsibilities are less than fully met; and second, even where a state is adequately fulfilling its responsibilities under the Norms, its jurisdictional reach may still be less than the reach of the TNCs in respect of whose activities there are human rights concerns. This explains the need for transnational regulations that go beyond states and seek to address corporations directly, and that have the potential to pierce the corporate veil, where necessary to trace liability back to the parent company. In the present environment, there is no incentive for states to fill the various gaps in corporate accountability that exist at the level of domestic laws (in both developed and developing states, though most especially the latter) and exploitation of these legal loopholes remain within easy reach of those TNCs minded to do so.<sup>85</sup>

In practice, the dividing of responsibility between the state and the TNC most often occurs when a government fails in its human rights duties. Joint responsibility can apply in such situations to both the government and the TNC, within their respective spheres of activity and influence.<sup>86</sup> The Norms do not purport definitively to establish binding legal obligations

84 As reflected in the concerns raised by the SRSG in his Interim Report. For further discussion, see *infra* n. 136 and accompanying text.

85 On the use, abuse and decline of *forum non conveniens* in this context, see Ward, 'Legal Issues in Corporate Citizenship', International Institute for Environment and Development, February 2003 at 12–5, available at: <http://www.iied.org/pubs/pdf/full/16000IIED.pdf>.

86 In this respect, see the International Law Commission's (ILC) express recognition of circumstances where state responsibility under international law can stretch to encompass the wrong-doings of non-state entities in Chapter II (especially Article 5) of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, A/56/10 (2001); and Crawford, Peel and Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading', (2001) 12 *European Journal of International Law* 963.

(although they do not rule out such an eventuality); still less do they purport to replace state responsibility with corporate responsibility to protect human rights. Rather, they establish that companies should not be able to hide behind governments that are failing to implement human rights, and deny any responsibility whatsoever for human rights violations in which they are involved or complicit.

The Norms also cover the situation where a state not only fails to uphold its citizens' human rights, but is itself the perpetrator of human rights violations. When this occurs, companies that work in concert with the state may find that they are complicit in the state's wrongdoing. The seminal case of *Doe v Unocal*<sup>87</sup> illustrates this point very well. Unocal and its business partner Total constructed a pipeline from Burma through to neighbouring Thailand. Burmese troops from the infamous military junta of the State Peace and Development Council were engaged by Unocal to provide security and build infrastructure for the project. These troops were accused of committing egregious human rights abuses including forced labour, rape, torture and summary execution in the course of their security and building activities under the project. In the ensuing case before the US Court of Appeals for the Ninth Circuit, the court ruled that Unocal could be held responsible under the Alien Torts Claims Act (ATCA) for aiding and abetting the Burmese government. There was no evidence of active participation or cooperation by the company in the government's wrongdoing, but its knowledge of the violations was sufficient for it to be complicit in the government's actions.<sup>88</sup> In December 2004, Unocal agreed to settle the claim for an unspecified sum, which included payment of compensation to the plaintiffs as well as funds to enable them and their representatives to develop programmes to improve living conditions in the area of the pipeline.<sup>89</sup>

The ATCA case law provides useful insight into how the concept of complicity might develop.<sup>90</sup> When a company benefits from human rights abuses committed by a third party, it is unlikely that this alone will attract ACTA liability. But as seen in *Unocal*, US courts have borrowed the concept of aiding and abetting from international criminal law in order to define what level of involvement in the wrongdoing results in complicity.<sup>91</sup>

87 395 F.3d 932 (2002).

88 Kinley and Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', (2004) 44 *Virginia Journal of International Law* 931 at 980.

89 For further details on the case and the settlement, see EarthRights International, 'Doe v Unocal Case History', 30 January 2006, available at: <http://www.earthrights.org/index.php?option=com.content&task=view&id=189&Itemid=25>.

90 See further, Chambers, 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses', (2005) 13 *Human Rights Brief* 14.

91 Chambers, *ibid.* at 16, discussing *Presbyterian Church of Sudan v Talisman Energy, Inc* 244 F. Supp. 2d 289 (S.D.N.Y. 2003), in which the New York district court accepted that reference to international criminal law is appropriate when seeking to determine whether a corporation has aided and abetted a state in its commission of such acts as genocide and war crimes.

Similar reasoning could apply with respect to the Norms. Aiding and abetting or accomplice liability should require intentional participation in the wrongdoing, but not necessarily any intention to do harm. Rather, knowledge of foreseeable harmful effects should be sufficient to incur liability.<sup>92</sup> Thus, it should be made clear that if a company is warned of past or current abuses committed by a government or another entity, and if it nonetheless continues to take part in a venture that encompasses activities where the abuses are taking place, it should be liable for the wrongdoing as an accomplice.

TNCs (as well as other business enterprises linked to their operations) are singled out by the Norms because of their unique mobility, power and their transnational nature. The Norms attempt to address the width of TNCs' influence and power by using the notion of a company's 'sphere of activity and influence' to demarcate the scope of their responsibility. The delineation of responsibility in the specific terms of the 'sphere of activity' of the business is also used in the Global Compact.<sup>93</sup> Similarly, while the OECD Guidelines do not refer to a 'sphere of activity' *per se*, they do provide that TNCs should 'respect the human rights of those affected by their activities'. The phrase 'sphere of activity and influence' is not defined in the Norms. However, it might be reasonably assumed to encompass such actors as workers, consumers and members of the host community as well as the environment in which the company operates. The addition of the word 'influence' (not present in either the Global Compact or the OECD Guidelines) apports responsibility where the company has some degree of influence, even if the human rights violations are at the periphery of the company's area of activity. This is noted by Justine Nolan, who cites the *maquiladoras* in Tijuana as an example of companies that could bring their influence to bear in the provision of potable water for the local population, despite the fact that their core

92 See Clapham and Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses', (2001) 24 *Hastings International and Comparative Law Review* 339; and Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations', (2002) 20 *Berkeley Journal of International Law* 106 at 143–4.

93 Principle 1, UN Global Compact, *supra* n. 34, states: 'Business is asked to support and respect the protection of international human rights within their sphere of influence'. No definition of 'sphere of influence' is given in the 'Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles', available at: <http://www.uneptie.org/outreach/compact/docs/gcguide.pdf>.



business does not include potable water provision.<sup>94</sup> Using the OECD terminology, the people of Tijuana were affected by the activities of the *maquiladoras* in that their potable water supplies were reduced. These companies, therefore, have a duty to respect the right to clean water of the host community.

In another representation of the question, Frankental and House show diagrammatically, through a series of concentric rings, the sphere of influence of a company with respect to human rights. At the centre are its core operations, followed by business partners, host communities and finally advocacy and policy dialogue.<sup>95</sup> Legal liability is most likely to arise, if at all, within the innermost circles. If the company violates human rights directly or indirectly in its core operations, then it should be held legally accountable. The next circle, business partners, opens up the difficult issue of supply chain liability. Companies are urged to include the Norms in contracts and agreements,<sup>96</sup> so that suppliers will be in breach of contract if they commit human rights violations. TNCs must use due diligence to ensure that they do not benefit from abuses that they were, or ought to have been, aware of.<sup>97</sup> Thus the Norms seek, through states, to require that TNCs monitor the activities of their supply chains to ensure compliance.<sup>98</sup> TNCs would be legally liable for the actions of business partners only if they were found to be complicit in the wrongdoing. This concept, from paragraph 3 of the Norms, applies with respect to government or other third party human rights abuses in the host community, and makes TNCs accountable for benefits received as a result of serious human rights abuses by third parties. Certainly, liability for complicity needs to be fleshed out further if the Norms, or some derivative instrument, are to become *legally* enforceable. And this will require addressing such thorny questions as what constitutes a 'benefit' and what level of involvement or knowledge

94 Nolan, Background Research Paper (2003) [on file with authors], points out that the operations of a number of *maquiladoras* located in the region of Tijuana in Mexico have contributed to a scarcity of potable water. While none of the companies had *de facto* control of potable water, their cumulative impact was to reduce severely water supplies. This poses the question of whether they should be individually accountable for the water situation or whether the state, which controls the number of *maquiladoras* in the area, is responsible. The *maquiladoras* are able to influence the situation and have played a part in creating the problem. They share responsibility, therefore, with the local authority. For a general study of the role and impact of *maquiladoras*, see Reygadas, 'Corporate Responsibility and Social Capital: The Nexus Dilemma in Mexican Maquiladoras', in Sullivan (ed.), *Business and Human Rights* (Sheffield: Greenleaf, 2003) 207.

95 Frankental and House, *Human Rights—Is it Any of Your Business?* (Amnesty International and the Prince of Wales International Business Leaders Forum, 2000).

96 Para. 15, Norms.

97 Para. 1(b), Commentary states: 'transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware'.

98 See further, the SA8000—a social accounting standard which allows companies to implement and assess standards within the supply chain. For more information see Social Accountability International, available at: [www.sa-intl.org](http://www.sa-intl.org).

(e.g. subjective or objective) on the part of the company is required. Professor Ruggie, therefore, is clearly correct when he points out that there currently is no legal definition of the whole or any part of the notion of a corporation's 'sphere of activity and influence', either in the Norms or elsewhere in international law, and that defining its terms is crucial to any endeavour that seeks to make corporations liable for human rights abuses within their respective spheres.<sup>99</sup> However, it is our view that he should not be looking to the Norms to provide such a definition in the first place. As we consistently maintain throughout this article, this is the sort of task that will be derived from the Norms, to be addressed either in domestic regulation or some future international legal instrument, or possibly both. Indeed, the very debates that we are now having about what constitutes 'an activity' within a sphere of activity and influence and what liabilities should flow there-from, are precisely the sort of exploratory interactions one would expect to accompany any future domestic or international laws on the matter.

Thus, for example, in respect of Frankental and House's outer ring, it may be asked whether a company's sphere should stretch as far as government relations, where it potentially has influence through advocacy and policy dialogue.<sup>100</sup> This is not an area for legal liability. While such dialogue would not be beyond the capacity of most TNCs, to require companies to intrude in this way in respect of human rights issues would necessarily be seen as challenging state sovereignty. However, pushes in this direction have already occurred,<sup>101</sup> and there are also instances where precisely this sort of corporate influence has been brought to bear on governments.<sup>102</sup> The inherent circularity of the notion that the corporate responsibilities arising out of the Norms will accrue when and so far as the issue in question falls within the corporation's 'sphere of activity and influence', should not necessarily be seen as problematic.<sup>103</sup> It simply reduces the matter to

99 Para. 67, Interim Report.

100 See Frankental and House, *supra* n. 95.

101 For instance the US/UK Voluntary Principles on Security and Human Rights, *supra* n. 33, provide that: 'companies should support efforts by governments, civil society and multi-lateral institutions to provide human rights training and education for public security as well as their efforts to strengthen state institutions to ensure accountability and respect for human rights'; and further 'where companies operating in the same region have common concerns, they should consider collectively raising those concerns with the host and home government'.

102 See, for example, the argument made by the UK oil company, Premier Oil, which claimed that on account of the relationship it had established with the military government in Burma through its commercial interests there, it had been able to use its leverage 'to promote respect for international law' primarily through a series of human rights workshops that it sponsored for members of the Burmese government and military. See the section on Premier Oil in Ethical Corporation, *The Business and Human Rights Management Report: A Study of Eight Companies and Their Approaches to Human Rights Policy and Management System Development* (Ethical Corporation, November 2004) at 56–64.

103 See questions posed by Ratner, *supra* n. 30 at 510, in this respect. Ratner implies that he sees the ties between influence and responsibility as being somewhat amorphous in that they are not fixed but move with the given human right.

an evidentiary question; although it is yet to be determined upon whom the onus of proof should fall to show either the existence or the non-existence of influence and of the responsibility that follows it.

#### *D. Coverage*

Certain commentators<sup>104</sup> have attacked the Norms for the way in which they, supposedly, artificially stretch the definition of human rights by including *inter alia* labour rights, rights against corruption, consumer protection and environmental rights.<sup>105</sup> Such reasoning is clearly wrong in respect of labour rights, which overlap with international human rights in respect of not only their conceptual bases—both labour and human rights are based on notions of individual rights to equality, liberty and fairness—but also their form, since labour rights are expressly included as human rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>106</sup> On the other hand, while the Norms' proposed obligations in respect of consumer protection are not traditional human rights law, their infringement could certainly amount to violations of human rights if this results in personal injury or death.<sup>107</sup> Likewise, the Norms' anti-corruption obligations are not drawn directly from international human rights law. Although, here again, their infringement could have the effect of denying populations economic, social and cultural rights where national resources are squandered for the benefit of a privileged few leaving the country unable to fund social services for the poor or disadvantaged. There is room to argue over questions of categorisation, but in so doing there is a danger of losing sight of the importance of these matters—whatever their precise label—to states, communities and corporations alike.

The inclusion of the collective rights to development and to a healthy environment presents problems as to the identification both of rights holders and duty bearers. These two rights are nonetheless appropriately included in the Norms as both are expressly recognised in international law and are intimately connected to corporate enterprise. The right to a healthy environment is an integral part of the right to health under Article 12 of the ICESCR,<sup>108</sup> and the right to development is proclaimed 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development,

104 See IOC/IOE submission, *supra* n. 44 at 25; and Mendelson, *supra* n. 83 at para. 11.

105 Paras 23, 13 and 14, Norms, respectively.

106 1966, 993 UNTS 3. Specifically, Articles 6, 7 and 8, ICESCR.

107 Muchlinski, 'The Development of Human Rights Responsibilities for Multinational Enterprises', in Sullivan (ed.), *supra* n. 94, 43.

108 And additionally, in Principle 1, Rio Declaration on Environment and Development, Annex I to the Report of the United Nations Conference on Environment and Development, 12 August 1992, A/CONF.151/26 (Vol I).

in which all human rights and fundamental freedoms can be fully realised'.<sup>109</sup> What is more, as states and business are rightly keen to point out, the activities of corporations can and do bear directly and beneficially on development and environmental issues by, crucially, raising standards of living.<sup>110</sup> But, equally, their activities can and do impact detrimentally on these areas—especially through environmental degradation which can infringe such rights as the right to food, health, shelter and security of person—a fact that corporations are less keen to advertise.<sup>111</sup> Certainly, in respect of protection of the environment, corporations have for a long time been regulated by legislative codes, and there is also emerging regulation in respect of corporate activities that affect development rights.<sup>112</sup> The bottom line is that both the negative and positive aspects of the impact of business on economic development and the

109 See Article 1, GA Res. 41/128, Declaration on the Right to Development, 4 December 1986, A/41/53. See also Part I para. 10, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23. Furthermore, there is now strong argument to suggest that there is an intimate relationship between the UN's Millennium Development Goals and international human rights laws more generally: see Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', (2005) 27 *Human Rights Quarterly* 755.

110 See, for example, the statement of the US Government, *supra* n. 2; and the US Council for International Business declaration in its submissions to the OHCHR Inquiry that 'private enterprise is unmatched in its ability to assemble people, capital and innovation to create meaningful jobs and profitably produce goods and services that meet the needs and requirements of the world's peoples', para. 2, US Council for International Business, 'Submission to the High Commissioner for Human Rights for the report on "Responsibilities of transnational corporations and related business entities with regard to human rights"', available at: <http://www.ohchr.org/english/issues/globalization/business/docs/uscouncil.pdf>. See also, generally, UN Commission on the Private Sector and Development, 'Report to the Secretary General of the United Nations: Unleashing Entrepreneurship: Making Business Work for the Poor', United Nations Development Program, 1 March 2004, available at: <http://www.undp.org/cpsd/documents/report/english/fullreport.pdf>.

111 Some of the most extreme examples of environmental and human rights violations by companies have occurred in the oil rich Niger Delta, beginning with Shell last century; see Amnesty International, 'Nigeria: Ten years on: Injustice and violence haunt the oil Delta', AFR 44/022/2005, 3 November 2005. However, violations by corporations are not limited to developing countries. In December 2005 DuPont was fined \$16.5million for not disclosing that a toxic chemical was used in the manufacture of Teflon; see Montgomery, 'DuPont fined \$16.5million by the EPA', *Delaware Online*, 15 December 2005, available at: <http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20051215/NEWS/512150347/1006>.

Corporations are increasingly indirectly responsible for human rights violations due to financing roles, and this was recognised in December 2005, when Action Aid, Amnesty International, Friends of the Earth, New Economics Foundation and several other NGOs published 'A Big Deal? Corporate Social Responsibility and the Finance Sector in Europe', December 2005, available at: [http://www.corporate-accountability.org/docs/Big-Deal\\_Report.12-2005.pdf](http://www.corporate-accountability.org/docs/Big-Deal_Report.12-2005.pdf), discussing the impact of the finance sector on environmental and social rights.

112 See, for example, the International Finance Corporation's (IFC) Safeguard Policies cum Performance Standards (for example on Forestry, International Waterways, Indigenous People, etc.), available at: <http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies>; and the Equator Principles, *supra* n. 33, that cover the social (and environmental) impacts of development project financing.

environment need to be recognised. However, to do so properly, a balance must be struck between protecting the individual rights associated with these issues, while at the same time not stifling the enterprise of business that benefits communities at large.<sup>113</sup>

In any event, it does not appear that business alliances are against these rights *per se*. Rather their criticism appears to be that social, economic and cultural rights (including environmental rights and the right to development), as laid out in the Norms, are too vague and this leaves businesses vulnerable to arbitrary criticism. However, this approach seems to deflect attention away from the undeniable fact that it is in the area of economic, social and cultural rights that the activities of TNCs are most likely to have a direct impact,<sup>114</sup> covering, as they do, the rights to access to adequate health care, housing, education, working conditions, fair pay, trade union membership and non-discrimination.<sup>115</sup> The criticism might be valid if the standards in these areas were intended to be precise in form and substance, but the fact is that such standards are, as argued above, necessarily imprecise. In the event, therefore, of claims that corporations are accused of infringing human rights, the burden of proof will necessarily be shared between those who make the claims to support their assertions, and the corporations themselves to show how, on the contrary, their actions are human rights-compliant. As noted earlier, it is the nature of international human rights law to provide a framework for standards in a particular area, which states then implement and enforce by fleshing out the standards in detailed domestic legislation. The nature of duties imposed upon states by international human rights law with respect to economic, social and cultural rights are different from those imposed with respect to civil and political rights. While the state must work towards accomplishment of the former, it should already be in a position to address and remedy the latter.<sup>116</sup> However, the nature of economic, social and cultural

113 This is the essential message of the UN Commission on the Private Sector and Development's 2004 report, *supra* n. 110.

114 In this respect, Kinley and Tadaki, *supra* n. 88 at 962–93, argue, that these sorts of 'self-reflexive' duties on corporations (not to interfere with the enjoyment of human rights on which a company's activities have direct impact) are of a higher order than the more distant, 'third party' duties placed on corporations (such as those regarding a right to fair trial, rights to political participation and freedom from arbitrary arrest), which obliges the corporations merely to act so as to prevent others from breaching human rights.

115 As protected by ICESCR.

116 Article 2, ICESCR obligates each State Party to take steps 'to the maximum of its available resources' with a view to the progressive achievement of the rights set out in the Covenant. The state's role with respect to the right to development is also programmatic: the Declaration on the Right to Development, *supra* n. 109, requires states to formulate national development policies (Article 2(3)) and to take all necessary measures for the realisation of the right to development (Article 8(1)). This can be contrasted with Article 2, ICCPR which requires states to take steps necessary for the implementation of the rights contained in the Covenant. However, in reality, the achievement of the rights set out in both Covenants is progressive rather than immediate: e.g. a right to fair trial cannot be achieved overnight if the country is poor and the courts or the judiciary are under-developed.

rights does not prevent them from being legally binding and subject to checks such as other rights. The duty to uphold economic, social and cultural rights is contained in a legally binding covenant<sup>117</sup> and interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comments and through periodic country reports. On the other hand, the progressive nature of the duty does translate into allowing some latitude to states as long as they act in good faith in trying to raise the standards,<sup>118</sup> illustrated in part by the fact that there is presently no individual petition procedure under the ICESCR as there is for civil and political rights.<sup>119</sup> Many of the types of rights which fall under the mantle of economic, social, cultural and environmental rights are already protected in the corporate context through labour, occupational health and safety and environmental protection law, and have long been accepted as part of the domestic legal landscape of Western countries in particular.<sup>120</sup>

The Norms themselves provide that TNCs shall respect economic, social and cultural rights (including the rights to development and protection of the environment) and to 'contribute to their realisation'.<sup>121</sup> This is a less onerous obligation than, for example, those required of states by the ICESCR. Contribution to the realisation of these rights would be limited to those people who fall within a company's sphere of activity and influence, perhaps extending only to the rights of the workforce (which coincides with other obligations, such as the requirement set out in paragraph 8 that remuneration is sufficient to ensure an adequate standard of living for workers and their families) and the immediate communities in which they operate. It is noted that although these are the people who would usually fall within the company's sphere of activity and influence, the boundaries of that sphere

117 ICESCR to which 152 states are party.

118 CESCR General Comment No. 3, The Nature of States Parties Obligations (Article 2, para. 1), 14 December 1990, E/1991/23 Annex III; 1-1 IHRR 6 (1994). See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997, (1998) 20 *Human Rights Quarterly* 691.

119 However, see the ongoing discussions of and proposals for an Optional Protocol to the ICESCR. The Open-ended Working Group on an Option Protocol had its third session at the 62nd session of the Commission on Human Rights (6–17 February 2006). The Working Group's documents are available on the OHCHR website: Commission on Human Rights 62nd Session: Open-ended Working Group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, available at: <http://www.ohchr.org/english/issues/escr/group3.htm>.

120 See Kinley, 'International Human Rights as Legally Binding or Merely Relevant', in Bottomley and Kinley (eds), *Commercial Law and Human Rights* (Aldershot: Ashgate Dartmouth, 2002) 25.

121 This is the phrase used in para. 12, Norms. In para. 1, the phrase 'secure the fulfilment of . . . human rights' is used, and according to para. 1(a), Commentary, all other provisions in the Norms should be read in the light of this paragraph. What this means in practice is unclear. The obligation in para. 12 is less onerous than that contained in para. 1. It is submitted that 'contribute to the realisation of' is the correct obligation with respect to the rights contained in para. 12 and that the Commentary should clarify this position.

are not pre-determined and will almost certainly vary from corporation to corporation and situation to situation.<sup>122</sup>

The Norms further propose that TNCs and other business enterprises be required to conduct their activities in a manner contributing to the wider goal of sustainable development.<sup>123</sup> While, in this regard, there have been several significant declarations on the right to a healthy environment,<sup>124</sup> there has been no relevant General Assembly declaration and there is no international legal definition of 'sustainable development'. However, in the 20 years since the term was first coined by the World Commission on Environment and Development (WCED), the concept it represents has become known and understood.<sup>125</sup> It is not only a buzzword in the context of business development, but is also used in respect of community development in the wider context. In order to conduct business in a manner that contributes to sustainable development, a company will need to engage in complex balancing exercises to evaluate the strength of competing rights such as the economic development needs of the country versus the environmental, social and other consequences of a proposed development. Inherent in such a balancing process is the fact that there will be no 'correct' answers, rather a penumbra of what might be described as reasonable responses to the situation. This balancing process should not expose companies to unfair criticism: it should provide a framework for decision-making that allows companies a reasonable margin of discretion in what they decide. Companies which undertake this balancing exercise diligently and in good faith will have fulfilled their obligations under the Norms.

### E. Enforcement

Human rights laws, both domestic and international, generally require balancing between the interests of the state and the rights of the individual,<sup>126</sup>

122 Thus, some TNCs will have a role that goes beyond merely abstaining from interference with these rights, if, for example, a TNC has assumed *de facto* control of a region in which it operates or of the resources of that region.

123 Para. 14, Norms provides that 'as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development'.

124 The Stockholm Declaration on the Human Environment, 16 June 1972, A/CONF.48/14/REV.1, linked human rights and the environment: 'Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself'. Its successor, the Rio Declaration on the Environment and Development, *supra* n. 108, contains a more definitive right: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature' (Principle 1).

125 The World Commission on Environment and Development (WCED) defined the principle to mean: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs', in WCED, *Our Common Future* (Oxford: Oxford University Press, 1987) at 43.

126 Ratner, *supra* n. 30 at 513.

and this holds true in respect of TNCs. A company's responsibilities must turn on a balancing of the individual right at issue with the company's interests and other legal rights,<sup>127</sup> using concepts such as proportionality and reasonableness to determine whether the ends justify the means. For example, a state that prevents a citizen from criticising the actions of a company will normally be infringing that citizen's right to freedom of expression.<sup>128</sup> However, if that citizen works for the company in question, it is not likely that the company would be infringing that citizen's rights by preventing them from criticising the company in correspondence with a competitor.<sup>129</sup> Such balancing is not a novel concept— all human rights treaties are replete with qualifications that at all times require balancing. One example is the right to freedom of thought, conscience and religion.<sup>130</sup> A person's right to practise their religion must be balanced against the rights of others, including the right of non-discrimination, which may be breached if that religion vilifies other religions or groups in society.<sup>131</sup> Thus the balancing exercises inherent in many of the rights laid out in the Norms are not new to international law. Rather, international human rights law is new to corporations and their legal advisers, and its processes are, for the moment, somewhat alien.<sup>132</sup>

A key element of corporate criticism of the Norms is an apparent fear that their implementation and enforcement will be arbitrary, or at least

127 See *infra* n. 132.

128 An exception is when the criticism amounts to defamation and is therefore actionable in the courts.

129 As pointed out by Kinley and Tadaki, *supra* n. 88 at 968. See also the example given by Ratner, *supra* n. 30 at 514, of a TNC breaking into a person's home to tap telephones or intercept mail under suspicion of theft of company property. It is likely that in such a case the TNC would violate the right against arbitrary interference with privacy, family, home or correspondence, but it is less likely to be violating employees' human rights by screening their work email for inappropriate or illegal use.

130 Article 18, ICCPR.

131 See, for example, *Peterson v Hewlett-Packard Co.* 358 F.3d 599 (2004), in which an employee pasted quotations from biblical scriptures in a prominent position in the office where he worked, in response to a diversity poster campaign which highlighted that members of the Hewlett-Packard workforce are homosexual. Apparently, he hoped that his gay and lesbian co-workers would read the passages, repent and be saved. Company management requested that he take down the quotations, as they were a violation of the company's policy prohibiting harassment. When he refused to do so he was dismissed. He then brought an action claiming Hewlett-Packard engaged in differential treatment by terminating him because of his religious views, and that it failed to accommodate his religious beliefs. His case was unsuccessful. The court found that the company was not required to accommodate his religious beliefs in such a way that would result in discrimination against his co-workers.

132 Mendelson, *supra* n. 83 at para. 19, makes this point, but his view is that balancing exercises are 'best left to the political process and to governments' and that it is not for TNCs to make these judgments. This view does not take into account that TNCs routinely engage in these balancing exercises in the course of carrying out their business, and while states set the parameters (e.g. when freedom of speech must be curtailed in order to prevent racial vilification) TNCs have their own decisions to make within their spheres of activity and influence which require the same careful balancing.



unpredictable, due to the imprecise nature of the duties they contain. Implementation of the Norms by states will inevitably involve undertaking the balancing exercise described earlier, in order to determine the validity of competing and, at times, imprecise human rights claims as well as legitimate corporate interests. This is not different from the process undertaken by the state in incorporating any international legal obligation into domestic law. In order for corporations to comply with the standards set by the Norms, they will be required to undertake a comparable exercise, through establishing appropriate processes within the company to identify and attach value to the rights in question and, crucially, to calibrate the nature and extent of their responsibilities to protect those rights. Any disputes that do occur will be resolved through determining whether a careful, good-faith balancing exercise has been conducted and whether the company's decisions fall within the range of reasonable responses or its margin of discretion. This type of balancing exercise is an ever-present feature of courts when they adjudicate on vague standards or competing rights, and it does not result in arbitrary decisions.<sup>133</sup>

Outside of formal enforcement mechanisms, the business alliances fear that the Norms will be used as the basis of criticism in campaigns, by NGOs or other political actors, aimed at vilifying TNCs. This vilification, it is argued, will breach the rights of TNCs and the business people who work for them, to keep and protect their reputation and, therefore, make a living. However, the fact is that the Norms are, on their own, hardly likely to generate unfair criticism of corporations—that can and will happen regardless of the Norms. Rather, they introduce some form of universal standard, which might control less principled and reasoned criticism. The commercial rights to reputation and pursuit of legitimate business aims will be protected by the laws of defamation and libel for untruths and by well-established curial intolerance of vexatious or unwarranted law suits (potentially with costs awarded to penalise vexatious plaintiffs). In broader terms, the public can, and will, make reasonable judgments about corporate behaviour and about whether criticism, from whatever quarter, is fair and legitimate. The reality is that companies will need to accept some level of engagement in public debate and, perhaps, greater transparency will be necessary.<sup>134</sup>

133 Consider, for example, the use in tort of 'the reasonable man' or the notion of 'reasonable foreseeability', or the balancing of legal protections to privacy on the one hand, and the demands of free speech and/or criminal law on the other.

134 The Business and Human Rights Resource Centre, *supra* n. 54, gives corporate and other subscribers the opportunity to learn of, and respond to, public criticism through an alert service. This service informs TNCs of criticisms in the international press, and then publishes the TNC's response, if any is given.

## 4. The Legal Implications of the Norms

### A. Non-State Parties Under International Law

As international rules directed at TNCs, the Norms engage in the growing recognition of non-state parties in international law.<sup>135</sup> A battle cry of the anti-Norms lobby has been that states are the only subjects of international law and that the Norms fly in the face of this legal orthodoxy by attempting to regulate the behaviour of TNCs from an international standpoint. However, this view ignores developments over the last 60 years or so that have seen non-state parties grow in their roles and responsibilities on the global stage, albeit usually mediated through the direct international responsibilities of states' parties.<sup>136</sup> As Nicola Jägers reminds us, legal personality is not a static concept: it is flexible and can be conferred and then later withdrawn.<sup>137</sup> The complexity lies in that there is no central body that determines whether an entity has international legal personality. It is only through the behaviour of the principal actors, states, that we can establish which entities have legal personality.<sup>138</sup>

The behaviour of states in respect of TNCs indicates, at the very least, an emerging recognition of their legal personality. States have applied the international rules prohibiting genocide, slavery and torture to bar such conduct by individuals, including companies, as well as by governments.<sup>139</sup> These rules and others have been applied by international tribunals against corporations, most notably at the Nuremberg Tribunals, which found

135 Ratner, *supra* n. 30 at 476, states that 'the orthodoxy now accepts that non-state entities may enjoy forms of international personality'.

136 On which, see Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press; New York: Oxford University Press, 1994) at 49–50; Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', (2004) 5 *Melbourne Journal of International Law* 1; and, generally, Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).

137 Jägers, 'The Legal Status of the Multinational Corporation Under International Law', in Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague/Boston: Kluwer, 1999) 262.

138 The state behaviour that is required, according to the International Court of Justice, is the conferral of both rights and responsibilities on non-state entities. See *Reparation for Injuries Suffered in Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 at 178–9.

139 States have applied international rules prohibiting genocide, slavery and torture to bar such conduct by individuals and legal persons (including companies) as well as by government officials.

that employees and directors of the I.G. Farben Corporation had violated international law<sup>140</sup> through the company's role in the Holocaust.<sup>141</sup> Beth Stephens points to international treaties that specifically refer to corporate crimes, including the Apartheid Convention,<sup>142</sup> and treaties governing corruption and bribery, hazardous wastes and other environmental violations as examples of duties borne by companies under international law. The fact that there may be few or no enforcement mechanisms for these norms does not negate their legal status. These treaties imposing duties on corporations are complemented by treaties bestowing rights upon them—for instance, rights regarding access to dispute settlement mechanisms (e.g. under the North American Free Trade Agreement).<sup>143</sup> Thus, it can be seen that companies, according to the widely accepted qualifying criteria, have at least some form of legal personality in public international law.<sup>144</sup> This is not exactly the same type of personality as that of states, but this does not negate its existence.

The phrase 'privatising human rights' is often used by critics of the Norms to characterise their view that somehow implementation of the Norms will let states 'off the hook' in respect of their role in upholding human rights shifting the responsibility for protection and promotion of human rights onto the private sector. Thus, for example, in their joint submission to the OHCHR inquiry on the Norms, the IOE and the ICC declared that the privatisation of human rights 'leaves the real duty-bearer—the state—out of the picture, by shifting the human rights duties to civil society and 'placing the entire burden on private

140 Stephens, *ibid.* at 76 and 77.

141 Ramasastry, *supra* n. 92 at 106: 'In 1947, twenty-three employees of I.G. Farben were indicted for plunder, slavery, and complicity in aggression and mass murder [in the case of *U.S. v Krauch et al. 'The I.G. Farben Case'* 10 *Law Reports of Trials of War Criminals* 1]. I.G. Farben was a major German chemical and pharmaceutical manufacturer. The defendants in the Farben case were prosecuted for "acting through the instrumentality of Farben" in the commission of their crimes. Five of the Farben directors were held criminally liable for the use of slave labour. This was the first time that a court attempted to impose liability on a group of persons who were collectively in charge of a company'.

142 International Convention on the Suppression and Punishment of the Crime of Apartheid 1973, 1015 UNTS 243.

143 The North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, (1993) 32 *International Legal Materials* 368 (entered into force 1 January 1994) (NAFTA). NAFTA's infamous 'Chapter Eleven' provisions enable corporations to sue governments for various violations of the NAFTA. Mexico, Canada and the United States have all been forced to defend claims. For an overview of NAFTA Chapter 11 litigation, and a history of similar clauses see Alvarez and Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11', (2003) 28 *Yale Journal of International Law* 365.

144 Kinley, 'Corporate Responsibility and International Human Rights Law', in Mullerat (ed.), *Corporate Social Responsibility, The Corporate Governance of the 21st Century* (The Hague: Kluwer Law and International Bar Association, 2005) 205 at 205–7.

business persons.’<sup>145</sup> The UK Foreign and Commonwealth Office has raised the same concern.<sup>146</sup>

These apprehensions are misplaced. Notwithstanding the above discussion regarding the increasing prominence of non-state actors in international law, the fact is that international law still overwhelmingly speaks directly to states and imposes legal obligations directly upon them. Certainly, those obligations may entail domestic regulation of the actions of non-state actors within their jurisdiction, but that is not the same as placing those non-state actors under a direct international legal obligation.<sup>147</sup> It is very much in this sense that the Norms proclaim that states will retain primary responsibility for the protection of human rights.<sup>148</sup> In any event, no matter what the level of direct or indirect legal effects that the Norms may have on corporations, it does not follow that from the expansion of sites of responsibility comes a corresponding reduction of a state’s liability in respect of human rights protection and promotion.<sup>149</sup> Rather, the human rights burden is increased and to some extent differently composed, as the duty to discharge that burden is shared across the different entities.<sup>150</sup> In any event, paragraph 19 of the Norms confirms that nothing in the document shall be construed as diminishing the human rights obligations of states. This is a view consistent with the case law of supervisory bodies of the principal UN human rights treaties. These treaty bodies have found that privatising a state’s functions—for example, the provision of drinking water—does not absolve the state from its responsibility to ensure respect for human rights.<sup>151</sup>

145 Joint views of the IOE and ICC, supra n. 44 at paras 2, 4 and 32.

146 In his CBI Advice, Mendelson, supra n. 83 at para. 21, quotes the Parliamentary Under-Secretary of the FCO, Bill Rammell MP, replying to a Parliamentary question by stating that ‘according human rights responsibilities to private business enterprises in international law could be used by certain states to avoid their own obligations and to distract from human rights abuses by states’.

147 The direct imposition on individuals of responsibilities for war crimes and crimes against humanity under the Rome Statute of the International Criminal Court is the exception that proves this rule in international law.

148 Preamble, Norms states: ‘*Recognizing* that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights . . .’.

149 Kinley, supra n. 144 at 207–8.

150 Ibid.

151 Kamminga, ‘Corporate Obligations under International Law’, Stakeholder submissions to the report of the High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights, Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, 17 August 2004, at 5, available at: <http://www.ohchr.org/english/issues/globalization/business/docs/kamminga.doc>.

### B. *International Legal Implications of the Norms*

In their present form as a compendium of human rights principles relating to TNCs and other business enterprises, the Norms have no immediate ramifications in international law. The Sub-Commission, which compiled the Norms, is not able to enact new international law: such law can only be created through international agreement in the form of a treaty, or through the development of customary international law. At present there is no treaty that incorporates the Norms; nor is there evidence of any state practice supporting such a development in customary international law.

The Norms are not therefore, 'instant international law',<sup>152</sup> although some have mistakenly believed them to be so.<sup>153</sup> The Commission itself expressly stated, in its 2004 decision, that the Norms, in their present form (i.e. merely a draft proposal), have no binding legal effect.<sup>154</sup> The most that can be said regarding the Norms' legal status, is that any existing international law (as it applies to states)<sup>155</sup> that has been codified in sections of the Norms obviously retains its force as international law and is unchanged by its re-statement in certain paragraphs of the Norms. These paragraphs may be described as having a 'declaratory effect'.<sup>156</sup> They merely reinforce rights contained in either customary international law or treaties. While there remains dispute as to whether the Universal Declaration of Human Rights and even possibly

152 The expression is quoted by Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises', in Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Deventer/Boston: Kluwer, 1980) 3 at 13, footnote 52; and is taken from Cheng, 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law', (1965) 5 *Indian Journal of International Law* 23.

153 By both supporters and detractors of the Norms, as well as those who might at some future point be called upon to arbitrate disputes concerning the Norms. See Mendelson, *supra* n. 83 at paras 7–10.

154 See *supra* n. 49 and accompanying text.

155 The SRSG's concern that the Norms cannot 'restate' something that at present does not exist—namely, directly binding obligations on corporations (as opposed to states) under international human rights law—would indeed be valid were it *clearly* the case and intention (see Interim Report at para. 60), but, in reality, such concern is borne of the corporate lobby's over-eager interpretation of the (admittedly) indefinite terms of the Norms, rather than unimpeachable and immovable fact.

156 Brownlie describes three categories of situation in which informal prescriptions such as the Norms can have legal effect, one being when such instruments are declaratory of existing human rights standards: Brownlie, 'Legal Effect of Codes of Conduct for MNEs: Commentary', in Horn (ed.), *supra* n. 152, 40.

the two International Covenants are, in part or in their entirety, customary international law,<sup>157</sup> it is clear that certain principles contained within them do amount to customary international law and are thus binding on all states.<sup>158</sup> Furthermore, these and other named instruments cited in the Norms remain binding on their states parties and, therefore, are part of international law as it applies to those states.<sup>159</sup> The question of whether international law can impose obligations on individuals (or companies) as well as states is addressed above.<sup>160</sup> At the very least it is clear that obligations, such as those in paragraph 3 of the Norms, which prohibit TNCs and other business enterprises from engaging in or benefiting from egregious human rights abuses, including war crimes and genocide, are already binding on individuals as well as states and as such are re-statements of existing obligations or paragraphs of 'declaratory effect'.<sup>161</sup>

### C. Questions of the Legal Status of the Norms

It is a fact, therefore, that most provisions of the Norms do not represent international law (instant or otherwise), and that they would not become so even if they had been adopted by the Commission, or the Human Rights Council that has replaced it.<sup>162</sup> However, this does not prevent them from 'hardening' into

157 Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles', (1988–89) 12 *Australian Year Book of International Law* 82, argue that it is only valid to describe a rule as customary international law when state practice and *opinio juris* have had a chance to establish themselves solidly in an initial, formative stage (it is not sufficient for the rule to be universally proclaimed). Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', (1995–96) 25 *Georgia Journal of International and Comparative Law* 287 at 317–39, concludes that although there is insufficient international support to find that the entire Universal Declaration of Human Rights constitutes binding customary international law, there would seem to be little argument that today many provisions of the Declaration do reflect customary international law.

158 For example, the prohibition against torture under Article 5, Universal Declaration of Human Rights and Article 7, ICCPR.

159 Examples of named instruments cited in the Norms include the Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; the Slavery Convention 1926, 60 LNTS 253; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956, 266 UNTS 3; and the International Convention on the Elimination of All Forms of Racial Discrimination 1966, 660 UNTS 195.

160 See supra Part 4 A ('Non-State Parties under International Law').

161 Despite the fact that some paragraphs of the Norms re-state existing international human rights law as it is applicable to companies, there is, at present, little by way of international enforcement mechanisms to ensure that companies comply with international human rights obligations. See Stephens, supra n. 139 at 76: 'International tribunals have applied human rights and humanitarian norms to corporations from the time of the Nuremberg Trials', but at 77 she notes a 'reluctance' to apply international criminal law to corporations in the mid-20th century. Note also the quotation from Louis Henkin that Stephens quotes at 77.

162 See UN Press Release, 'General Assembly Establishes New Human Rights Council By Vote Of 170 In Favour To 4 Against, With 3 Abstentions', 15 March 2006, available at: <http://www.un.org/News/>.

'international custom, as evidence of a general practice accepted as law',<sup>163</sup> if state practice moves accordingly. In order for custom to develop, states would have to participate in the implementation of the Norms, through whatever mechanism for enforcement is created, with the necessary legal intention that enforcement is required under international law.<sup>164</sup> Baade makes this point in his discussion of the legal effects of codes of conduct,<sup>165</sup> as an example of a method by which initially non-binding codes can, over time, become legally binding, whether through international custom or adoption in domestic law, or both. Baade was writing in the late 1970s when the original version of the OECD Guidelines<sup>166</sup> and the ILO Tripartite Declaration<sup>167</sup> had recently been launched. It is apparent from reading Horn, who builds on Baade's thesis,<sup>168</sup> that there was an expectation that the OECD Guidelines, for example, would take on a more binding character as their implementation procedure was utilised, and conflicts were settled with due regard to their rules. It is certainly open to question whether, with respect to the OECD Guidelines, any such development has in fact taken place.<sup>169</sup> However, this does not preclude such a process occurring with the Norms, which are different in many important respects to the OECD Guidelines. Unlike the Guidelines, the Norms are legally framed. Also, they are the product of a broad-based international treaty-making body, which specialises in human rights. The Guidelines, in contrast, were developed by a small group of nations joined together to progress economic development and cooperation goals.

Brownlie adds a further category to Baade's methods by which informal prescriptions can become legally binding.<sup>170</sup> He describes the catalytic effects of

163 Article 38(1)(b), Statute of the International Court of Justice 1945, 1976 YBUN 1052.

164 Muchlinski, *supra* n. 107 at 47: 'the Working Group has recognised that, given the uncertainties around the precise legal status of companies and other non-state actors, some form of "soft law" exercise is a necessary starting point. This has been the normal pattern of operation in relation to the adoption of other binding human rights instruments. Hence, in the absence of state opinion to the contrary (perhaps an unlikely eventuality), some transition from 'soft' to 'hard' law is more likely to occur, with the Draft Norms as the first step in the process.'

165 Baade, *supra* n. 152 at 13.

166 See *supra* n. 31.

167 See *supra* n. 32.

168 Horn, 'Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making', in Horn (ed.), *supra* n. 152, 45 at 52.

169 Although the OECD Guidelines, *supra* n. 31, have been utilised and interpreted by the OECD's Committee on International Investment and Multinational Enterprises (CIIME) and the National Contact Points (NCPs), there is no method for enforcement of decisions made by these bodies and so the rules have little impact on the behaviour of specific companies or the state members of the OECD. For a description of the enforcement mechanisms for the Guidelines see International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Versoix, Switzerland: International Council on Human Rights Policy, 2002) at 99–102, available at: <http://www.international-council.org/paper.files/107.p.01.pdf>. For a critique of whether the implementation of the OECD Guidelines constitutes their becoming custom, see Kinley and Tadaki, *supra* n. 88.

170 Brownlie, *supra* n. 156 at 41.

normative statements, which, although lacking in legal status, can nonetheless be picked up by states—and other bodies that are able to take part in the orthodox international law-making process—and be ‘re-stated’ in the practice of such bodies. Thus informal prescriptions are given legal significance by the actions of authoritative decision-makers, without necessarily hardening into a general principle of international law. An example Brownlie gives is the Truman Declaration of 1945 on the continental shelf, which had no legal status whatsoever when made, but had a ‘Pied Piper effect’ in that it was re-stated in practice by states and thus given legal significance. This process would enable the Norms to obtain a limited degree of legal authority in a relatively short time span. However, the debate about whether the Universal Declaration of Human Rights has crystallised into customary international law is illustrative of the imprecise and protracted nature of this process.<sup>171</sup> The catalytic process described by Brownlie could occur if the Norms were followed in practice by states or corporations, or both. A *de facto* implementation of the Norms is being undertaken under the auspices of the Business Leaders Initiative on Human Rights (BLIHR). As mentioned earlier, the member corporations of BLIHR are ‘road-testing’ the Norms over the period 2004–2006.<sup>172</sup> Due to the variety of corporations involved over a wide range of industry sectors (including finance, energy, manufacturing and more), each company is testing the Norms in a way that fits their own operations. This diversity of practice means that the road test may be of limited value in providing clear precedent in respect of the Norms, but it does illustrate that the Norms are amenable to being followed in business practice.<sup>173</sup>

Another means by which codes and other non-binding instruments may acquire legal authority is if they are used as a means of interpreting existing treaty law. Baade cites the European Union employment law case of *Hertz*<sup>174</sup> to illustrate how non-binding codes are used as tools of interpretation and gap-filling in existing treaty law. In *Hertz*, the provision to be interpreted was the principle of free movement of workers in the Treaty establishing the European Community<sup>175</sup> (EC Treaty). The company, Hertz, was accused of importing labour to Denmark in order to break a strike, which is prohibited by the ILO Tripartite Declaration, but which the EC Treaty made no provision in respect of. Hertz sought to rely on the free movement provisions of the EC

171 For example some rights from the Universal Declaration of Human Rights which are argued to have ‘hardened’ into customary international law, such as the right to freedom from torture, may have done so regardless of their inclusion in the Declaration. It is not clear at all that their inclusion in the Declaration is instrumental to their becoming customary international law.

172 As mentioned earlier, the member corporations of BLIHR have been ‘road-testing’ the Norms since 2004.

173 Millar, ‘An Overview of the BLIHR “Road-testing” of the Norms’, in *BLIHR Report 2: Work in Progress* (London, December 2004) at 15, available at: <http://www.blihr.org/Pdfs/BLIHR%20Report%202004.pdf>.

174 [1976] OJ C 293/12.

175 [2002] OJ C 325.



Treaty to defend its actions. The Council of the European Communities, in an opinion requested by Denmark, interpreted the free movement provisions as being of use in the positive sense of enabling workers to travel and work throughout the EC rather than as a defence in trade disputes such as this. The opinion concluded by citing the ILO Tripartite Declaration and stating its substance. In a similar fashion, the Norms could develop an indirectly binding character if, and in so far as, international forums use them as an aid to interpretation of existing international law.<sup>176</sup> Alternatively, it has been suggested that the various UN human rights treaty bodies might require accounts from states of how they are ensuring that corporations within their jurisdiction are complying with the international human rights obligations that the state itself has signed up to.<sup>177</sup> If such a situation arises, one might reasonably expect the treaty bodies to refer to the Norms as an appropriate standard against which to measure the behaviour of corporations and the efficacy of their regulation by the state.<sup>178</sup>

In respect of the indirect means of making the Norms binding, there is another, unorthodox, avenue that states might take. It has been argued that, if a state makes a declaration of commitment (or unilateral action) to a non-binding code, such as the Norms, that declaration can give rise to legal obligations on the part of the state not to go back on the declaration; a type of estoppel is formed to prevent this.<sup>179</sup> Thus, if states commit to the Norms through

176 Human rights treaties are increasingly viewed as 'living instruments' (see, for example, *Loizidou v Turkey (Preliminary Objections)* A 310 (1995); (1995) 20 EHRR 99 at para. 71) and the use of other treaties and even informal documentation such as draft instruments as interpretative aids is not uncommon (for example, the European Court of Human Rights has referred to ILO Conventions in a number of cases, including *Van Der Musselle v Belgium* A 70 (1983); (1984) 6 EHRR 163 at para. 32; and the Inter-American Court of Human Rights has relied on the Draft UN Declaration on the Rights of Indigenous Peoples: see, for example, the Concurring Opinion of Judge Sergio García Ramírez in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) IACtHR Series C 79; 10 IHRR 758 (2003) at para. 8).

177 Typically, international human rights treaties require states to ensure to all within their jurisdiction, the protection afforded by the rights in the relevant treaty; see, for example, Article 2(1), ICCPR and Article 2(1), ICESCR. The Human Rights Committee has stressed that obligations placed on states to ensure Covenant rights 'will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'. HRC General Comment No. 31, The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; 11 IHRR 905 (2004). The Committee for Economic, Social and Cultural Rights (CESCR) routinely stresses the responsibilities of corporations in their General Comments, for example in: CESCR General Comment No. 12, The Right to Adequate Food (Article 11), 12 May 1999, E/C.12/1999/5; 6 IHRR 902 (1999) at paras 20 and 27; and CESCR General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12), 11 August 2000, E/C.12/2000/4; 8 IHRR 1 (2001) at paras 42 and 55.

178 See Nolan, 'With Power Comes Responsibility: Human Rights and Corporate Accountability', (2005) 28 *University of New South Wales Law Journal* 581 at 607.

179 Baade, supra n. 152 at 17–9 citing the *Nuclear Tests Case (Australia v France)*, Merits, Judgment, ICJ Reports 1974, 253.

a formal declaration, intending to be bound to that declaration, an obligation to implement and enforce the Norms would be legally effective as such for those states.<sup>180</sup> This is very much a defensive mechanism that might be utilised in the long term to hold states to their commitments to the Norms. There have been no such commitments to date.

Finally, aside from the somewhat distant prospect of the Norms (or some derivative document) becoming a treaty, it is conceivable that the Norms might be adopted by the United Nations as a declaration, resolution or some other strictly non-binding instrument. Any one of these outcomes would significantly increase the Norm's potential to develop into positive law. Michael Bothe has analysed the factors that indicate the authority of a non-binding instrument and its potential to create legal obligations. His view is that the circumstances that have led to the adoption of an instrument, and the degree of agreement upon which it is based, are both significant.<sup>181</sup> Also important is the form of the instrument (whether a declaration or a resolution); the content of the instrument; the political rank of the organ adopting the instrument; and the implementation procedures contained in the instrument. Thus, the Norms are more likely to take on a binding character if they are adopted by the UN General Assembly, with a broad support base from different governments. The creation of an effective implementation procedure would also be crucial, as this would provide proof to TNCs and states that compliance is expected. It would further provide a means of exerting pressure to secure compliance.<sup>182</sup> But this is some way down the track. What is clear at the present time is that there are no immediate international legal implications of the Norms beyond their re-statement of existing law in certain paragraphs. There are various ways in which the legal importance of the Norms might develop, extending from the hardening of the Norms into law through the creation of an international convention including an enforcement mechanism like the International Criminal Court,<sup>183</sup> to a development into 'soft law' through the adoption

180 Brownlie, *supra* n. 156 at 40 does not agree with Baade's characterisation of legally binding unilateral acts because he refutes that one can discover acquiescence by states in the face of a whole set of legal principles such as the Norms. His view is that the reaction of the state in the *Nuclear Tests Case* was to a very specific setting and specific obligations on particular occasions in respect of particular subjects.

181 Bothe, 'Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?', (1980) 11 *New York International Law Journal* 65 at 78.

182 In this respect, see Nolan's insistence that there must be 'credible procedures for their [the Norms] monitoring and verification' and her overview of the 'multiplicity of possible approaches' by which this could be achieved, *supra* n. 178 at 606 *et seq.*

183 See Muchlinski, *supra* n. 107 at 50. He sounds a note of caution about a 'hard law' approach—even hard law agreements, in provisions concerning controversial social issues, have been put into very general, and probably meaningless, hortatory language, simply to show that something has been done, where there is little intention to see these provisions have any real legal effect.

of the Norms by states or other international law-creating bodies and their re-statement in state practice (Brownlie's 'catalytic effect'<sup>184</sup>) or their use in interpretation of international treaties.

#### D. Domestic Legal Implications of the Norms

It is at the domestic level that international law, including international human rights law, finds its most effective expression of legal effect. And so it would be with the Norms, in so far as they are and might further be implemented within a national human rights framework.<sup>185</sup> This fits with the traditional model of implementation of international human rights law, in which the front line of implementation and enforcement is to be found in domestic legislatures, executives and courts; international apparatus are nearly always secondary to these municipal organs.<sup>186</sup> However, even as a non-binding international code, the Norms might still have domestic impact. It is argued in this respect that since codes or other non-binding 'solemn high-level endorsements of preferred courses of conduct'<sup>187</sup> can become a source of binding international obligations for states, states will rely on and utilise such codes to fill in gaps in the relevant law and practice at the domestic level. Thereby, 'the Code may become a spring-board for legally creative action by national courts and other agencies'.<sup>188</sup> In the same vein, others have cited the less specific example of how principles from the Universal Declaration of Human Rights were picked up by domestic courts and applied as international law despite the Declaration's 'designedly non-binding status'.<sup>189</sup> The Norms could similarly shape legal and policy thinking at the state level, or otherwise be utilised in domestic courts, despite their status as

184 Supra n. 156.

185 The Norms do not contain any jurisdictional provisions or 'home state control'. Para. 17. Norms addresses state implementation, providing: 'States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.'

186 For discussions of this international/domestic law nexus generally, see Cassese, *International Law*, 2nd edn (Oxford: Oxford University Press, 2005) at 213–37; and in respect of human rights specifically, see Donnelly, *Universal Human Rights in Theory and Practice*, 2nd edn (Ithaca: Cornell University Press, 2003) at Chapter 2, particularly 34–7.

187 Baade, supra n. 152 at 29.

188 Ibid., quoting the UN Commission on Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature, 22 December 1978, E/C.10/AC.2/9. Baade also (at 29–32) cites the German case of *Nigerian Cultural Property* BGHZ 59 (1972), as an example of the use of internationally accepted standards of public policy (here a UNESCO recommendation and a treaty to which West Germany (as it was then) was not party) for the purposes of domestic adjudication of a transnational dispute.

189 Brownlie, supra n. 156 at 42. See also, in an Australian High Court case, Kirby J's invocation of the Universal Declaration of Human Rights in his discussion on the 'interpretive principle' in his dissenting judgment in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 *Commonwealth Law Reports* 513.

an informal statement of non-binding international law. Although, at present, the latter effect is likely only in situations where the state already has relevant legislative provisions relating to the same matters covered by the Norms, the former effect may have greater potential.<sup>190</sup>

Use could also be made of the Norms in private law suits without their prior adoption as a convention or other legally binding instrument. For example, an action in contract could be brought against a company where adherence to the standards contained within the Norms is a term of a contract to which the company is a party, and the company fails to comply with one or more of the Norms. Such an action could also be brought on grounds of misrepresentation, or false or misleading conduct, if a company holds out that it is complying with the Norms and this turns out to be false.<sup>191</sup> An action for misrepresentation could be brought by any party, including a consumer who has purchased from the company in reliance upon the assertion of compliance with the Norms.<sup>192</sup> Finally, negligence actions might be brought in which the tortious standard of care is based upon the Norms. Thus, it could be alleged that failure to comply with the Norms is evidence that the company in question is not meeting accepted standards of conduct—including in respect of corporate disclosure<sup>193</sup>—and that the company is, therefore, not exercising reasonable care or diligence in conformity with generally accepted standards.<sup>194</sup>

190 See, for example, discussion in Kinley and Tadaki, *supra* n. 88 at 958–60; and Murphy's more general advancement of his 'carrot and stick' middle way of bringing 'government more actively back into the process of promoting good corporate conduct, but would do so by both reinforcing the value and benefits of the voluntary codes to MNCs [carrots] and holding MNCs to the codes to which they have subscribed [sticks]', in Murphy, 'Taking Multinational Codes of Conduct to the Next Level', (2005) 43 *Columbia Journal of Transnational Law* 389 at 423 *et seq.*

191 The prospect of such litigation, however faint, appears to have been of sufficient concern to some signatory corporations to the Global Compact to have prompted the Global Compact secretariat to have taken the extraordinary step of issuing an 'indemnity letter' to those of its concerned clients stating, in effect, that their agreement to abide by the principles contained in the Global Compact constitutes no legal expectation that they would necessarily do so. Georg Kell, Executive Head of the Global Compact, revealed this much in an 'in conversation' session at the Business for Social Responsibility Annual Conference, New York, 11 November 2004 [notes on file with author].

192 For an example of such litigation see *Marc Kasky v Nike* 27 Cal 4th 939 (2002) and the US Supreme Court decision dismissing a writ of certiorari, *Nike v Marc Kasky* 123 S.Ct 2554 (2003). For a discussion of the Australian position and in particular the impact of sections 52, 53 and 75AZC of the Trade Practices Act 1974 (Commonwealth) which prohibit misleading and deceptive conduct on the part of companies, see Spencer, 'Talking about Social Responsibility: Liability for Misleading and Deceptive Statements in Corporate Codes of Conduct', (2003) 29 *Monash University Law Review* 297.

193 See Nolan's, *supra* n. 178 at 609–10, assessment of case law and various domestic legislative initiatives in respect of disclosure and reporting requirements relating to human rights matters.

194 Muchlinski, *supra* n. 107 at 51.

One method of encouraging the development of the Norms as legal standards is by incorporating them into procurement procedures. Governments could lead by example through buying goods and services from Norm-certified companies.<sup>195</sup> The Norms would then become a term in all government procurement contracts, thus enabling them to be domestically enforced if the companies supplying governments are found to be in breach.<sup>196</sup> Alternatively, regulatory authorities,<sup>197</sup> or ethical investment indexing bodies,<sup>198</sup> might adopt the Norms as part of their mandatory reporting requirements. For example, socially responsible investment (SRI) performance criteria in the area of human rights could be based on the Norms. In this way, companies subject to the regulation or participating in the ethical investment index would be required to report on human rights issues as laid out in the Norms and would be subject to legal sanction if they misstated their compliance. Thus the Norms would take on a legally binding character despite their current informal status.

### *E. Legal Framework Rather Than Voluntary Initiative*

One of the most outspoken detractors of the Norms, the Vice-President of Shell, Robin Aram, while speaking on behalf of the ICC, made the following statement

- 195 Government departments/local authorities commonly adhere to voluntary/external standards in their procurement policies. See, for example, San Francisco's 'Sweat Shop Free Ordinance' on procurement implemented in 2005, details of which are available at: <http://www.sfgov.org/site/mayor.index.asp?id=32792>.
- 196 It is not uncommon that government procurement contract regulations require compliance with broad human rights standards. See, for example, provision 26 of the Canadian Human Rights Code, RSO 1990, Chapter H19, regarding discrimination in employment under government contracts; and Section 1120.2570, 'Equal Employment Opportunity: Affirmative Action' of the Illinois Administrative Code, Title 44: Government and Procurement Contracts, Subtitle B: Supplemental Procurement Rules, Chapter XIV: Comptroller, Part 1120 Standard Procurement, available at: <http://www.ilga.gov/commission/jcar/admincode/044/04401120sections.html>.
- 197 Kinley and Tadaki, supra n. 88 at 956–8, discuss some of the legislative and regulatory authorities that have adopted mandatory reporting requirements on social and/or environmental issues. See also Nolan, supra n. 178 at 608 (in particular, the discussion in footnote 129 and accompanying text).
- 198 For example:
- (i) the Dow Jones Sustainability Indexes, launched in 1999, available at: <http://www.sustainability-indexes.com/default.html>;
  - (ii) the Ethibel Sustainability Index, available at: <http://www.ethibel.be/subs.e/4.index/main.html>;
  - (iii) the FTSE4Good Index Series, available at: <http://www.ftse.com/ftse4good/index.jsp>; and
  - (iv) the Johannesburg Stock Exchange's Socially Responsible Investment Index, available at: <http://www.jse.co.za/sri/index.htm>.

in an interview: 'The problem is the legalistic form that has been used in drafting the Norms . . . We [the ICC] didn't like the look of it. It contained too many *whereases*.'<sup>199</sup> This negative perception of the Norms may well be the crux of the matter. As we have noted throughout this article, business alliances have advanced a number of substantial and procedural criticisms of the Norms. Some of these, such as the apparent novelty of such a venture in international law, the imprecision of some of the language used and the concerns over divisions of responsibility, are, at least on their face understandable and even appealing, but none stand up to analysis. It is evident that a multi-faceted attack was used to obscure the true message, which is, quite simply, that business alliances, in the main, do not want TNCs to be held legally accountable for the human rights abuses that they may inflict or are complicit in, and that the Norms are seen as a first step towards such regulation.<sup>200</sup> The question of whether TNCs should be made legally accountable for their human rights violations can be answered in part by looking at the effectiveness of voluntary initiatives in this area. Corporate codes of conduct and policies addressing human rights have proliferated in recent years,<sup>201</sup> but so far these have been unable to stem the flow of human rights violations by TNCs.<sup>202</sup> For a number of reasons, such initiatives are weak in terms of the protection they give. Often authored by the companies themselves, these codes and policies regularly involve careful picking and choosing of the rights to be included. Internal codes only bind those corporations which adopt and implement them, which are by no means all TNCs,<sup>203</sup> thus leaving an un-level playing field in which

- 199 SustainAbility, 'In the Hot Seat: Robin Aram, Vice President of External Relations, Policy and Social Responsibility, Shell', 24 February 2005, available at: <http://www.sustainability.com/network/business-leader.asp?id=219>. In point of fact, the term is not used anywhere in the Norms!
- 200 Their concern is to avoid the construction of the type of regulatory regime that allows for an 'escalation to punishment'. Braithwaite, 'Rewards and Regulation', (2002) 29 *Journal of Law and Society* 12 at 21, sees such punitary enforcement mechanisms as providing the only real 'incentives for the rational actor' (that is the market-conscious corporation) to actually comply with the system's provisions.
- 201 See Murphy, supra n. 190 at 413–20; and Kinley and Tadaki, supra n. 88 at 953–62. For a more comprehensive compilation see Jägers, supra n. 137.
- 202 Growing corporate spheres of influence have led to even more areas in which corporations are impinging on rights. New areas such as internet censorship have come to the forefront, such as when internet provider Yahoo! came under attack for giving the Chinese Government details of internet activists and journalists, see Amnesty International, 'Yahoo's data contributes to arrests in China: free Shi Tao from prison in China!', ASA 17/003/2006, 31 January 2006. In relation to resources, while oil remains a critical area, another growing area of concern is water, with Coca-Cola at the centre of debate on sustainability and community access, as well as being the subject of ongoing criticism regarding its relationship with workers and unions, particularly in Columbia, see Srivastava, 'Coca-Cola and Water—An Unsustainable Relationship', India Resource Centre, 8 March 2006, available at: <http://www.indiaresource.org/campaigns/coke/2006/cokewwf.html>.
- 203 Joseph, 'The Human Rights Accountability of MNEs', in Kamminga and Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer Law International, 2000) 75 at 82–3.

companies that stick out their necks and do the right thing are penalised.<sup>204</sup> This highlights two issues: first, that infringements are often the result of the actions of rogue corporations or those with little or no reputation to protect; and second, the challenge of determining how far we ought to make TNCs at or near the top of the supply chain responsible for the actions of those further down it. Thus far, broad-based legislative proposals aimed at levelling this playing field at the national level have failed to be translated into law.<sup>205</sup>

Perhaps most significantly, it is strongly argued that such voluntary measures will be ineffective, and thereby lose their legitimacy, unless there are enforcement and reparations provisions put in place, and such schemes are independently monitored.<sup>206</sup> Currently, this is seldom the case, and consequently, companies may either pay lip service to human rights, using codes as mere public relations exercises, or they may follow a code until such time as serious profits are at stake, at which point human rights considerations are pushed aside.<sup>207</sup> Therefore, self-regulation cannot be relied on as the primary means for ensuring respect of basic human rights by TNCs, if only because of its necessary reliance on an 'internal' frame of reference rather than, as Christine Parker trenchantly argues for, a system of external legal enforcement built on social (i.e. non-corporate) values and expectations.<sup>208</sup> Indeed, it is precisely this sort of thinking in the broader field of corporate governance that prompted consideration of extending the type of regulation of financial probity as represented by such legislation as the Sarbanes-Oxley Act in the United States,<sup>209</sup> to cover corporate social responsibilities,<sup>210</sup> and the 2004 amendments to the US Sentencing Guidelines requiring Boards of Directors not only to abide by the law, but further to cultivate an 'organizational culture that

204 For example, British Petroleum (BP) Plc in line with its internal codes and policies published details of the bribes that it gave to the authorities in Angola. The authorities responded by throwing BP out of Angola, thus allowing other less scrupulous oil companies to take over the business.

205 See McBeth, 'A Look at Corporate Code of Conduct Legislation', (2004) 33 *Common Law Review* 222.

206 For accounts of a number of these arguments see Murphy, *supra* n. 190 at 420–32.

207 See McCarthy, *supra* n. 61.

208 Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility', in McBarnett, Voiculescu and Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, forthcoming).

209 Sarbanes-Oxley Act (2002) Pub. L. No. 107–204.

210 See, for example, in the United Kingdom, s.173(1)(d), Companies Bill 2006, which, within the general duty of directors to act in ways that 'promote the success of the company', obliges directors to have regard to 'the impact of the company's operations on the community and the environment'. In Australia, see the discussion paper produced by the Australian Government's Corporations and Market Advisory Committee (CAMAC) into the question of amending the current scope of directors' duties under the Australian Corporations Act 2001 (Commonwealth) to require directors to consider the interests of stakeholders other than shareholders when making corporate decisions. See CAMAC, 'Corporate Social Responsibility Discussion Paper', November 2005 available at: [www.camac.org.au](http://www.camac.org.au), along with further updates of the inquiry. See also, Nolan, *supra* n. 178 at 610 (at footnote 141 and accompanying text).

encourages ethical conduct'<sup>211</sup>—an initiative which John Sherman argues has prompted US courts to interpret the fiduciary duties of directors to encompass taking due heed of the interests of stakeholders beyond merely those of the shareholders.<sup>212</sup>

Considering the imposition of fundamental, international legal obligations on such non-state actors as individuals<sup>213</sup> and armed oppression groups,<sup>214</sup> it would be anomalous for companies to remain almost wholly outside the ambit of international law. This is particularly striking when one considers the enormous economic power that TNCs wield and the often considerable size of their social footprint. The growing importance of companies in the face of increased 'contracting out' of state functions attaches particular urgency to the need to scrutinise corporate activities and to punish corporate wrongs.<sup>215</sup>

## 5. Conclusion

Despite their imperfections, it cannot be overlooked that the Norms already represent a big leap forward in the setting of human rights standards for TNCs at the levels of both international and domestic law. Their traits of being universal, broad-based and authoritative set them apart from all other initiatives

211 Available at: <http://www.ussc.gov/2005guid/8b2..htm>.

212 See Sherman, 'Human Rights Implications of the 2004 Amendments to the US Sentencing Guidelines for Organizational Defendants', Draft Position Paper prepared for the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, available at: <http://www.icj.org/news.php3?idarticle=3910&lang=en>.

213 For example, in respect of the crimes listed in Articles 6, 7 and 8, Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

214 In this respect, Article 1(1), Additional Protocol II to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609, expressly binds 'other [ie non-state] organized armed groups'.

215 An example of a traditional function of the state now taken over by corporations is that of interrogating prisoners of war: this has been demonstrated in Iraq where companies such as Titan Corporation and CACI International have been accused of torture and unlawful killing of Iraqi prisoners at Abu Ghraib prison (Iraq) in the case of *Sami Abbas Al Rawi et al. v Titan Corp.*, S.D. Cal., No. 04 CV 1143R (NLS), complaint filed 9 June 2004, available at: <http://www.mirkflem.pwp.blueyonder.co.uk/pdf/alrawititan60904cmp.pdf>. See also a complaint lodged in 2005 with the Australian National Contact Point (NCP) under the OECD Guidelines for Multinational Enterprises by a number of human rights NGOs against Global Solutions Limited, a corporation that has been contracted by the Australian Government to administer a number of detention centres across Australia. The complaint alleges that the corporation has been complicit in a series of human rights violations including detention without trial or judicial review, detention of children in circumstances other than as a last resort, and physical and psychological abuses of detainees. See 'Statement by Australian National Contact Point: GSL Australia Specific Instance', 6 April 2006, available at: <http://www.oecd.org/dataoecd/28/2/36453400.pdf>.



and this, in itself, has an inherent value. The SRSG has an important role in ensuring that this is not lost, either by throwing the baby (of inherent value) out with the (politically compromised) bathwater, or by overlooking what little derivative legal status the Norms have already. With respect to this latter concern, the SRSG, for example, cannot ignore the legal force of the Norms where they re-state what is already international human rights law in respect of states, and by derivation, what have become domestic legal human rights obligations in respect of corporations. As a 'work in progress', moving through the UN human rights machinery (albeit haltingly and at the lower end of the UN hierarchy), the Norms in their entirety gain a certain status, best described as soft law, and the newly minted Human Rights Council will be in a position to preserve this.

Evidently, the Commission, that the Human Rights Council has replaced, took the view that what was needed was further deliberation, discussion and debate in respect of the whole question of the relationship between human rights and corporations, and, especially, whether there ought to be some sort of supra-national regulatory regime established to police it. In response to this, we pose a series of questions. First, can a company infringe the human rights of individuals? It is clear that this is not only possible, but is an all too frequent reality, albeit systematically perpetrated by a small minority of corporations, or inadvertently or carelessly by many more.<sup>216</sup> Second, should there be a set of international human rights standards by which the conduct of corporations can be judged?<sup>217</sup> Or, in the alternative, should companies be adhering to the laws of the home or host states in which they locate themselves and setting their own standards where lacunae in those state laws exist? In our view, the answer to each of these questions is 'yes'. Not only would such an initiative generally enhance the international framework for the protection and promotion of human rights, more specifically it would prompt and assist states to develop and strengthen their own domestic laws that govern corporate conduct relating especially to labour and workplace rights, rights to privacy and security of person, and environmental, health, education and housing standards within their respective jurisdictions. Moreover, these enhancements at the levels of international and domestic law would surely push individual corporations and peak industry bodies to bolster their own voluntary standards in the area of human rights compliance. If these inter-connected outcomes are to be realised, the task in front of those who want to build upon, rather than dismantle, the Norms is to overcome the fact that companies have set their faces against the Norms because of the enforcement mechanisms contained therein, despite these mechanisms being putative at best, and there

216 See, *supra* Part 3 A ('Non-State Parties under International Law').

217 Or as stated in the Report of the United Nations High Commissioner, *supra* n. 13 at 16, under 'Outstanding Issues': is there a need for a UN statement of universal standards setting out the responsibilities of business entities with regard to human rights?

being a strong argument that the establishment of clear and explicit standards on human rights is very much in their interest.<sup>218</sup>

Flowing from the above, the final question is the key: is there any point in setting out standards without any means of enforcing them? This article has shown that there is some point. Soft law standards can be used in a number of ways to effect hard law outcomes. Even fully fledged public international law is by its very nature often difficult to enforce, but this does not detract from its legal and political importance. That said, something more is needed to ensure that the standards are not simply ignored as toothless tigers. Over 20 years ago, Norbert Horn identified the discrepancy between the transnational reach of TNCs' business activities and the territorial limits of national legal and administrative control over the economy, as constituting the classic problem raised by TNCs.<sup>219</sup> That dilemma remains true today. This problem is exacerbated in the area of human rights by the fact that many states are unwilling to regulate TNCs within their jurisdiction or beyond. There are many reasons why a mechanism which seeks to fix liability on TNCs through domestic regulation alone will fail, including the fact that sometimes states are in connivance with the very TNCs that are encroaching on human rights guarantees. States are also notoriously inconsistent, or at any rate self-serving,<sup>220</sup> in their respect for and enforcement of international human rights, which thereby calls into question the efficacy of any approach that relies solely on states to enforce human rights obligations on TNCs.<sup>221</sup>

The most practical and effective method of ensuring that standards are enforced is, in light of the current state of international human rights law, a treaty that speaks to states and obliges them to regulate the conduct of TNCs in relation to human rights in their own jurisdictions.<sup>222</sup> Ultimately and ideally, therefore, we are looking for a mature instrument of public international law to emerge, after appropriate modification and amendment, from the presently neophyte Norms. In that way, when standards are not enforced in

218 Corporations are very adept at handling compliance frameworks in respect of matters such as product specification and financial accountability and incorporating them within their strategic and operational planning. Likewise compliance with human rights obligations could and would inform corporate decision making, and therefore, be aided by the establishment of universally agreed, relatively clear transnational standards.

219 Horn, *supra* n. 168 at 50.

220 On this particular point, see Chapter 4 in Goldsmith and Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005) especially at 119–26.

221 Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?', (2003–04) 19 *Connecticut Journal of International Law* 1.

222 As the UN High Commissioner for Human Rights was reported to have 'stressed in her statements that even though states retain the primary responsibility for ensuring the protection of human rights under the human rights treaties, there is a new awareness that such responsibility entails ensuring that companies operating from or within their jurisdiction must not undermine existing human rights obligations or the international rule of law'. See Weissbrodt and Parker, Report of the Seminar to Discuss UN Human Rights Guidelines for Companies, 29–31 March 2001, E/CN.4/Sub.2/2001/WG.2/WP.1/Add.3 at paras 11–2.

host states under existing domestic laws, victims might be able to seek redress in the home state. It would be reasonable to expect, furthermore, that the establishment of an international regime would increase both the instance and range of a state's definition of what constitutes a home state, a definition wide enough to encompass the countries in which TNCs locate significant assets, as well as their headquarters. Thereby, victims might be able to look to a number of different national jurisdictions so that, if the home state has not signed up to the treaty, redress could be sought in another state which was a signatory. And indeed, there appears to be a pattern of wider acceptance by domestic courts, in countries such as the United Kingdom and Australia, that jurisdictional hurdles should not prevent claims being heard. The European case of *Owusu v Jackson*<sup>223</sup> spelt the end of *forum non conveniens* in England and Wales, while in Australia a claimant-friendly legal test for *forum non conveniens* has been in place for some time.<sup>224</sup> These developments, furthermore, at least allow these common law countries to sit more comfortably alongside civil code states where there is an absence of any such jurisdictional barrier.<sup>225</sup>

One immediate way forward is to focus on persuading the SRSG that an international legal document of this type needs to be drawn up, and that the Norms, or something like them, can and should be used as a basis for such an initiative. In that way, the task as identified by the Special Representative himself will be advanced—namely, that we must address the 'core challenge of business and human rights, [which] lies in devising instruments of corporate and public governance to contain and reduce the tendencies' of corporations to 'run afoul of [their] own corporate principles or community expectations of responsible corporate behaviour'.<sup>226</sup>

And yet, the *Realpolitik* which constitutes the background to any international law route is the slow and tortuous process of treaty-creation. Presumably partly in recognition of this difficulty, the Norms contain other interim and parallel enforcement measures such as incorporation into internal operation rules and contracts with other parties. The current Norms document attempts to cover all bases; it is not the case that we necessarily need all of the forms of enforcement which it provides, but, until such time as we achieve the 'gold standard' set out previously (whereby the Norms are widely and effectively enforced through national courts), the Norms' piece-meal measures, such as incorporation into contracts and the like, fill the gap in the interim.

223 C-281/02, [2005] QB 801, ECJ.

224 See *BHP Billiton Ltd v Schultz* (2004) 2 DDCR 78; *Dagi v BHP* [1995] 1 VR 428; *Gutnick v Dow Jones and Company Inc* [2001] VSC 305; *Dow Jones and Company Inc v Gutnick* (2002) 194 ALR 433; and *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

225 The resort to pursuing corporations through litigation in civil jurisdictions is traditionally nothing like that found in common law jurisdictions. For an account of this and other features of the position in France, see Colonomos and Sanisto, 'Vive La France! French Multinationals and Human Rights', (2005) 27 *Human Rights Quarterly* 1307.

226 Interim Report at para. 23.

It seems then, that in the short term, the private law implications of the Norms will be fairly limited. The United States is the only jurisdiction in which—through ATCA—violations of international human rights law by corporations can be the subject of civil suits no matter where the violation occurs<sup>227</sup> (and there has not yet been a judgment against a defendant corporation under ATCA).<sup>228</sup> However, in the context of ATCA, the definition of international law is limited,<sup>229</sup> and in no way encompasses all the rights contained in the Norms. Greater private law implications require states to put the Norms on a full treaty footing, and then to sign up to the resultant instrument. The primary obstacle to this is the strength of the corporate lobby's opposition to, and criticism of, the Norms. This article has shown that many of the criticisms of the Norms fall away when the document is seen for what it really is: not a treaty, and not national law, but a draft set of standards that, in their present form, guide and suggest rather than compel.

By framing issues as standards and responsibilities—and purported legal standards and responsibilities at that—the Norms have promoted awareness, discussion and debate and have managed to flush out both extreme and compromised reactions to what are unarguably complicated and confronting questions. It is our view that far from contaminating the debate by exciting controversy, the Norms have helped to mark out the boundaries of debate. To dismiss them now as a distraction would be counterproductive in that the powerful arguments for something like them will certainly not disappear, and indeed, if anything, are likely to be heightened by the sense of having to make up lost ground. In any event, form aside, the Norms' subject matter of human rights is, by nature, not about unambiguous absolutes, but rather is about circumstantial interpretation and balancing of competing rights and interests. The Norms provide a starting point for the proclamation and protection of human rights standards, and as such are necessarily less than perfect. The fact that as a draft instrument of public international law the Norms have already provoked such interest and debate, while at the same time obtaining a level of derivative authority within private, domestic legal relations, represents an important first step in what will inevitably be a long journey.

227 Though courts in a number of civil code countries have the capacity to prosecute individuals and corporations through their exercise of universal jurisdiction for crimes against humanity and other egregious human rights violations. For a survey of European states whose courts have this capacity, see Breining-Kaufmann, "'The Legal Matrix of Human Rights and Trade Law' State Obligations versus Private Rights and Obligations', in Cottier, Pauwelyn and Bürgi (eds), supra n. 15, 95 at 120–2.

228 See Interim Report at para. 62.

229 In the case of *Sosa v Alvarez-Machain* 542 US 692 (2004) at 732, the US Supreme Court proclaimed that to qualify, the purported international law must be 'specific', 'obligatory' and 'universal'. For discussion of the implications of the case for corporations, see Vázquez, '*Sosa v Alvarez-Machain* and the Human Rights Claims against Corporations under the Alien Tort Statute', in Cottier, Pauwelyn and Bürgi (eds), supra n. 15, 137 at 137–47.