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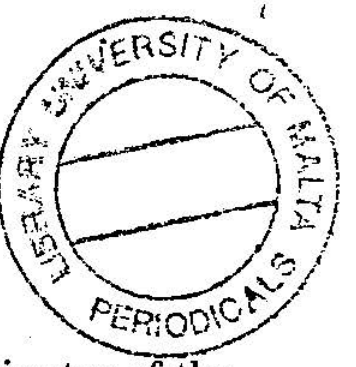

FOREWORD

PATRICIA MALLIA
Guest Editor and Academic Co-ordinator of the Conference

This special edition of the *Mediterranean Journal of Human Rights* is dedicated to the proceedings of an international conference on the relationship between human rights and corporate social responsibility, held in Malta over two days last November. *Human Rights and Corporate Social Responsibility* was held at the *Aula Magna* of the Foundation for International Studies within the context of the Mediterranean Masters Programme in Human Rights and Democratisation, a course which is co-ordinated by the University of Malta and which is supported by the European Commission.

The conference explored various topics relating to the links between corporations and human rights policies. Apart from the direct discussions on human rights aspects, the other facet of the conference focussed on responsible business conduct and the role of corporations in contributing to a wider protection of human rights.

Both speakers and audience, which was quite numerous, came from various countries and hailed from different backgrounds such as law, banking, international relations and business. The high quality of the papers presented and the ideas put forward by the speakers were extremely well received by a good number of the audience who participated actively in the post-presentation debates.

This is a selection of the papers delivered in the conference where the main focus of discussion centred around the relationship between public and corporate interests, and how the globalisation of the world economy and increased role of the multinational corporation affects human rights. Radu Mares from the Raoul Wallenberg Institute in Lund, Sweden, discusses the effects of CSR on human rights while Surya Deva from the University of Syndey, Australia, evaluates the thesis of universal standards which should apply to corporations wherever situated. Fabrizio Pagani, from the OECD Legal Directorate gives an analysis of the various OECD legal instruments aimed at enhancing corporate social responsibility while John Pace,

a visiting fellow at the University of New South Wales, Australia, gives an interesting insight to the United Nations Global Compact. The balancing of corporate, governmental and citizens' rights seen in the context of the WTO is discussed by Lucienne Attard of the George Washington University School of Law, USA. An intervention from Joseph F. X. Zahra, the Chairman of the Bank of Valletta plc, Malta, evaluates whether profitability and corporate social responsibility are compatible, while Helga Ellul, Managing Director of Brandstatter Malta Ltd, discusses CSR from an employer's perspective. Other papers include one by Danwood Mzikenge Chirwa from the University of the Western Cape, South Africa, discussing the importance of regulation for non-State actor and another by Zelim Skurbaty, of the Danish Centre for Human Rights, looking at the relevance of codes of conduct.

The conference succeeded in reflecting the direct and immediate significance that corporate social responsibility has on human rights issues, succeeding in emphasizing the necessity corporate social responsibility be a mainstream consideration in all areas of policy within the corporation, and highlighting, once again, the vital role that corporations play in the protection of human rights.

INAUGURAL ADDRESS

THE HONOURABLE TONIO BORG
Minister for Home Affairs and the Environment, Malta

Mr Chairman, Ladies and Gentlemen, may I extend a warm welcome to all participants at this Conference, particularly the foreign delegates. I hope that your short stay in Malta will enable you to get acquainted with the rich culture of these islands and the warm hospitality of its inhabitants.

The subject chosen for this Conference reflects the new trends in globalisation which have also reached our shores. While globalisation has created unprecedented wealth and resources, this has been associated with unacceptable levels of absolute poverty. One shudders when one considers that the ratio of average income in the world's 20 richest countries to those of the world's poorest has risen from a ratio of twenty to one in 1960 to about forty to one today; and some 66 countries are poorer now than a decade ago.

Rather than trade providing increased resources for improving living and working conditions, it has all too often resulted in government actually reducing workers' rights in order to minimize labour costs. All the standards included in the ILO Declaration on Fundamental Principles and Rights at Work have been under attack in consequence. Some goods are being manufactured in the supply chain under conditions of serious exploitation involving violations of fundamental labour standards and of simple standards of decency with the principal victims being women workers.

At the World Economic Forum at Davos in January 1999, the UN Secretary General Kofi Annan challenged world business leaders to 'embrace and enact the Global Compact both in their individual corporate practices and by supporting appropriate public policies. Mr Annan asked world business to support and respect the protection of international human rights within their sphere of influence and to make sure that corporations are not accomplices in human rights violations. He appealed to world business to uphold freedom of association and the effective recognition of the right to collective

bargaining, the elimination of all forms of forced and compulsory labour and the effective abolition of child labour and discrimination in respect of employment and occupation.

Revelations of exploitation have produced a response from some companies in the form of corporate social responsibility (CSR). Although some negative aspects and dangers exist, such as using such CSR as a form of public relations exercise and nothing else, there are also positive aspects. For instance, in the year 2000 a new sensitivity to the need to improve corporate behaviour led to the revision of the OECD Guidelines for Multinational Enterprises and, more importantly, to the strengthening of the procedures for their implementation by National Contact Points maintained by OECD and other adhering governments.

In Malta new enactments have introduced new trends in corporate criminal responsibility. For decades our criminal laws were based on the criminal responsibility of physical not legal persons. With recent amendments to the Criminal Code and the Prevention of Money Laundering Act, this trend had changed. The new Criminal Code amendments include corporate responsibility of a criminal kind in matters relating to trafficking of persons for illicit purposes (art 248E), money laundering, the crime of corruption (art 121D) and other serious crimes such as, belonging to an organized crime group (art 83A), in line with the Palermo Convention against Transnational Organised Crime and its Protocols, the consequence being that legal persons along with natural ones are liable to criminal fines.

Besides, in virtue of our alignment of domestic legislation with the Convention, the crime of trafficking and smuggling in human beings has been introduced as a specific offence, particularly the exploitation of women and children for specific illicit purposes such as exploitation, prostitution, and the transplant of human organs. Exploitation is described as requiring a person to produce goods and provide services under conditions and in circumstances which infringe labour standards governing working conditions, salaries, health and safety. Besides, Maltese courts have extra-territorial jurisdiction over any crime of this kind committed abroad if a Maltese national or permanent resident is involved or if only part of the action giving execution to the offence took place in Malta.

Naturally, legislation alone will not solve all matters. The multinational enterprise does not need to wait for States to impose

these principles through legislation since it is strong enough to implement these principles on a voluntary basis. In point of fact, it is through a merging of the regulatory and voluntary systems that human rights may become an integral part of corporate strategies. Regulation will enforce compliance with minimum norms whereas voluntary systems are necessary for the provision of incentives which instill the mentality that 'doing the right thing' is also good business sense. The development and adoption of policies which ensure compliance with and respect for human rights will enhance the protection of brand image, avoid trade sanctions, increase worker productivity and appease consumer concerns.

The practice has emerged for companies to draft codes of conduct. These codes of conduct are certainly morally binding; however for such codes to be something more than a public relations exercise, the need is felt for the setting up of independent monitoring mechanisms; the idea behind independent monitoring is that a code will be credible if compliance were monitored by persons or organisations independent of the company that has adopted the codes. The ILO, based as it is on the tripartite structure and being a repository of expertise in all matters of labour practices including labour inspection, is probably the most appropriate organization to establish benchmarks for the training of monitors, for standards of verification and for the development of social auditing.

Malta's experience in this field is limited; indeed the developments in this field of human rights around the globe should sharpen our consciousness in these matters helping us to avoid a narrow and insular approach to human rights. Globalisation will not spare Malta; and our preparedness in this area of human rights should serve us now and in the near future when our expected membership of the European Union will expose us to more global influences but also to greater co-operation, alignment and harmonisation in this field of law and policy.

WELCOME SPEECH

PROFESSOR ROGER ELLUL MICALLEF
Rector, University of Malta

Ladies and Gentlemen, I am delighted to welcome you to this Conference on Human Rights and Corporate Social Responsibility. This event is being organized as part of the post-graduate programme in Human Rights and Democratisation, which is now in its third year of operation and is quickly gaining a high level of international exposure and reputation.

The Mediterranean Master's course in Human Rights and Democratisation is co-ordinated by the University of Malta on behalf of a network of universities and human rights institutions, receiving financial aid from the European Commission. It focuses on the integration of human rights and democratic principles and plans to analyse human rights principles from the operational and policy-oriented views. Such an arrangement is surely one which is essential to the future of the Mediterranean and to efforts to create co-operation therein.

An important feature of this post-graduate programme is thus the holding of this afternoon's conference, a unique occasion where we welcome with us once again last year's students who will be having their graduation ceremony within the next few days, and also, this year's intake of students who are just embarking on this post-graduate experience.

The featured topic over today and tomorrow shall be Human Rights and Corporate Social Responsibility, and I must say, that it is a good sign that such level of interest has been shown in this endeavour. The idea of corporate social responsibility reflects the ever-increasing link between corporations and human rights – it emphasizes the fact that human rights is the business of business, if you will.

Corporate social responsibility is about how companies manage the business processes to produce an overall positive impact on society. It focuses on the business as a main actor in society.

Mary Robinson, the former UN High Commissioner for Human

Rights, (07/05/2002, {first World Leaders} in her lecture this year to the Royal Society for the encouragement of Arts, Manufactures and Commerce in London) stated that:

> *'Business leaders do not have to wait – indeed, increasingly they cannot afford to wait – for governments to pass and enforce legislation before they pursue 'good practices' in support of international human rights, labour and environmental standards within their own operations and in the societies of which they are part. The public increasingly expects corporations to act in a socially responsible way.'*

Human Rights are a central feature of Corporate Social Responsibility – especially when one considers that new approaches need to be sought in order to solve persistent and serious global problems. The link between human rights promotion and protection and good governance is constantly being advocated and evidenced – this will be the focus of your attention for the duration of this dialogue.

PAPERS

WORLD TRADE ORGANIZATION: BALANCING CORPORATE, GOVERNMENTAL AND CITIZENS' INTERESTS

LUCIENNE ATTARD*

1. World Trade Organization and the Axis of Evil

Critics of the World Trade Organization (WTO) and, to a certain extent, of the Breton Woods Institutions (IMF and World Bank), have dubbed these three financial/trade organizations as comprising the new 'axis of evil', in part borrowing on the recent political statement of the Bush administration in relation to rogue states and the fight against terrorism. The implications are in themselves frightening, and how far this is true can only be ascertained through an empirical/objective analysis of these institutions' work and the legal instruments giving them their mandate.

The main purpose of WTO is to help trade flow as freely as possible, avoiding undesirable side-effects. Based on Ricardo's theory of Comparative Advantage, WTO seeks the dismantling of trade barriers and encourages member States to focus their resources on their most efficient industries and to exchange products of these industries with like-minded countries. In this way, trading partners would achieve net economic gains.

Corporations have a professed interest in this flow and in unrestricted access to foreign markets. The term market in this case

* Currently an S.J.D. candidate at The George Washington University Law School in Trade Law, Ms. Attard has an LL.M from the same school, and a Masters and first degree in Law from the University of Malta.

is used to include the exchange of goods and services, labour and capital. Corporations and governments alike are interested in this global market as it gives them a bigger chunk than was traditionally the case. To achieve this, the removal of obstacles by protectionist governments is essential. Individuals, companies and governments must know what the international trade rules are, and ensure there will not be sudden policy changes. Essentially this means the rules have to be *transparent* and *predictable*.[1]

Transparency goes directly to the heart of the Dispute Settlement of Understanding (DSU), which is discussed in Part 3 of this paper. Predictability, on the other hand, is crucial for foreign investors, companies and governments – all need to be confident that trade barriers are not raised arbitrarily, and they should remain within the bound rate according to each member's schedule of concessions.

The questions to be raised are therefore the following:

- First, how much are we, as citizens or as entrepreneurs, aware of what the trade rules are, and more importantly, are these rules reflecting human rights, labour and environmental standards?
- Secondly, should these rules be reflective of human rights standards, or should we maintain a strict separation of powers, whereby WTO deals strictly with trade disputes in isolation of all the rest?
- Third, how transparent is the multilateral system, specifically the dispute settlement system?

The freedom of future generations to sustain their lives requires that we, as present generations, learn how to govern effectively and that we learn how better to govern together. Due to a widening gap between rich and poor countries, it is becoming more and more difficult for Least Developed Countries, and to a certain extent, also developing countries, to implement domestic policies that ensure sustainable growth for present and future generations. Also, innovative ways to bridge the growing imbalance in global rulemaking need to be devised.

A greater role for these countries is imperative at the international level, including at WTO level. This, of itself, ensures

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[1] See generally official website of WTO at http://www.wto.org

transparency and predictability as developing countries become familiarized with the workings and advantages of an extensive body of trade rules.

Trade rules have become more robust and enforceable in the last decade or two - intellectual property rights are an excellent example in this regard. The very mandate of WTO favours global market expansion. In essence, there is nothing wrong with this. Whether we like it or not, the stronger economies are the ones embracing free market policies, with the exception of a few emerging markets in Asia. From a conceptual point of view, trade law is clearly utilitarian – it is concerned with economic efficiency and welfare.[2]

The goal of trade law is to improve the economic well-being of human beings through the facilitation of 'efficient exchanges'. In this light, free trade is a great thing because it maximizes individual welfare from efficiency gains and comparative advantage. Welfare is maximized by increased consumer choices, competition in the market, specialization, lower prices and increased employment. Human Rights law, on the other hand, is essentially focused on the moral worth of each individual, regardless of their utility. It is based on the protection of human dignity, linked to the non-utilitarian liberalism of Kant and others.

This notwithstanding, there is not necessarily a conflict between trade law and human rights law. A look at any trade law treaty reveals there are no blatant conflicting rules, *au contraire*. Often, as part of negotiations of a trade treaty there is emphasis on drafting of transparency clauses, protection of intellectual property and more importantly, the inclusion of Most-Favoured Nation (MFN) and National Treatment provisions. These last two principles ensure equal treatment for all countries members of WTO and ensure for foreign investors same treatment as that accorded to nationals.[3] Dismantling of trade barriers makes for more open markets, and, consequently, stronger economies.

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[2] FRANK GARCIA, Symposium 'The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle', 25 Brooklyn Journal of International Law 51, (1999)

[3] See generally RAJ BHALA INTERNATIONAL TRADE LAW: THEORY AND PRACTICE (2nd Ed. Lexis) Chapters 5 and 8.

A strong international economic law can, of itself, contribute directly to the promotion of economic rights.

- A stronger economy could ensure better health, higher education, employment benefits and economic opportunities.
- Secondly, open markets lead to increased trade relations between democratic governments and oppressive regimes, and this should ultimately improve citizens' rights, by the imposition of food safety standards, consumer and product compatibility with international processes, to mention a few.
- Thirdly, global markets have been facilitated because of a stronger commitment to the rule of law in international economic relations.

More aspects of international economy are today regulated by multilateral treaties or regional agreements, leaving less opportunity for states to maneuver or to take unilateral action. There is also the old adage that trading partners tend not to go to war with each other. The result is a proliferation of complex trade rules leading to numerous disputes whose nature has become increasingly interlinked with other areas of law, especially with human rights concerns, labour standards, environmental and health protection.

How far should trade treaties go in recognizing these standards and protecting them? Apparently, the negotiators of the North American Free Trade Agreement (NAFTA) considered this linking extremely important. They went so far as to include two Side Agreements to NAFTA – one on Labour and one on Environment. In this instance there was no hesitancy as to the overlap and relevance of labour and environmental standards with trade rules. The significance of the NAFTA is discussed further in Part 2.

This is not to say that there were no efforts made at WTO level to incorporate a social clause in the trade agreements. At the 1996 Ministerial Conference in Singapore, WTO members recognized the role of trade in promoting core labour standards. Although there was disagreement over having a Working Committee on Trade and Labour, yet, there was recognition of the need to collaborate with ILO on labour standards. The main obstacle to pushing this agenda is the position adopted by developing countries. They consider this to be a protectionist measure of the wealthy nations which want to erode the competitiveness of developing countries in lower labour costs.

Another drawback of human rights law, as compared to trade law, is that rules intended to promote equally valid social objectives, such as poverty reduction, labour standards, human rights or environmental quality, lag behind and in some instances have actually been weakened. To be more precise, these rules are not as enforceable as trade rules. There are also problems of domestic implementation and a general disfavour by governments to these principles. The same governments negotiating more sophisticated rules of international trade and investment, are simultaneously violating universal human rights standards, or allowing TNCs (transnational corporations) to contribute to this general dissipation of social standards – either actively or passively.[4]

The story of GAP (a U.S. clothing business) in El Salvador shows how in certain instances, even if TNCs are willing to improve working conditions in factories in third world countries, there is only so much they can change if they are not backed by government reforms. Governments often refrain from raising the minimum wage or enforcing labour laws out of fear that the investor will move away to a more competitive labour-intensive country.[5]

The truth is that a number of TNCs are introducing improvements in conditions of work, possibly also due to enormous pressures by protestors, and imposing voluntary codes of conduct in countries where human rights and labour standards are systematically violated. Through their efforts they are addressing issues as forced labour, child labour and gender discrimination. TNCs are however taken to task for these very efforts – allegations are made that they are utilizing the codes to mitigate liability and justify corporate presence in countries with excessive human rights abuse. Whichever way it goes, it seems that someone out there is going to be upset.

One of the strongest criticisms of WTO and leading trading powers concerns China's accession to WTO. Critics have claimed, and in some ways rightly so, that human rights standards have been set

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[4] See generally JOHN GERARD RUGGIE Symposium:'Trade, Sustainability And Global Governance': Keynote Address 27 Columbia Journal of Environmental Law 297 (2002)

[5] See KAUFMAN & GONZALEZ, 'Labour Standards Clash With Global Reality', New York Times April 24, 2001 available at http://www.globalpolicy.org/socecon/tncs/2001/kauf0424.htm

aside in the interest of the global trading system. Human rights activists sought to put pressure on the U.S. government to rescind China's Most Favoured Nation (MFN) trade status and pushed for a general trade boycott on account of China's international law violations. The U.S., instead, separated the trade status issue from the controversial human rights issue. This allowed the continuation of trading relations without adverse economic ramifications despite the excessive human rights violations.[6]

Was this 'de-linking' a case of double standards? Maybe so, but the question is whether WTO is meant to act as protector of human rights as well as arbitrator in trade disputes. Clearly this organization was not established with this mandate, and there are most certainly other organizations and institutions that are better endowed to deal with such issues.

One final point relates to the question of trade-offs and trade sanctions. By their very nature, human rights are 'alien' to the notion of trade-offs. A standard is a standard, and there are core human rights principles which are not to be derogated from or placed on balance with other competing interests. This is not the case in trade negotiations and agreements. International economic law excels in compromises in the pursuit of good results.[7] It is this very notion that has worked in China's accession to WTO. The EU, on the other hand, seems to be taking a rather different approach with regard to Turkey's application for full membership of the Union, making this country's accession conditional on reforms in their human rights practice. This highlights the distinctly different mandate of each of these institutions. While we consider both to be 'economy oriented', the EU is also having a politico/social mandate that additionally demands a harmonization of environmental, labour and human rights standards.

Insofar as trade sanctions are concerned, there is likely to be a conflict between international trade law and measures taken at a domestic level to protect human rights. This can be the case when a State imposes unilateral economic sanctions against another state

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[6] KIMBERLY GREGALIS GRANATINO 'Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability'23 Suffolk Transnational Law Review 191 (Winter 1999)

[7] FRANK GARCIA supra note 3

that is considered to be violating universal human rights laws. Such trade sanctions, while laudable for their nobility, can be challenged on the basis of constituting unlawful trade measures in terms of the GATT as we shall see shortly.

1.1 International Trade Instruments and Human Rights

Trade rules include the GATT of 1947 and 1994, TRIPS which regulates Intellectual Property, TRIMS regulating trade-related investment measures, the DSU (referred to earlier in Part 1), GATS which concerned with services, and several other specialized multilateral Conventions regulating so many sophisticated areas of law. One may wonder what brought on this consent by States to a multitude of international treaties, considering how jealous nations are of their sovereignty.

While previously I said that trade rules are more successful because they are more enforceable than international human rights conventions, yet, the truth is that under the Uruguay Agreement the sovereignty of countries was well protected. Decisions at WTO are reached by consensus. In this way, WTO will have no power to change US, EU or any other trade law for that matter. In case of conflict between WTO law and US law, for example, US law, under the 1994 Act 19 U.S.C. § 3512 (a) makes clear that US law will take precedence.[8]

The overriding question remains whether WTO is contributing in a structured manner to the principles of Corporate Social Responsibility – that is, to a healthy life, protection of the environment and good labour practices. If we look at environmental questions, for instance, we would see that back in 1994 at the Marrakech Meeting of Ministers, a Work Program on Trade and Environment was initiated. The mandate of the Committee on Trade and Environment (CTE) is unequivocal:

- to identify the relationship between trade measures and environmental measures in order to promote sustainable development; and
- to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading

[8] See RAJ BHALA supra note 4

> system are required, compatible with the open, equitable and non-discriminatory nature of the system. [9]

At the same time we have to remember that WTO competency for policy coordination remains limited to trade and those trade-related aspects of environmental policies which may result in significant trade effects for its Members. WTO is not an environmental agency. Nor should it get involved in reviewing national environmental priorities, setting environmental standards or developing global policies on the environment. This is the responsibility of national governments and of other intergovernmental organizations better suited to the task.

Mike Moore, former Director-General of WTO summed it up as follows:

> *'Every WTO Member Government supports open trade because it leads to higher living standards for working families which in turn leads to a cleaner environment. This report underscores that trade and environment need not be contradictory but can indeed be complementary'.*[10]

Of course, such a statement can be highly contested from several angles, but it does seem to point to generally accepted principles of CSR. Mr. Moore seems to be implying that free trade encourages foreign investment, and with it come new employment opportunities. The downside to this is it also often brings pollution, disruption to rural lifestyles and poor working conditions, especially for workers in Least Developed Countries (LDCs). Many Asians are still working in conditions akin to slavery: at work seven days a week with no rest, paid less than the minimum wage by TNCs in the textiles and other labour-intensive manufacturing businesses.

Following are some of the main findings in a report of the CTE:

- Most environmental problems result from polluting production processes, certain kinds of consumption, and the disposal of waste products – trade as such is rarely the root cause of

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[9] See official website of WTO at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/13envi_e.htm

[10] WTO News 1999 Press Releases available at http://www.wto.org/english/news_e/pres99_e/pr140_e.htm

environmental degradation, except for the pollution associated with transportation of goods;
- Environmental degradation occurs because producers and consumers are not always required to pay for the costs of their actions;
- Trade would unambiguously raise welfare if proper environmental policies were in place;
- Trade barriers generally make for poor environmental policy; and more importantly
- A good environmental profile is often more of an asset for a corporation than a liability in the international market-place, notwithstanding somewhat higher production costs.

2. Other International Efforts

The IMF and the World Bank are engaged in the enforcement of social standards through conditionality principles when deciding on aid, technical assistance or balance of payment issues. Clearly, certain labour standards attract the Bank's attention much more, as for example questions of child labour, prohibition of forced labour and equal opportunity. The International Financial Corporation (IFC), a member of the World Bank Group, has set certain standards related to child labour and the environment. TNCs that participate in IFC development projects are expected to observe these standards and practices. Because of their power-based structure, these international financial institutions do not need a new, formal international agreement to legitimize such actions. An enforcement mechanism is already in place, tied to the principal of conditionality. Even without outright coercion, recipient countries and participating TNCs are being encouraged to improve their labour standards.

Despite their neo-liberal economic bias, the IMF and the World Bank are directly involved in upgrading the social environment of developing countries. The new commitment by the World Bank to structural social reforms – including 'good government', poverty reduction, and an end to child labour – shows that the Bank has increased its attention to social issues and no longer has a single-minded focus on macroeconomic efficiency criteria. IMF and World Bank policies to promote workers' rights through their program-based lending are viable ways to radically upgrade labour standards at the global level.

The purpose behind harmonization of labour standards, according to Baghwati, is not to provide a uniform economic environment, but to:

> *'prevent a jurisdiction from deliberately taking advantage of externalities by lowering its standards to impose costs on others while reaping benefits'.*[11]

The demand for harmonization is based on the assumptions of fair trade, fair competition, and a need to conform to certain formal arrangements in order to achieve increased benefits.[12] In this manner, there must be a convergence of labour standards. Different regulations lead to externalities, materialized in absolute or relative losses of welfare and sub-optimal public policy choices.

A similar situation does occur frequently in international trade when goods are 'dumped' on foreign markets at a price lower than the world market price, – i.e. dumping of goods that are produced at below cost to gain market share.[13] The harmonization argument is perhaps strongest in the context of protecting international public goods. Even though Baghwati's examples refer to environment-related public goods, this argument can also be used with respect to labour standards. Labour standards are public goods that are provided (in most cases) by a domestic regulatory actor - i.e., national governments.

While market globalization may represent a unique opportunity for human rights law, the same globalization may pose a threat to the continued effectiveness of human rights law. The regulatory framework which international economic law provides for globalization operates according to a view of human nature, human values and moral decision-making fundamentally at odds with the view of human nature, human values and moral decision-making which underlies international human rights law.

The human rights movement could find in market globalization the ultimate victory of a regulatory system that, by nature and operation, cannot properly take into account what the human rights movement holds most dear: that underlying positive human rights laws are moral entitlements that ground moral, political, and legal

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[11] See generally BAGHWATI & HUDEC, FREE TRADE AND.HARMONIZATION (1996)

[12] Id.

[13] For a detailed analysis of the practice of dumping under international trade law, see BHALA supra note 4 at Ch. 13

claims of special force, claims which must be morally and legally prior to society and the state.

This principle, from the point of view of a human rights promoter, is at risk of being 'traded away' when human rights laws come into conflict with trade law and trade values in the new tribunals of globalization, in particular the World Trade Organization's (WTO) dispute settlement mechanism. The Dispute Settlement system of WTO is discussed in Part 3 of this paper. The question of trade-off and linkages of trade disputes with human rights or other concerns highlights the need to establish some kind of mechanism whereby international economic law would give due regard to human rights concerns. Alternatively, it may be best to leave WTO to deal exclusively with trade disputes and leave other international organizations to focus on human rights disputes.

3. Trade Sanctions and Article XX Exceptions

As the law stands today, the only way a state could potentially impose 'legitimate' trade sanctions on the basis of human rights violations is through the application of Article XX exceptions. Essentially, any national measure that singles out a particular country's trade, provided both are parties to WTO, is a violation of the MFN principle under Articles I and III of GATT. The only way a WTO member can impose a trade-restrictive measure without incurring the penalty of a trade dispute before the Dispute Settlement Mechanism is to justify that measure as an exception allowed by GATT in Article XX. While there are no clearly applicable exceptions for a human rights oriented measure, a state may attempt to invoke Article XX (a) which permits 'measures necessary to protect human morals'; or Article XX (b) relating to 'measures necessary to protect human, animal or plant life or health', or Article XX (e) which permits measures 'relating to the products of prison labour'.

Each of these exceptions is either too narrowly tailored (for example, the prison labour exception permits derogation from MFN only for goods produced by prison labour) or else, raise questions as to their applicability when used to influence the human rights policies of another sovereign state.[14]

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[14] FRANK GARCIA supra note 3

4. Invoking article XX Exceptions: The Tuna/Dolphin

This is the dispute that best highlights the high tensions between free trade principles and the environmental agenda. The United States wanted to protect dolphins from certain tuna fishing practices and it did so by passing the Marine Mammal Protection Act (MMPA) in 1972. This Act banned the importation of fish which have been caught with commercial fishing technology resulting in the accidental killing of ocean mammals, essentially dolphins. A certain species of tuna swims under dolphins making it difficult for fishing trawlers to avoid catching the dolphins as well as the tuna.

A GATT panel ruled in favour of Mexico's claim that the American Act was essentially an embargo that caused it to lose hundred of millions of dollars in lost export revenues. The GATT ruled that the U.S. conservation measures were inconsistent with Article XI: 1 which prohibits quantitative restrictions on imports. The law reads as follows:

> *'No prohibitions or restrictions...whether made effective through quotas, imports or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of another contracting party.'*

The panel found the direct import prohibition on certain yellow-fin tuna products from Mexico and the provisions under the MMPA were inconsistent with Article XI: 1. It should be noted that the United States sought to justify its actions in terms of Article XX. The exceptions under Article XX are particularly relevant from a human rights perspective and are discussed shortly. The panel report was never adopted and Mexico did not press the point further, as it was then negotiating NAFTA and did not want to jeopardize its relations with the U.S. Human rights proponents would consider this another 'trade-off' and unacceptable in human rights terms.

4.1 Shrimp / Turtle

For the first time in GATT history, unilateral trade restrictions aimed at the conservation of extraterritorial natural resources were upheld as justified under Article XX.

The issue in this dispute was the domestic U.S. law (§609) and its ban on imports of shrimp and shrimp products from countries that

were not 'certified'. The countries affected were Malaysia, Pakistan and Thailand. Similar to Tuna/Dolphin, the U.S wanted to protect sea turtles from extinction by equipping vessels with 'turtle excluder devices', allowing turtles to escape from the net. Under the U.S. law imports of shrimp were prohibited unless the countries were certified as having a comparable marine turtle conservation program. While initially the U.S. was found to be in violation of its obligations under GATT Article XI relating to quantitative restrictions, this decision was reversed when the U.S. revised the guidelines for implementation of §609.

Shrimp/turtle aroused the anger of environmentalists in that it upheld the U.S. act as being in conformity with GATT, and subsequently found by the Appellate Body to be 'provisionally justified'. It also raised questions of law in that the Appellate Body went a long way in giving interpretations to the obtaining legal instruments that WTO members claimed were not negotiated and were therefore beyond the scope of the law.[15]

One other exception to MFN treatment is found in Article XXI of GATT. A country may attempt to invoke the national security exception found under this provision. In this case a state is permitted to enact unilateral trade-restrictive measures when it judges such measures to be 'necessary for the protection of its essential security interests' during a time of emergency in international relations. This provision is least likely to work as it would entail a wide interpretation of national security by WTO, which is something member states have shown a reluctance to do.[16]

5. Improving the Multilateral System: Negotiating Reforms in WTO's Dispute Settlement Understanding (DSU)

The DSU has come under much attack since it started hearing trade disputes among 144 member States of WTO. The drafters of the system are already cognizant of the need for improvements. Reforms currently debated in the system also indirectly impact on human rights norms insofar as they concern not only technical issues

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[15] For a detailed analysis of Shrimp/Turtle see BERNARD H. OXMAN ET AL, 96 American Journal of International Law 685, July 2002

[16] Id.

as sequencing, retaliation and compensation, but also have to do with transparency issues, participation in the system by civil society and openness of the dispute system to the public.

Views of the success or failure of the DSU are as divergent as sugar is to spice. The Chairperson of the U.S. Senate Finance Committee, Senator Max Baucus, has expressed the frustration experienced by American trade policy makers of recent. In his view, WTO Appellate Body and Panels have far exceeded the scope of review and in this way, imposing obligations on the U.S. which Congress had not approved back in 1994 during the Uruguay Round Negotiations.[17] The EU takes a more measured approach. In its Submission to WTO, it considered that while the DSU has worked in a generally satisfactory manner, there is a need of reform in certain areas.[18]

The Doha Round Ministerial Conference Declaration acknowledges the need to review the operational procedures in inter-State trade disputes. Fortunately, negotiating changes to DSU is being considered as a separate item from the rest of Doha negotiations. This ensures that DSU reforms do not get bogged down with other problems that are likely to be encountered in the field of development and agriculture issues, amongst others.

Two main areas of interest to businesses and private citizens are reforms that relate to questions of *transparency* and *participation*.

5.1 Transparency

Should oral arguments before WTO adjudicatory authorities be open to the public? Currently, they are closed to all but government officials involved in the hearing, and the decision-makers themselves. The antipodal position would be to open them to any person, and even broadcast them on television. An intermediate possibility would be to open them only if both complainant and respondent agree. Clearly, something needs to be done. As things stand now,

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[17] ROBERT MACLEAN 'The Urgent Need to Reform the WTO's Dispute Settlement Process' International Trade Law and Regulation, Issue 5 (2002 Sweet & Maxwell)

[18] See Communication from the EC and Member States at http://www.wto.org TN/DSW/1. For a more in-depth analysis of *DSU* reform see RAJ BHALA & LUCIENNE ATTARD 'Austin's Ghost and DSU Reform' to appear in The International Lawyer (2003).

proceedings before WTO have earned the name of being secret courts where shady dealings take place and where societal considerations take a backseat, if at all.

The United States favours public and open hearings, seeing them as a move towards greater transparency and confidence in the whole WTO system.[19] The U.S. position considers decisions of the Panels and Appellate Body to have a significant impact on civil society. The system at present is not inclusive of private citizens or businesses, whether as observers or direct participants in trade disputes.

The United States maintains there is no reason why WTO should operate differently from other long-established international fora in which proceedings are public, such as the International Court of Justice, the *Ad Hoc* Tribunals for Former Yugoslavia and Rwanda and the European Court of Human Rights, amongst others. The United States suggests public hearings may actually facilitate implementation of the rulings of the DSB, by increasing confidence in the fairness and adequacy of the process. I would like to mention that while the U.S. position is encouraging and positive, the reasons behind it may be motivated by other calculations – as for example, the impact a greater role for American TNCs could have on members of Panels and the Appellate Body, and consequently, on domestic politics.

5.2 Participation

This also links to the question of *amicus briefs* submitted before Courts by a 'friend of the Court' (*amicus curiae*), and the acceptance of *amicus* briefs by third parties, including WTO members who are not parties to a dispute, is highly contested at present. While the system does not really regulate the acceptance of such indirect participation, the Appellate Body, has on some occasions, taken the liberty to accept such interventions as happened in the *Asbestos* Case.

Participation in the legal debates surely contributes to legitimacy of the process. Those affected by the ensuing decisions, directly or indirectly, are aware that the outcome is an informed one. The one problem with the acceptance of *amicus curiae* briefs is that they can delay the whole process, one which is already over-burdened by the complexity of trade rules and domestic procedures.

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[19] See BHALA & ATTARD supra note 18 at 20.

Other issues currently debated are the permanence of panelists, compensation vs. retaliation, sequencing and enforcement of panel and Appellate Body decisions. The underlying point of these reforms is the need for transparency, and this can be done by giving a greater role to the main actors. In a global world, the main actors are no longer only governments; businesses and private citizens are likewise concerned with trade issues.

6. NAFTA

A stronger role for the private investor is found under the NAFTA. It can be easily considered as the most innovative step forward that has changed the nature of international trade law and trade disputes. NAFTA has gone further than WTO in two important ways. The first relates to the dispute settlement mechanism and the right of the private investor to bring a claim against one of the NAFTA parties before an arbitration panel. Much has been written about the infringement on states' sovereignty of such private right of action under Chapter 11 of the NAFTA.

The second point refers to the Side Agreements to the NAFTA, one on Labour and on Environment. It is legitimate to state that the dispute resolution process under these two agreements is the first serious attempt in international trade law to reconcile trade values with social and environmental values.

Article 904 states as follows:

> *'Each Party, may, in accordance with this Agreement, adopt, maintain or apply any standards-related measure, relating to safety, the protection of human, animal or plant life or health, the environment and consumers, and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another Party.'*

One should remember, however, that NAFTA Labour Side Agreement does not establish cross-border harmonization of labour law. Rather, through the dispute resolution procedures found in the Labour Side Agreement, there is hope for better enforcement of the existing laws of each NAFTA party. Under Articles 27 to 29 a complaining Party has a right to bring an enforcement proceeding against any other Party that exhibits a persistent pattern of failure

to enforce its occupational safety and health, child labour or minimum wage technical labour standards.[20]

7. Conclusions

Businesses especially play an important role in redefining and challenging governments' responsibilities in the global marketplace to ensure societal needs. International law has fallen behind global reality because of recent advances in technology, communications, and the expansion of democracy. In this sense, businesses need to be more deeply involved in managing the accountability of human rights standards because the monitoring of rights, establishment of standards, and influence on governments protects individual's rights. TNCs' renewed commitment to human rights will undoubtedly promote fundamental change in international law because of the global community's escalating demands, the interdependence of people, and the enhanced technologies.

The UN Global Compact, launched by Secretary-General Kofi Annan, enlists the global business community, together with civil society and international organizations, to promote human rights, environmental and labour standards. At its initiation, Mr. Annan expressed his concern about a growing practice of linking trade agreements with environmental standards. His view was that this practice works against developing and Least Developed Countries (LDCs) who cannot meet these standards and as a result, will never be on an equal footing at negotiations. I beg to differ on this point. It is true that fifty years ago, when today's wealthy nations were in their development stage, protectionist measures were utilized by these nations to achieve the wealth they have today. Yet, the global scenario today is much different.

The world is today painfully aware of the devastating consequences of pollution, soil erosion and deforestation. Lessons learnt need to be worked into trade agreements, with due attention to the needs of developing and LDCs. Special and differentiated (S&D) treatment can be part of the solution. Longer phase-in periods can be negotiated. But the commitment has to be there, spelled out in clear terms. Businesses have a special role to play.

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[20] See RAJ BHALA supra note 4 at Ch.22

A global marketplace, extended national borders, as well as trade, economic, and environmental issues, all give TNCs a special role. The globalization of business emphasizes the focus on international human rights for one specific reason. The investor examines a country's standards, including human rights and rule of law, when analyzing business opportunities.

The governance battle must involve all relevant actors and all forms of social engagement – businesses, along with civil society, are also relevant actors in the WTO process. Doha has opened the road for serious negotiations on a number of issues including health, agriculture and development. Businesses have a role to play in all these areas. Corporate interests and economic gains need to go hand in hand with the protection of economic, social and cultural rights. Issues that were long considered to be 'outside the domain' of international trade law can no longer be swept aside, and WTO with its 134 Member States, has come to acknowledge this.

OBLIGATIONS OF NON-STATE ACTORS IN RELATION TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE SOUTH AFRICAN CONSTITUTION

DANWOOD MZIKENGE CHIRWA*

1. Introduction

A feature that has earned the South African Constitution international admiration is the inclusion of a detailed catalogue of economic, social and cultural rights in its Bill of Rights. Already, South African courts have taken the lead in developing jurisprudence around these rights.[1]

However, most of the research and litigation has focussed on state obligations with very little attention being paid to the duties of the private sector. That non-state actors have come to occupy central positions in the provision of key services and goods essential for an individual's day-to-day life is beyond dispute (Freeman, 2001; Bergman, 2000, pp. 485). These have included, for example, the privatisation of municipal services, the role of banks in ensuring access to adequate housing, and the role of medical aid schemes and pharmaceutical corporations in facilitating access to health care.

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[1] The justiciability of these rights was confirmed in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South African Constitution* 1996 (4) SA 744 (CC)(*In re Certification*), 1996 (10) BCLR 1253 (CC), at paras. 76–78. Since then judicial enforcement of these rights has generated a number of cases including *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (*Soobramoney*); *Government of the Republic of South Africa and Others v Grootboom* 2000 (11) BCLR 1169 (CC) (*Grootboom*); *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (7) BCLR 652 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC) (*TAC*).

These new phenomena have found concrete expression in South Africa as in many other countries (Jeter, 2001; McDonald & Smith, 2002).

Although there is widespread consensus that the acts or omissions of private actors have serious implications for the enjoyment of economic, social and cultural rights,[2] the precise obligations of private actors in relation to these rights remain largely obscure. This paper de-mystifies the anti-horizontalist approach to human rights and argues that the South African Constitution imposes socio-economic rights obligations on non-state actors. It investigates the nature of these obligations drawing heavily on emerging international and domestic trends in this regard.

2. Application of human rights in the private sphere

2.1 Arguments against horizontal application

According to the traditional liberal tradition, a bill of rights is regarded as a bulwark against state intrusion into an individual's private life.[3] This view maintains a neat distinction between the 'public' sphere and the 'private' sphere. The former consists of a relationship between unequal parties, namely, the citizen and the

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[2] See, e.g., A. Clapham & S. Jerbi 'Categories of corporate complicity in human rights abuses' <http://www.business-humanrights.org/Clapham-Jerbi-paper.htm> (accessed 12 August 2002); Danish Human Rights and Business Project *et al* *Defining the scope of business responsibility for human rights abroad* 2000.

[3] E.g. Van Dijkhorst J in *De Klerk & Another v Du Plessis & others* 1994 (6) BCLR 124 at 130D-131D stated: *'Traditionally bills of rights have been inserted in constitutions to strike a balance between governmental and individual liberty ... It would ... be correct ... to take the view that our Constitution is a conventional constitution unless there are clear indications to the contrary.'* Hogg, commenting on the Canadian Constitution has also noted that *'[i]n deciding that the Charter does not extend to private action, the Supreme Court of Canada has affirmed the normal role of a constitution. A constitution establishes and regulates the institutions of government and it leaves to those institutions the task of ordering the private affairs of the people'*. Quoted in S. Woolman, (1999), 'Application', in M. Chaskalson *et al* (eds.) *Constitutional law of South Africa* Cape Town: Juta & C Ltd, pp. 10-19. Similar statements can be found in *Gardner v Whitaker* 1995 2 SA 672 (E) 683G; J. van der Vyfer, (1994), 'The private sphere in constitutional litigation' *THRHR*, Vol.57, pp. 378, 387-8.

state. The only way of ensuring individual freedom is by building powerful defences in the form of human rights around the individual so that he or she is protected from the heavy hand of the state. By contrast, the private sphere is believed to consist of relationships between free, equal and autonomous parties. The bill of rights is therefore irrelevant to these relationships (Cockrell, 2001, pp. 3A-3; Cockrell, 1993, pp. 227, 227ff).

The second objection to the application of human rights to private actors is premised on democratic principles. This objection posits that if state intrusion into the private sphere is to be permitted, such invasion should be made by the legislature. This branch of government is believed to be more representative of the people and therefore legitimately able to decide on issues relating to non-state actors. Furthermore, the legislature is regarded as being better equipped to decide on complex policy issues. By contrast, the judiciary consists of the unelected elite and lacks institutional competence to deal with conflicting and intricate policy choices. Thus, allowing the bill of rights to apply horizontally would result in an illegitimate shift of power from the legislature to the judiciary. This, the argument goes, would constitute an inexcusable violation of the tenets of modern liberal democracy.

The horizontal application of human rights is also resisted for fear of watering down the effectiveness of fundamental rights as a bulwark against state invasion. Adherents to this view hold that a floodgate of actions would result if a bill of rights were to apply to private relationships. According to Marshall:

> *'characterising every shouting match or every decision with whom to associate as actions that may lead to constitutional liability is to trivialise the meaning of constitutional protection and thereby to weaken the force of a claim of 'true' constitutional violation by overexposure'* (Marshall, 1985, pp. 558, 569).

Relying on this reasoning, the fear is expressed that a backlog of cases that would emerge from suits alleging horizontal violations of human rights would stretch the judiciary to the limit and thus leave the individual vulnerable to the vicissitudes of state power.

2.2 Demystifying 'anti-horizontalism'

The restriction of the application of a bill of rights to vertical relationships is undoubtedly a brainchild of the natural law tradition. Justifying the existence of natural rights in the Age of Enlightment, the natural law theory posited that every individual had 'inalienable' and 'unalterable' rights originating from a metaphysical source, for example, God or human nature (Shestack, 1998, pp. 201). Philosophers of the time portrayed a human being as egoistic and competitive, and therefore deserving of some sort of political governance to secure order in society.[4] For this purpose, people had to negotiate a 'social contract' whereby they pledged allegiance to state authority on condition that the state assumed the responsibility of ensuring their protection and promised to refrain from interfering into their private affairs in the pursuit of their enjoyment of property. As a measure of circumscribing state authority, natural rights constituted a firebreak to protect the individual from the reach of the state's repressive tendencies. The issue of whether social groups, corporations and other commercial entities could wield such power as to impede the enjoyment of rights by individuals or groups escaped the critical mind of the philosophers of the time.[5] In the context of the fledging capitalist market, the preoccupation was with freedom of the individual to enable him to compete in the market.

The above principles shaped and defined the rights that gained a presence in the celebrated English Bill of Rights (1689), the American Declaration of Independence (1776) and the French Declaration on the Rights of Man and Citizens (1789). These historic documents recognised traditional civil and political rights and admitted their

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[4] The social contract theory was coined in by John Locke and refined by Jean-Jacques Rousseau. See J. Locke, (1952), *The second treatise of government*; J. Rousseau, (1950), 'A discourse on the origin of inequality' in *Social contract and discourses* (Translated by GDH Cole) NewYork: Dutton; C.B. Macpherson, (1962), *The political theory of possessive individualism: Hobbes to Locke* Oxford: Oxford University Press.

[5] Cassese has noted for instance that beginning from the signing of the Peace of Westphalia in 1648 throughout the Enlightment Age, emphasis was placed on state autonomy versus the individual. This period was an epoch for state sovereignty and the individual found no place in international relations. See A. Cassese, (1990), *Human rights in a changing world* Cambridge: Polity Press, pp. 11. The vertical form that natural rights took is therefore not surprising.

vertical application only. When the decision was made at the United Nations (U.N.) to create an international bill of rights, it was taken almost as given that human rights only have application as between the individual and the state.[6]

However, there is a growing consensus that understanding human rights from the narrow viewpoint of the natural law/liberal tradition can be misleading or can downgrade the human rights ideology from relevance to irrelevance. Theorists have increasingly come to realise that natural law claims that human rights are 'universal' and 'timeless truths' have served to legitimise changes in political power in specific geopolitical contexts (Shivji, 1989, pp. 45-46; Fields & Narr, 1992, pp. 2-3; Stammers, 1995, pp. 488, 491-492). In present times, for example, the natural law/liberal conception of human rights operates to shield non-state actors from liability for egregious violations of human rights under the façade of vertical application of human rights.

Thus, an alternative understanding of human rights has emerged, and is gaining increasing ground, holding that human rights are social constructs generated by struggles against oppression by real people in various social and historical contexts (Shivji, 1989, pp. 45-46; Fields & Narr, 1992, pp. 4-6; Heyns, 2001, pp. 171). In the words of Stammers, to say that human rights are socially constructed

> *'is to say that ideas and practices in respect of human rights are created, recreated, and instantiated by human actors in particular socio-historical settings and conditions'* (Stammers, 1999, pp. 980, 981).

This perception departs radically from the natural law conception of human rights as pre-existing the state or the individual and is

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[6] The natural law theory was also used as a device for rejecting the expansion of human rights to include civil and political rights. Animated by the Cold War, the West was determined to project on to the world scene the home ideals of human rights and liberal democracy. For a discussion of the controversies surrounding the adoption of the international bill of rights and the role of the Cold War thereon, see M. Craven, (1995), *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* Oxford: Clarendon Press, pp. 6-16; Cassese, *ibid*, 24-45; K. Arambulo, (1999), *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* Oxford: Intersentia, pp. 16-23.

flexible enough to extend the reach of human rights to horizontal relationships. In addition, it leaves sufficient room for the evolution of human rights so that they are kept relevant to changing social, political and economic circumstances.

The argument for the application of human rights to private actors is a typical response to such social changes. Since the end of the Cold War in 1989, the winds of globalisation have swept the world leaving behind 'fragmented centres of power', the exercise of which has had an appreciable effect on the daily lives of millions of people (Clapham, 1993, pp. 137; Du Plessis quoted in Woolman, 1999, pp. 10-47). The unrestricted pursuit of liberalisation and privatisation have seen the private sphere amassing unprecedented authority previously regarded as the exclusive preserve of the state. That horizontal relationships involve equal partners has therefore historically proved to be as fallacious as it was in John Locke's own time.[7] Given this significant power shift, the modern understanding of human rights, as social and historical constructs would strongly support the application of human rights in the private sphere. This is clearly in recognition of the fact that to prioritise circumscription of state power and leave the individual defenceless to the vicious non-state actor would render the very concept of human rights superfluous and virtually nugatory. In this connection, the contention that a floodgate of actions would emerge is premised on the 'fear of the unknown'. It seems to say that violations in the private sphere, no matter how repugnant, can be tolerated as long as state violations can be kept at bay. Besides, it amounts to saying that human rights can only be properly protected if courts handle a manageable caseload. A point that is often missed by opponents of the horizontal application of human rights is that the mere fact that there is a possibility for responsibility for a human rights violation might increase the overall observance of human rights by private actors.

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[7] Equality in the natural law paradigm had limited application. Slaves and women, for instance, did not enjoy any of the rights espoused by the natural law theory. In the words of Aristotle: 'From their birth some are marked out for subjection and others for rule ... It is both natural and advantageous for the body to be governed by the soul, and for the emotional part to be governed by the mind ... Also the male has a different nature than the female, the one being superior and the ruler, the other being inferior and the ruled.' Quoted in R. Gaet, (1993), *Human rights and the limits of critical reason* Aldershot: Dartmouth, pp. 114.

The argument that allowing the horizontal application of human rights would offend the pillars of liberal democracy is equally symptomatic of the limited liberal/natural law conception of human rights, which emphasises the negative obligations of the state regarding civil and political rights. It is no longer tenable to argue that civil and political rights do not engender positive obligations on the state or policy options for their realisation.[8] The question of lack of specificity of certain rights is as valid for civil and political rights as it is for economic, social and cultural rights. It is therefore submitted that the argument that policy issues are supposed to fall within the exclusive province of the legislature is not sacrosanct given that the adjudication of human rights issues by the judiciary naturally entails consideration of policy issues. It follows that the determination of human rights issues involving private relationships cannot be faulted for violating the cardinal principle of democracy. For human rights raise no more meaningful complex policy dilemmas when they apply horizontally than when they apply vertically. If a bill of rights is there to create a 'culture of justification' by those who wield political power (Mureinik, 1994, pp. 31), one would question the wisdom of letting those who wield other forms of power akin to

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[8] In *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (*SERAC Case*), decided at the African Commission's Ordinary Session held from 13 to 27 October 2001, the African Commission confirmed that: *'Internationally accepted ideas of various obligations engendered by human rights indicate that all rights – both civil and political rights and economic, social and cultural – generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.'* For arguments in reply to allegations that civil and political rights entail negative obligations only, see D. Beetham, (1999), *Democracy and human rights* Cambridge: Polity Press, pp. 95-114; S. Liebenberg, (2001), 'The protection of economic and social rights in domestic legal systems' in A Eide *et al* (eds.), *Economic, social and cultural rights* Hague: Kluwer Law International, pp. 55; P. de Vos, (1996), 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution', *South African Journal on Human Rights*, pp. 67; N. Haysom, (1992), 'Constitutionalism, majoritarian democracy and social and economic rights', *South African Journal of Human Rights* 451; Scot and Macklem, (1992), 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution', *University of Pennsylvania Law Review*, Vol 141, pp. 44.

state power or of a nature resulting in violations of individuals' or group rights escape similar accountability.

The upshot of the foregoing discussion points to the fact that arguments against horizontality are misconceived.[9] They largely represent the limited liberal conception of human rights. If the vitality of human rights ideology is to be maintained, it should be responsive to changing circumstances and not spare any form of dominance that demeans human dignity.[10] State and non-state actors alike should bear human rights responsibilities including economic, social and cultural obligations.

3. Emerging trends in international law

International law has historically been concerned with the regulation of inter-state relations. However, it is now settled that this body of law has evolved from recognising states as its ultimate subject to conferring certain rights and duties on supranational institutions such as the United Nations (UN) and the Organisation of African Unity (OAU),[11] and other actors such as insurgent or rebel groups,[12] individuals and

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[9] Clapham has criticised the anti-horizontal application argument using a different route. He insightfully analyses the moral philosophies of human rights including the duty-based, goal-based and rights-based theories and concludes that all of them do not preclude the application of human rights to private relationships. See A. Clapham, (1993), *Human rights in the private sphere* Oxford: Clarendon Press, pp. 138-144.

[10] Christopher Weeramantry, a former judge of the International Court of Justice, has stated emphatically that: *'We must attune the international law of the future to accept that a large variety of new actors have appeared on the international scene, with rights and responsibilities which international law will recognise as inhering in them. The great corporations are a very important group of these new international actors whom the law of the future will recognise as accountable to the international legal system.'* International Council on Human Rights Policy, 2002), *Beyond voluntarism: Human rights and the developing international legal obligations of companies* Versoix: International Council on Human Rights Policy, pp. 76. As will be shown below, the change that Weeramantry envisioned is already underway.

[11] See *Reparations for Injuries Case* ICJ Reports, 1949, pp. 149.

[12] E.g., article 3 common to the Geneva Conventions unequivocally enjoins insurgent groups and state armies to protect prisoners and to respect prohibitions relating to attacks of civilians, hostage taking, terrorist attacks or the use of starvation as a mode of combat. The Optional Protocol to the Convention on the Rights of the

corporations.[13] The emerging jurisprudence on non-state actor responsibility for human rights establishes two kinds of accountability, one direct and the other, indirect. The focus in this paper will be on those norms touching on economic, social and cultural rights.

3.1 Direct obligations of non-state actors

The Universal Declaration of Human Rights (the Declaration) is internationally acknowledged as forming the bedrock of international human rights. It is remarkable to note that the Declaration explicitly imposes direct human rights obligations on private actors. According to the preamble:

> *'... every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...'* (emphasis supplied)

The obligations that the Declaration imposes on every individual and every organ of society are not restricted to a particular category of rights. The Declaration espouses not only civil and political rights but economic, social and cultural rights as well. It is also clear from the reference to 'progressive measures' that individuals and any organ of society may have to take positive steps in order to discharge those obligations. Neither 'organ of state' nor 'individual' can be said to exclude corporations. In the carefully chosen words of Henkin, a leading scholar in international law:

> *'Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all'* (Quoted in International Council on Human Rights, 2002, pp. 58).

Child on the Involvement of Children in Armed Conflict, adopted by the UN General Assembly on 16 November 2000 also places an obligation on armed groups including rebel forces to prevent children from participating in armed conflict. It also prohibits the recruitment of children into their armed groups.

[13] See, e.g., *Autronic AG v Switzerland*, Eur. Ct. H.R. Series A. 178 (1990); 12 (1990) E.H.R.R. 485, para 47.

International law norms establishing direct responsibilities for human rights on private actors have increased in volume since the adoption of the Declaration. The African Charter on Human and People's Rights (African Charter),[14] the African Charter on the Rights and Welfare of the Child (African Children's Charter)[15] and the American Declaration of the Rights and Duties of Man adopted in 1948, for example, impose duties directly on such subjects as individuals, children, parents and communities. Some of these duties relate to economic, social and cultural rights. These obligations are not exclusively negative in nature but also require positive steps of the relevant duty holders.

The preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR) expressly declares that the individual is under 'a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant'. The Committee on Economic, Social and Cultural Rights has in its recent general comments explicitly stated that non-state actors have obligations for the realisation of economic, social and cultural rights entrenched in the ICESCR. For example, with respect to the right to food, it has stated that:

> *'While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organisations, civil society organisations, as well as the private business sector – have responsibilities in the realisation of the right to adequate food ...'* (para 20 of General Comment No 12 'The right to adequate food (Art 11)' 12 May 1999).

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[14] Adopted by the OAU on 27 June 1981 and entered into force on 21 October 1986. Articles 27 to 29 impose duties on every individual to work and pay taxes, preserve positive African cultural values, to respect parents, to preserve the family, etc.

[15] Adopted by the OAU on 11 July 1990 and entered into force on 29 November 1999. Article 20 imposes the primary responsibility on parents regarding the upbringing and development of the child including the duty to secure conditions of living necessary to the child's development. Article 31 imposes obligations on the child to work for the cohesion of the family, assist parents in case of need, serve the national community, to preserve and strengthen social and national solidarity, to preserve and strengthen African cultural values.

The Committee has made similar remarks with regard to the right to health (Para 42 of General Comment No 14 'The right to the highest attainable standard of health (Art 12)', 4 July 2000). Read in the light of the preamble referred to above, it could be argued that the nature of the obligations of private actors alluded to by the Committee go beyond the duty to respect. They include positive obligations.

The statements of the Committee cited above find staunch support among several international declarations. These include the UN Declaration on the Elimination of All Forms of Racial Discrimination,[16] the UN Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief,[17] the Rio Declaration on Environment and Development,[18] the Beijing Declaration and Platform for Action,[19] and the Copenhagen Declaration on Social Development and Programme of Action.[20] These

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[16] Adopted on 20 November 1963 by UN General Assembly Resolution 1904 (XVIII). Art 2 thereof stipulates that *'No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.'*

[17] Adopted by the UN General Assembly Resolution 36/55 on 25 November 1981. Article 2(1) of the Declaration states prohibits States, institutions, groups of persons, or persons from discrimination against people on the basis on their religion or beliefs.

[18] Adopted by the UN Conference on Environment and Development, Rio de Janeiro on 13 June 1992, UN Doc: A/CONF.151.26 (Vol.1) (1992).

[19] Adopted by the Fourth World Conference on Women, Beijing, 4-15 September 1995. Among other things the Declaration places obligations on the private sector and employers regarding the prevention of violence against women, economic empowerment of women and the promotion of harmonisation between family responsibilities and work. See paras 125, 126, 177 and 180.

[20] Adopted by the World Summit for Social Development, Copenhagen on 12 March 1995, UN Doc: A/CONF.166/9 (1995). Para 12 of this Declaration states that economic growth and market forces conducive to social development requires the encouragement of *'national and transnational corporations to operate in a framework of respect for the environment ... with proper consideration for the social and cultural impact of their activities'*. Paragraph 45 states that *'[P]articular efforts by the public and private sectors are required in all spheres of employment policy to ensure gender equality, equal opportunity and non-discrimination on the basis of race/ethnic group, religion, age, health and disability, and with full respect for applicable international instruments.'*

declarations speak in unison that private actors have both negative and positive duties in respect of socio-economic rights.

The International Labour Organisation (ILO) has also gone a long way towards conferring direct obligations relating to labour rights on private actors. This has principally been accomplished through the adoption of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[21] The preamble states:

> *'The Governing Body of the International Labour Office .... [h]ereby approves the following Declaration ... and invites governments of States Members of the ILO, the employers' and workers' organisations concerned and the multinational enterprises operating in their territories to observe the principles embodied therein'.*

Paragraph 8 of the Declaration proceeds:

> *'All the parties concerned by this Declaration ... should respect the Universal Declaration of Human Rights and the Corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organisation.'*

Among other things, the Tripartite Declaration calls upon multinational companies to take positive measures such as creating employment opportunities, promoting equality, ensuring security of employment, providing favourable work conditions and workplace safety and protecting freedom of association and the right to organise in host-countries. Although not binding and lacking in means of enforcement, its strength lies in the fact that governments, trade unions and employer organisations from all over the world have adopted it.

The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises[22] also recognise

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[21] Adopted by the Governing Body of the ILO at the 20th Session in Geneva, November 1977.

[22] The OECD is an organisation comprising of 30 'Western countries' in a geopolitical sense. Its chief objective is the promotion of policies aimed at securing the highest sustainable economic growth for its members and expansion of free trade and economy globally. The Declaration aforementioned was first adopted in 1976 to protect the rights of investors. Due to enormous criticisms that these Guidelines were tilted in favour of the interests of multinational enterprises, Ministers from the OECD members revised these Guidelines in 2000.

that private actors have direct responsibilities regarding the realisation of economic, social and cultural rights. These Guidelines set out standards of practice for multinationals in the areas of information disclosure, workers rights and industrial relations, environmental protection, bribery and consumer interests, science and technology, competition and tax payment. Significantly, as revised in 2000, these Guidelines expressly state that:

> *'[Enterprises should] respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'* (para 11.2).

Not only do these standards entail obligations on multinational companies to refrain from interfering with the enjoyment of socio-economic rights but they also require of them positive measures in this regard.

Neither the ILO Tripartite Declaration nor the OECD Guidelines are legally binding. However, they may constitute evidence of an emerging customary rule that private actors have direct obligations engendered by economic, social and cultural rights.

Companies have also increasingly adopted voluntary codes of conduct that express commitment to respecting human rights including economic, social and cultural rights.[23] Although voluntary codes of conduct are obviously non-binding in nature, they constitute an acknowledgement on the part of the private sector that they are bound by human rights. Pledges made by these voluntary codes

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[23] Corporate codes of conduct are policy statements that define ethical standards for companies. Corporations voluntarily develop such codes to inform consumers about the principles that they follow in the production of the goods and services they manufacture or sell. Among the most popular codes include the Sullivan Principles, developed by the Reverend Leon H. Sullivan in 1977 and aimed at putting pressure on US corporations doing business in South Africa during the apartheid era to promote racial equality in employment; the McBride Principles, developed in 1984 by the Irish National Caucus to address allegations of anti-Catholic discrimination in employment in Northern Ireland; the Slepak Principles, issued in 1987 by the Slepak Foundation and aimed at U.S. corporations doing business in the former Soviet Union; and the Model Business Principles released by Bill Clinton, the former President of the US in 1995. See generally L. Saunders, (2001), 'Rich and rare the gems they wear: Holding De Beers accountable for trading conflict diamonds', *Fordham International Law Journal*, Vol. 24, pp. 1402.

oscillate between blanket commitments to implementing the Universal Declaration and specific promises according to the groups with which they have direct connections such as employees, sub-contractors, suppliers and host governments. Generally, they make specific commitments to respect for labour rights and non-discrimination, the protection of the environment and consultation with local communities affected by their operations (International Council on Human Rights Policy, 2002, pp. 70). Implicit in these obligations are the duty to respect, protect and promote these rights. It is also important to note that the UN is in the process of adopting a code of conduct for multinational corporations. Like other codes, the Draft Human Rights Code of Conduct for Companies (E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1, 25 May 2000) imposes several obligations on companies relating to economic, social and cultural rights.

Thus far, international criminal law has been foremost in enforcing the direct human rights obligations of non-state actors.[24] Although most international offences relate to gross violations of civil and political rights, some, such as genocide,[25] grave breaches of the Geneva Conventions[26] and crimes against humanity,[27] involve

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[24] The creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, in 1993 and 1994 respectively and the International Criminal Court has firmly established that private actors have human rights duties. 77 States had ratified the Rome Statute of the ICC by 20 August 2002. In terms of article 28 of the Statute, the ICC became operational on 1 July 2002.

[25] This offence includes acts committed with intent to destroy in whole or in part a national, ethnic, racial or religious group. Such acts include deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in part or in whole, imposing measures intended to prevent births within a group and forcibly transferring children of a group to another group. See art 5 of the ICTY Statute and art 2 of the ICTR Statute.

[26] This crime involves such acts as devastation of property, plunder of public or private property, and destruction or wilful damage to institutions dedicated to religion or education. See Common art 3 of the Geneva Conventions.

[27] Crimes against humanity encompass such acts as extermination of a population, forced and arbitrary displacement of people, enforced prostitution, forced pregnancy and enforced sterilisation. In *Prosecutor v Baskic*, Judgment, IT-95-14-T, 3 March 2000, destruction of property was considered to form part of persecution if it consists of the destruction of towns, villages and other public and private properties belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily.

infringements of economic, social and cultural rights. Thus, these offences are so defined as to criminalise conduct that results in violations of these rights as well.[28] Certain company officers such as company directors may therefore be individually responsible for international crimes involving violations of economic, social and cultural rights despite the fact that corporate liability for international crimes remains a contested issue.[29] Apart from criminal responsibility, international law has not yet developed other enforcement mechanisms for direct obligations of private actors.

However, it is clear from the foregoing that international law recognises private actors as bearers of duties implicit in economic, social and cultural rights. These precise obligations have not yet developed but the current practice points towards the growing clarification of such obligations. What also emerges from the jurisprudence discussed above is that contemporary international law recognises that private actors have both negative and positive obligations pertaining to economic, social and cultural rights.

3.2 Indirect obligations

As noted earlier, international human rights law has principally been concerned with interstate relations or state/citizen relations. International legal norms will therefore primarily impose human rights obligations on the state. One level of these obligations requires the state to take legislative and other measures to protect citizens or individuals under its jurisdiction from the harmful acts of others. Through the discharge of this duty, private actors become indirectly responsible for human rights.

A vast range of international and regional covenants expressly require States to regulate the conduct of non-state actors so that they do not violate economic, social and cultural rights. Article 2(e)

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[28] See n 45-47 above.

[29] For instance, the debate during the drafting of the Rome Statute failed to yield a consensus on the issue with the result that corporate liability was excluded from the Statute. See A. Clapham (2000), 'The question of jurisdiction under international criminal law over legal persons: Lessons from the Rome Conference on an International Criminal Court' in M.T. Kamminga and S. Zia-Zarifi (eds.) *Liability of multinational corporations under international law* The Hague: Kluwer Law International, pp. 139-195.

of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[30] for example, places an obligation on states 'to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise'. To clarify this duty, the Committee in charge of the supervision of the CEDAW has emphatically stated that:

> *'Discrimination under the Convention is not restricted to action by or on behalf of Governments ... Under general international law and specific human rights covenants, States may also be responsible for private acts ...'*[31]

Likewise, the Convention on the Elimination of All Forms of Racial Discrimination (CERD)[32] enjoins states to 'prohibit and bring to an end ... racial discrimination by any persons, group or organisation' (art 2(1)(d)). Furthermore, although the Convention on the Rights of the Child (CRC)[33] and the African Children's Charter are premised on the understanding that parents or guardians have the primary responsibility for the upbringing of children, both of them require states to ensure that children are protected from acts committed in the private sphere.[34]

The Committee on Economic, Social and Cultural Rights has also emphasised the indirect obligations of non-state actors with regard to the enjoyment of economic, social and cultural rights. For instance, it has underlined that State parties 'should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food' (General Comment No 14, op. cit., para 27). Thus, 'failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of

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[30] Adopted by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981.

[31] General Comment 19, 'Violence against women', 30 January 1992, UN Doc: A/47/38, para 9.

[32] Adopted by the UN General Assembly on 21 December 1965 and entered into force on 4 January 1969.

[33] Adopted by the UN General Assembly on 20 November 1989 and entered into force on 2 September 1990.

[34] For example both the CRC and the African Children's Charter obligate States to regulate childcare institutions, protect children from child abuse, child labour and violence, and proscribe harmful traditional practices.

others' amounts to a dereliction of duty by the state engendered by the right to food (General Comment No 14, op. cit., para 19).

The issue of indirect responsibility for economic, social and cultural rights by private actors did not escape the minds of the international experts who drew up the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights adopted in 1997. Accordingly, they summed up the duty of States *vis a vis* private actors as follows:

> *'The obligation to protect includes the States responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights'* (para 18; also SERAC case para 57).[35]

Unlike direct obligations, it is arguable that international law has sufficient mechanisms for monitoring the implementation of indirect obligations of non-state actors. The state reporting procedure is obviously one of those mechanisms.[36] However, the judicial enforcement mechanism has proved to be an important supervisory mechanism. Thus, the Human Rights Committee, although charged with the monitoring of civil and political rights under the ICCPR, has imposed liability on states for failure to protect citizens from acts of private actors resulting in infringements of the negative obligation generated by economic, social and cultural rights using the family protection and privacy clause. In *Hopu and Bessert v France*,[37] for example, a local community from Tahiti lodged a complaint with the Committee against France, alleging that the construction of a hotel by a private business, Sociètè Hôtelière

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[35] See para 18. The African Commission has made a similar declaration in the *SERAC Case* (n 20 above) para 57.

[36] For example, the Committee on the Rights of the Child, whilst examining the Report of the Democratic Republic of Congo, noted and emphasised the *'role of numerous actors in the conflict, including the armed forces of several States... armed groups and numerous private companies'* in the armed conflict in the Democratic Republic of Congo as having contributed to the poor implementation of the rights of the child. See Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of Congo, 27th Session, UN Doc: CRC/C/15/Add.153, June 2001, para 6.

[37] Report of the Human Rights Committee, Vol., II, U.N. Doc. A/52/40, pp. 70-83.

RIVNAC, had encroached upon their tribal lands including their ancient burial ground and a traditional fishing ground that was a major source of subsistence. The Committee conceded that:

> *'The construction of [the] hotel complex ... did interfere with the right to family and privacy. The State party has not shown that ...[it] duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of [the] hotel complex'* (para 10.3).

Judicial enforcement of indirect obligations inherent in economic, social and cultural rights has also been relied upon at the regional level. The European Court of Human Rights, for example, has also relied heavily on the family protection and privacy clause of the European Convention for the Protection of Human Rights and Fundamental Freedoms[38] for holding non-state actors indirectly responsible for violations of economic, social and cultural rights. In *López Ostra v Spain*,[39] for instance, a complaint against Spain alleged that a waste treatment plant in a town called Lorca in Spain was deleterious to the neighbouring environment. The European Court determined that

> *'Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health'* (para 51).

Thus, Spain was held responsible for failing to regulate industrial pollution.[40] This case provides an instance of enforcement of indirect positive obligations of non-state actors.

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[38] Adopted by the Council of Europe on 4 November 1950 and entered into force on 3 September 1953.

[39] Judgment of 9 December 1994, Publications of the European Court of Human Rights, Series A, No. 303-C.

[40] *Guerra and Another v Italy*, Judgment of 19 February 1998, European Court of Human Rights, Reports of Judgments and Decisions 1998-1, No. 64, another case brought before the European Court, concerned toxic emissions from a fertiliser plant. These emissions were a living danger to many families around the factory. The wastes consisted of inflammable gas and such toxic substances as arsenic trioxide. At one point, 120 people were hospitalised due to an explosion that had

The Inter-American Court of Human Rights has also found states liable for infringements of economic, social and cultural rights by private actors. In *Yanomami v Brazil*,[41] for example, Brazil was found liable for failure to prevent settlers who had moved *en mass* to occupy certain areas in the Brazilian Amazon, which were occupied by various indigenous groups including the Yanomami. Apart from physical violence, this occupation disrupted the communal subsistence living of the indigenous groups and introduced new diseases to them, which caused them serious harm including death. The Court found Brazil to be in breach of the right to life and the right to health. By implication, the settlers had an obligation to refrain from interfering with the indigenous groups' enjoyment of the rights to food, life and health.

Similarly, the African regional human rights system has used its communication procedure to enforce compliance with indirect obligations of private actors. In the *SERAC Case* (above), the plaintiffs complained, among other things that the state-owned Nigerian National Company and Shell Petroleum Development Corporation (in which the former had a majority of shares) had been depositing toxic wastes into the local environment and waterways in Ogoniland in Nigeria without putting in place necessary facilities to prevent the wastes from spilling into villages. As a result, water, soil and air contamination brought about serious short-term and long-term health problems such as skin infections, gastrointestinal and respiratory ailments, increased cancer, and neurological and reproductive complications. Further allegations were made relating to repressive measures such as the destruction of food sources, homes and villages by the military government aimed at quelling opposition to the oil companies' activities. The African Commission determined that:

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occurred because of arsenic poison from the plant's waste. Again, the European Court found Italy liable for failure to discharge the duty to protect the right to private and family life. The Court stated that in such a case 'it need only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their and family as guaranteed by Article 8'.

[41] Res. No. 12/85, Case 7615, reported in *Annual Report of the Inter-American Commission on Human Rights*, 1985.

> *'Governments have a duty to protect their citizens, not only through appropriate legislation but also by protecting them from damaging acts that may be perpetrated by private parties ... This duty calls for positive action on the part of governments in fulfilling their obligations under human rights instruments'* (para 57).

It was therefore held that Nigeria was responsible for violations by the oil companies in addition to those that had been committed by the government itself. From the nature of the allegations against the oil companies, it is clear that the companies were in violation of their positive duties to ensure that their operations did not result in health problems and environmental damage.

All the human rights systems referred to above follow the due diligence test developed by the Inter-American Court as an appropriate test for determining whether the state should be liable for acts of private actors. By this test, the Court considers whether the state took reasonable or serious steps to prevent or respond to a violation by a private actor, including investigation and provision of remedies such as compensation. A typical example is to be found in the *Velasquez Rodriguez case*,[42] where Manfredo Velasquez Rodriguez was kidnapped, forcibly disappeared and probably killed by the Honduran army. The Court stated that:

> *'An illegal act which violates human rights and which is not directly imputable to a State can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention'* (para 172).

It was held in this case that even if the attackers were private actors, the State was liable because of its failure to take steps to find the victim or perpetrators or to provide any remedy to the victim's family. Several supervisory bodies and various declarations have also acknowledged the usefulness of this test.[43]

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[42] Judgment of 29 July 1988, Inter-American Court on Human Rights, Series C, No. 4 (1998).

[43] E.g. art 4(c) of the UN Declaration on the Elimination of Violence Against Women obliges States to *[E]xercise due diligence to prevent, investigate and, in accordance*

The above demonstrates that all systems of human rights recognise that private actors have obligations to discharge in respect of economic, social and cultural rights. These obligations are enforceable indirectly through the State. In turn, the state is obliged to ensure that non-state actors honour their obligations. The discussion of the cases brought against states has revealed that states have been held liable for violations of both negative and positive obligations of non-state actors.

4. Emerging domestic trends

As the preceding section has shown, States are enjoined to ensure that private actors perform the obligations that are implicit in economic, social and cultural rights. Failure to do so gives rise to state liability in international law for acts or omissions of private actors. Disappointingly, domestic jurisdictions have rarely recognised obligations of non-state actors embodied in economic, social and cultural rights. This is probably because these rights have gained recognition only recently.

4.1 African constitutions

In Africa, most municipal constitutions adopted after the end of the Cold War have entrenched economic, social and cultural rights side by side with civil and political rights.[44] Some of these have

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with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.' Para 9 of General Comment 19 on Violence Against Women, 30 January 1992, UN Doc: A/47/38, states that: *'Under general international law and specific human rights standards, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.'*

[44] Amongst those with the most elaborate provisions in this regard are the 1990 Constitution of Cape Verde, the 1996 Constitution of South Africa, the 1992 Constitution of Madagascar, the 1990 Constitution of Saõ Tomé and Principe, and the 1993 Constitution of Seychelles. There are several other African Constitutions with at least six economic, social and cultural rights. They include the 1991 Constitution of Burkina Faso, the 1990 Constitution of Benin, the 1992 Constitution of Burundi, the 1992 Constitution of Togo, the 1992 Constitution of Mali, the 1991 Constitution of Gabon and the 1992 Constitution of Niger. Others have a number of economic social and cultural rights in the bill of rights but they

gone further to admit the horizontal application of their bills of rights. Apart from the South African Constitution, the 1994 Constitution of Malawi, the 1996 Constitution of the Gambia, the 1990 Constitution of Cape Verde, the 1992 Constitution of Ghana and the 1992 Constitution of Mali are good examples in this regard. It is to be expected that litigation around these constitutions will contribute to the development of more specific obligations of non-state actors regarding economic, social and cultural rights.

4.2 The Alien Tort Claims Act

In the USA, the Alien Tort Claims Act (the Act)[45] provides a basis for accountability of private actors for human rights. This Act, which remained largely unused for almost two centuries, only gained

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also have directive principles of state policy in a separate chapter of the constitution. These include the 1992 Constitution of Ghana, the 1994 Constitution of Malawi, and the 1990 Constitution of Namibia. Constitutions adopted after 1990 with less than 4 economic, social and cultural rights include the 1991 Constitution of Rwanda, the 1991 Constitution of Mauritania, the 1992 Constitution of Morocco, and the 1992 Constitution of Djibouti, 1996 Constitution of Gambia. Others have directive principles of state policy and a property guarantee only. The 1999 Constitution of Nigeria and the 1991 Constitution of Sierra Leone are examples in this respect. See D.M. Chirwa, (2001), 'An overview of the impact of the international covenant on economic, social and cultural rights in Africa' available at:
<http://www.communitylawcentre.org.za/ser/docs_2002/Impact_of_Socio-economic_rights_in_Africa.doc> (accessed on 14 August 2002).

[45] This Act was enacted in 1789 as part of the Judiciary Act. Strictly speaking, the Act makes no express reference to legal rights in its text. Neither did its original form make any assertion about rights.[45] However, the key provision that has elicited increasing international attention stipulates that: *'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'* The fact the Act remained dormant for almost two centuries has made the identification of the original purpose of the Act difficult. The little evidence available suggests that it was intended to give power to federal courts to preside over torts involving the interpretation of international law. It was believed at that time that any government that wished to be regarded as a serious international partner would commit itself to the law of nations. It has also been suggested that the Act was intended to cover transitory or transboundary torts. See R.G. Steinhardt, 'Litigating corporate responsibility':
<http://www.globaldimensions.net/articles/cr/steinhardt.html> (accessed 21 July 2002).

relevance in 1980 when it was invoked to redress gross human rights abuses by a state official in the case of *Filartiga v Pena Irala* (630 F.2d 886, 887). Since then, the Act has generated a considerable number of suits alleging violations of international human rights by state and non-state actors committed outside America.

The jurisprudence that has evolved under this Act establishes two categories of acts for which a private actor may be held directly responsible. The first relates to liability for acts for which state complicity is a prerequisite. These include destruction of property, arbitrary detention and torture [*Kadic v Kuradzic* 70 F. 3d 232 (2d Cir. 1995)]. The other does not require state connivance because the acts falling in this category are such that they may be committed without the involvement of the State. These include, genocide, crimes against humanity, war crimes, economic plunder and mistreatment of civilians and prisoners of war [*Kadic v Kuradzic* 70 F. 3d 232 (2d Cir. 1995); Steinhard, 2002].

Thus far, most of cases brought under the Act have alleged gross violations of civil and political rights or international humanitarian law. However, a few have contained references to violations of economic, social and cultural rights although no finding of such violations has been made. The case of *Doe v Unocal* [963 F. Supp. 880 (C.D. Cal, 1997)], for example, included allegations concerning a violation of the duty to respect socio-economic rights. Farmers from Myanmar sued Unocal in connection with the joint venture of gas exploitation that the defendant corporation was involved in with the government of Myanmar. In order to clear the way for the pipeline, the government forcibly relocated villages, displaced local inhabitants from their homelands, and tortured and forced people to work on the project. It was therefore argued that Unocal was liable for these violations since it funded the repressive regime and the project with full knowledge of the abuses and thus benefited from the violations. The Court held that Unocal was not sufficiently linked to the state to establish joint action in the violations alleged. Although forced labour was considered not to require state complicity for a non-state actor to be held liable, the Court refused to hold Unocal liable for it on the mere basis that it had knowledge that government was engaging in forced labour. Unocal could have been found liable if evidence had been led of active steps in furtherance of such conduct or establishing participation of the private actor in the acts forming the basis of the suit.

Again, *Sequihu v Texaco, Inc.* [847 F.Supp. 61 (S.D. Tex. 1994)], plaintiffs alleged massive environmental damage caused by the defendant corporation's oil exploitation. The wastes from oil drilling operations had resulted in the illness and death of local people and forced local communities to relocate without compensation. The case was dismissed for want of *forum non conveniens*. However, the facts indicate that the thrust of the case revolved around the alleged breach by the corporation of the positive duty to protect the environment or to prevent wastes from its oil plant from spilling into the communities.

Wiwa v Royal Dutch Petroleum Co[46] also arose from environmental pollution by oil companies that resulted in various health hazards in Ogoniland in Nigeria. The main case brought under the Act seeks to establish responsibility of the oil companies for instigating, orchestrating, planning and facilitating, among other things, summary executions, crimes against humanity, torture, cruel, inhuman and degrading treatment; arbitrary arrest and detention; and violations of the right to peaceful assembly and association by the Nigerian government. However, the facts grounding this suit also reveal gross violations of economic, social and cultural rights. The violations of civil and political rights occurred following protests by the Ogoni people against environmental pollution by the oil companies, which caused illness to people and damage to the soil. It is arguable therefore that the protests served to underscore the fact that the oil companies were under a duty to take positive measures implicit in the rights to health and healthy environment, food and property (land) to prevent pollution of the environment. In suppressing protests, the duty to respect socio-economic rights was also breached in that the people's houses and food were destroyed, and livestock killed.

4.3 The duty of care principle

Similar litigation is taking place in other countries such as Canada, Australia, England and Spain (Ward, 2002; Shelton, 1999, pp. 89-

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[46] 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001). Discussed in AX Fellmeth '*Wiwa v Royal Dutch Petroleum Co.*: A new standard for the enforcement of international law in US Courts' (2002) 5 *Yale Human Rights and Development Law Journal* 241.

90; Report of IRENE seminar on corporate liability and workers rights, 2000). In England and Australia, the foundation of such actions has been the 'duty of care' principle. This involves a consideration of whether the private actor had a duty of care to the plaintiffs, whether it breached that duty, and whether the breach caused the injury complained of.[47] In a case alleging environmental pollution by a company, which resulted in various health hazards, an Australian Court held:

> *'To my mind, it is not at all improbable to suppose that the law imposes a duty of care in favour of persons who may use the water downstream as a food source or for a livelihood. The magnitude of the potential danger to the environment, which may be caused by such conduct, imposes a heavy responsibility on the defendant in such a case ... in terms of the ambit of the duty of care.'*[48]

The 'heavy responsibility' referred to in the above dictum seems to imply not only the negative obligation to refrain from polluting water but also positive duties to prevent the pollution.

The above discussion clearly establishes that municipal legal systems are increasingly acknowledging the role of non-state actors

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[47] *Connelly v RTZ Corp Plc* [1997] 4 All ER 335 (H.L.). In this case for example, the plaintiff, a Scottish man, brought a suit in the United Kingdom alleging that he had contracted throat cancer because of the negligence of the defendant corporation. The plaintiff had worked for the defendant outside the UK in several mining operations including a uranium mine run by its subsidiaries in Namibia. The defendant sought to have the action dismissed for want of *forum non conveniens* arguing that the courts in Namibia were more suited to deal with the case. The House of Lords rejected this application on the ground that it was impossible for the plaintiff to maintain a suit in Namibia, as there was no legal aid in his favour. Other cases include *Lubbe & Others v Cape Plc* Judgment of 29 November 1999 (Court of Appeal, Civil Division), (unreported). This case contains allegations against the defendant corporation for breach of the duty of care following the health hazards caused by exposure to asbestos in South Africa. The House of Lords held that the case could properly be maintained in the UK.

[48] *Dagi: Shackles; Ambetu; Maun & Others v The Broken Hill Proprietary Company Ltd & Ok Tedi Mining Ltd* (No. 2) [1997] 1 Victoria Reports [VR] 428, 441. Discussed in C Scott, (2001), 'Multinational enterprises and emergent jurisprudence on violations of economic, social and cultural rights' in A. Aide *et al* (eds.) *Economic, social and cultural rights: A textbook* Dordrecht: Martinus Nijhoff Publishers, 2001, 563, 591-592.

in the realisation of socio-economic rights. The cases discussed have dealt with liability for violations of negative and positive duties engendered by such rights as food, health, healthy environment, shelter and housing by non-state actors. They also demonstrate that even in countries where constitutions do not provide for horizontal operation of a bill of rights, courts have been innovative enough to ensure that private actors do not escape accountability for their human rights obligations.

5. Non-state actors' obligations under the South African constitution

5.1 Horizontal application of the Constitution

The 1993 Constitution, the forerunner to the 1996 Constitution (the Constitution), did not contain clear provisions on the applicability of the Bill of Rights to horizontal relationships. Section 7(1) of that Constitution provided that the Bill of Rights bound 'all legislative and executive organs of the state at all levels of government'. The omission of 'judiciary' from this section generated mixed judicial pronouncements on whether the Bill had horizontal effect. Some admitted that the Bill had horizontal reach[49] while others held the opposite view.[50] A few more opted for the position that at least some rights had horizontal reach.[51] The remaining decisions were ambivalent.[52]

The Constitutional Court laid to rest this judicial scuffle in *Du Plessis v De Clerk* [1996 3 SA 850 (CC)]. The majority of the Court took the view that the interim Bill of Rights did not lend itself to direct horizontal application. Rather, it was stated that, as regards

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[49] E.g., *Mandela v Falati* 1995 1 SA 251 (W); *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B).

[50] E.g., *Potgieter v Kilian* 1995 11 BCLR 1498 (N); *De Clerk v Du Plessis* 1995 2 SA 40 (T); *Holomisa v Argus Newspaper Ltd* 1996 2 SA 588 (W) 596-597; *Roux v Die Meester* 1997 1 SA 817 (T) 824H-I.

[51] *Gardiner v Whitaker* 1995 2 SA 672 (E) 680ff; *Motala v University of Natal* 1995 3 BCLR 374 (D) 381-382.

[52] *Kalla v The Master* 1995 1 SA 261 (T) 270E; *Knox D'Arcy Ltd v Shaw* 1996 2 SA 651 (W) 657G; *O v O* 1995 4 SA 482 (W) 486A-C 490B-F; *Knox D'Arcy Ltd v Jamieson* 1995 2 SA 579 (W) 603D-F; *Waltons Stationery Co (Edms) Bpk v Fourie* 1994 4 SA 507 (O); *Kotze & Genis (Edms) Bpk v Portgieter* 1995 3 SA 783 (C).

private parties, the Bill was relevant indirectly and could only be consulted in the development and application of common law. However, Woolman and Davis (1996) have argued convincingly that, even on the basis of the provisions of the interim Constitution, the Constitutional Court should have held that the Bill had direct horizontal effect.[53]

The 1996 Constitution is one of the few constitutions in the world that goes beyond giving express recognition to economic, social and cultural rights to providing for the horizontal application of its Bill of Rights. Section 8 of the Constitution provides:

> *(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*
> *(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*
> *(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court:*
> *(a) in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to give effect to that right; and*
> *(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).*
> *(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.*

This section is markedly different from the interim Constitution. It explicitly states that that a provision of the Bill of Rights binds a natural and juristic person. It goes further to recognise that juristic

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[53] Some still hold that even under the Final Constitution horizontal application of human rights is unacceptable. See, e.g., C. Sprigman & M. Osborne, (1999), '*Du Plessis* is *not* dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes', *South African Journal on Human Rights*, Vol. 15, pp. 25.

persons have certain rights. This section does not specify any category of rights for which the horizontal application is possible. The nature of each right and the duty it embodies are the ultimate determinants. There is also no distinction as to which private actors are amenable to accountability for human rights. These features comply perfectly with the emerging international and domestic norms regarding private actor responsibilities for human rights.

5.2 Applicability of socio-economic rights to private actors

Despite these clear provisions, suggestions that section 8 permits the application of economic, social and cultural rights in the private sphere have sparked spirited resistance. Cockrell (2001), for instance, has presented the following argument:

> *'(C)onsider social-welfare right such as the right to have access to sufficient food and water. As a matter of political morality, it is submitted that it would be wholly inappropriate for this right to be interpreted as imposing positive burdens on private agencies. Whatever view we may adopt regarding the existence of moral duties which require the rich to assist the poor, it would be intolerably far-reaching to endorse the proposition that rich persons have a constitutional duty to provide food to the impoverished... On the basis of this reasoning, it might be concluded that social welfare rights will, in general, not impose positive duties on private agencies'* (pp. 3A-13).

Likewise, Woolman (1999) has stated that 'the rights to property, housing, health care, food, water, social security, education, just administrative action and the rights of children' contain wording which limit the ambit of the rights to the vertical relationship (pp. 10-59). Cheadle and Davis (1996) have expressed similar sentiments.[54]

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[54] However, Liebenberg has more than once attempted to rebuff these assertions. See S. Liebenberg, (1999), 'Socio-economic rights' in M Chaskalson *et al* (eds.) *Constitutional Law of South Africa* Cape Town: Juta & C Ltd, pp. 41-45; S Liebenberg, (2002), 'South Africa's evolving jurisprudence on economic, social and cultural rights' <http://www.comunitylawcentre.org.za/ser/ docs_2002/Socio-economic_rights_jurisprudence.doc> (accessed on 15 August 2002).

The basis of their objection lies in the broad characterisation of socio-economic rights as entitlements that flow from a social democratic vision of the role of the state. This vision views the state as the sole provider of the basic services and goods necessary to facilitate basic equality of the citizenry, which in turn, is essential to achieving equal and fair participation in democratic processes. This duty is generally considered extremely onerous. Thus, they argue, the state is better placed to achieve these rights on a progressive basis.

However, the fact that socio-economic rights generally serve as a vehicle for facilitating social equality and that the State is the key player in securing that goal cannot be used to downplay the role that other actors play towards this bigger vision. Various socio-economic rights embodying different kinds of duties contribute to this ultimate objective in different ways. Such duties may not be as onerous as the overall duty to ensure social equality. In addition, the case for the application of socio-economic rights to the private sphere does not state that all private actors should hold same responsibilities for all socio-economic rights. Rather, it holds that the full enjoyment of certain rights requires that various actors discharge various levels of duty. For example, children's socio-economic rights can be realised better by concerted efforts of parents and the state.

Above all, this paper has amply demonstrated that international law has increasingly emphasised that non-state actors have obligations regarding the realisation of economic, social and cultural rights and that some domestic jurisdictions have already taken steps in compliance with this development. It is therefore argued that the argument that socio-economic rights are generally incapable of horizontal application is wrong in principle. Each right must be assessed on its own in the light of the duties it embodies to determine whether it has horizontal reach.

5.3 Nature of the obligations

It is settled that human rights generate four levels of duty: to respect, protect, promote and fulfil. The South African Constitution has expressly acknowledged these duties in s 7(2). For the most part, these duties have been defined in relation to the State. Thus, the duty to respect compels it to refrain from interfering in the enjoyment of all fundamental rights. The duty to protect requires the State to

protect right holders against other subjects by legislation and provision of effective remedies.[55] Furthermore, this obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic, and social interferences (*SERAC Case*, para 59). The duty to promote enjoins the State to ensure that individuals are able to exercise their rights and freedoms through promoting tolerance, raising awareness and building infrastructures. The duty to fulfil is intricately connected with the duty to promote although the former entails more positive action on the State to move its machinery towards the actual realisation of the right (*SERAC Case*, para 59: General Comment 14 above).

In short, the duty to respect is negative in nature while the other three duties require positive action. These duties apply as much to socio-economic rights as they do to civil and political rights. It is submitted that they are, with some modifications, capable of application to private actors as well. Indeed, as shown above, international law and certain domestic jurisdictions recognise that private actors have both negative and positive obligations to discharge in relation to socio-economic rights.

More specifically, the South African Constitution, expressly or implicitly, intends certain positive obligations engendered by socio-economic rights to be borne by private actors. For example, section 9(4) expressly provides that '*No person* may unfairly discriminate directly or indirectly against anyone' on any ground listed in subsection 2. The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, enacted to give effect to the right of equality and the prohibition of unfair discrimination provides in section 24(2) that 'All persons have a duty and responsibility to promote equality'. The Act has a schedule promulgated under section 29(1) that lists examples of prohibited unfair practices binding on the State and all persons.[56] These practices entail that positive steps are taken to ensure compliance with the Act.

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[55] See *SERAC Case*, *op. cit.*, paras 44-47. See also A. Aide, (2001), 'Economic, social and cultural rights as human rights', in A Aide *et al* (eds) *Economic, social and cultural rights: A textbook* Dordrecht: Martinus Nijhoff Publishers, pp. 9, 23-25.

[56] E.g. applying human resource utilisation, development promotion and retention practices which unfairly discriminate against persons; refusing to provide reasonable health services to the elderly or failing to reasonably accommodate the special needs of the elderly; etc.

Secondly, in terms of section 29(3) of the Constitution, everyone has the right to establish and maintain independent educational institutions at their own expense. However, the person who exercises this right assumes the duty to maintain standards of education that are not inferior to those of comparable public education institutions [section 29(3)(c)]. Thirdly, considering the international law jurisprudence referred to above, there is little room for arguing that private actors would not be bound to honour trade union rights and labour rights entrenched in section 23 and environmental rights recognised under section 25 of the Constitution. Compliance with these rights demands more than mere respect for the negative duty. A relevant duty holder is enjoined to take positive measures to give effect to the relevant rights.

5.4 Implications of the jurisprudence around ss 26 and 27

Section 26(1) entrenches the right to housing while section 27(1) guarantees the right of access to health care services, sufficient food and water, and social security. Subsection 2 of both sections enjoins the State to take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of these rights.

The Constitutional Court has on more than one occasion refused to hold that subsection 1 of either section 26 or 27 created self-standing rights. In *Soobramoney*, it stated that:

> *'What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources'* (para 11).

This position was reaffirmed in *Grootboom* and *TAC*. The Court reasoned, on both occasions, that the qualifications contained in subsection 2 to either section – 'progressive realisation', and 'within available resources'– could not be separated from those rights. In *TAC*, it stated that:

> *"Section 26 does not expect more of the State than is achievable within its available resources' and does not confer an entitlement to 'claim shelter or housing*

> *immediately upon demand' and that as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants concerned, 'the State is not obliged to go beyond available resources or to realise these rights immediately"* (para 32).

This interpretation can be construed broadly to imply that it is the State alone that has obligations in respect of these rights since subsection 2 of either section singles it out as the sole duty holder. This construction does not sit well with the certain specific pronouncements in the same judgments and the emerging trend in international human rights law discussed above, which lucidly demonstrates that non-state actors have positive and negative obligations correlative to socio-economic rights. There is also no basis for precluding the application of the rights guaranteed in the two sections in the private sphere when the other socio-economic rights, as shown above, do.

A restrictive construction of the three judgments would lead to the opposite conclusion.

International law has demonstrably established that the negative duty to respect socio-economic rights is sacrosanct. This obligation exists independently from the internal modifiers of socio-economic rights. In South Africa, this negative obligation gained acceptance in *Re Certification of the Republic of South African Constitution* (above). However, the issue whether private actors are bound by this obligation was only made clear in *Grootboom*. In this case, the Constitutional Court held, in the context of the right to housing, that there exists 'at the very least, a negative obligation upon the State and *all other entities and persons* to desist from preventing or impairing the right to access to adequate housing' (para 34). In the same case, the Constitutional Court noted that the right of access to housing suggested that '*it is not only the State* that is responsible for the provision of houses' (para 35).

These dicta support the position that private actors have both negative and positive obligations relating to socio-economic rights. The existence of these duties rests on subsection 1 of the relevant sections. It is therefore argued that subsections 1 of sections 26 and 27 can stand on their own, at least as regards private actors. This contention does not mean that private actors are bound to meet the

onerous obligations that the State is required to discharge on a progressive basis. As argued below, private actors have positive obligations which, depending on the nature of the actor, its level of interference into people's socio-economic rights and other factors, they are enjoined to discharge.

5.5 Distinguishing levels of responsibility of various non-state actors

Section 8(2) states that a provision in the Bill of Rights might apply to natural and juristic persons 'to the extent' that it is applicable depending on, among other things, the nature of any duty embodied in the right. This provision does not mean that a private actor has to hold all the layers of duty for a given right to apply to it. What it means, however, is that rights might need concerted action by several actors for them to be fully realised. It also implies that some actors might bear more obligations than others. A criterion has therefore to be developed for distinguishing levels of positive obligations that various non-state actors should bear.

In the United States, the 'state action' law has conventionally been used to determine whether a given private actor should be held liable for human rights violations (see generally Ellman, 2001). Thus, a plaintiff cannot succeed in suing a non-state actor unless he establishes that the conduct of the non-state actor amounts to state action. A conduct constitutes state action if it is a public function or is connected to the exercise of public functions. Thus, private actors exercising the functions of the State would be held liable for human rights violations. The state action jurisprudence has been construed more broadly to make non-state actors wielding especially oppressive power, although not linked to the State, liable for human rights violations (Ellman, 2001).

This benchmark could be used to differentiate the positive obligations of various private actors depending on the right and the nature of the obligations involved. For example, a private actor carrying out the functions of the State would be responsible to bear the relevant socio-economic rights obligations that the State would have. Similarly, a private actor not linked to the State but exercising power akin to or more than that of the State should be bound by as much positive obligations as the State would have in the specific area of dominance. The 'state action' test could be extended to hold private actors who, however small, hold positions in society that can

result in serious denials or violations of socio-economic rights responsible for the relevant positive socio-economic rights obligations.

5.6 Enforcement

There are many ways through which the obligations of non-state actors discussed above may be enforced. Criminal law is one of them. As mentioned earlier, some violations of economic, social and cultural rights may be criminalised by domestic law. An individual or corporation may therefore be prosecuted for committing such offences. Environmental regulation and consumer protection laws may be other important ways of ensuring that private actors fulfil their obligations. Reliance on remedies provided in the law of torts could also be of great use. The reporting mechanism of the Human Rights Commission can also be a useful monitoring and enforcement measure of social-economic obligations of private actors.[57]

Whether or not a person can found a civil action against a private actor directly on a provision of in the Bill of Rights has elicited some controversy in South Africa. Some people that hold that one has to rely on existing common law causes of action as the means of enforcing human rights when they apply in the private sphere (Cockrell, 2001, pp. 3A-17). They read section 8(2) and (3) together to mean that the horizontal application can only be enforced through the development of common law. Rautenbach (quoted in Cockrell, 2001, pp. 3A-18), for example, has observed that solutions to what are perceived to be constitutional problems 'overlap with private law techniques and concepts which, for many centuries, have been used to resolve private disputes between equal parties'. He opines that private law will 'remain the main source of the resolution of private disputes between equal parties, even when both applicants and respondents rely on constitutionally protected rights.' (see also Jeffrey, 1997)

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[57] Under section 184(1) (a) of the Constitution, the Commission is empowered to monitor the observance of human rights in South Africa. In terms of sub section (3), the Commission is entitled to require relevant organs of state to furnish information on measures they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. The same power can be exercised in relation to private actors through section 25(2) of the Equality Act.

Admittedly, common law contains many causes of action that can be used to enforce human rights provisions. Examples include defamation, negligent misrepresentation, negligence, and nuisance. However, this view should not be pursued to the extreme. For one thing, common law has historically failed to guarantee full protection of human rights. In South Africa, for example, common law did little to alleviate gross human rights violations committed during the apartheid era. It is therefore risky to require that one should always fit a human rights violation in the existing common law causes of action for a remedy. It would also appear that actions involving the State might be based directly on the rights violated. This might bring about inconsistencies in human rights jurisprudence. Different principles may arise from decisions addressing similar violations simply because one involved private parties and had to be resolved using common law causes of action while another involving the state would be directly based on the Constitution. Section 8 should therefore be given a generous interpretation to allow causes of action to be grounded on the Bill of Rights except where it is obvious that common law provides sufficient remedy.

The trend internationally supports this direction. For example, the Bill of Rights of New Zealand has been interpreted to justify causes of action based on the Bill although there is no express provision in the Constitution empowering the courts to create new remedies (See e.g. *Simpson v A-G* [1994] 3 NZLR 667, 717.) Similarly, it has been held that 'the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons and its officials'.[58] Even the US courts permit constitutional torts although one has to prove 'state action' to find liability. In *Bivens v Six Unknown Agents of Federal Bureau of Narcotics* [403 US 388, 91 SCt 1999 (1971)], for example, it was held that petitioners have an implied right of action under the Fourteenth Amendment against state officials who violate those rights.

[58] See e.g. *JP Hosford v John Murphy & Sons* [1987] IR 621; *Glover v BLN Ltd* [1973] IR 388; *Hayes v Ireland & Others* [1987] ILRM 651.

6. Conclusion

Times have changed. We certainly live in the world that was lived in some two centuries ago. However, the circumstances are different. People now face different challenges in their day-to-day lives from those faced in the past. As with time, the human rights concept is not static. It has historically played the role of liberation from oppression. It certainly cannot resist emancipating the masses from the new forms of domination and oppression that have emerged in the globalised world.

Private actors have obligations to discharge in order to ensure meaningful enjoyment of socio-economic rights. International law and some domestic jurisdictions are painstakingly moving in the direction of imposing enforceable obligations in this regard. The South African Constitution offers a wider opportunity for holding private actors accountable for socio-economic rights.

Although still rudimentary, international law, certain municipal legal systems and the South African Constitution suggest that the obligations of non-state actors for socio-economic rights have both negative and positive aspects. In principle, there is no socio-economic right that can be said to bind the State only. All private actors are enjoined, at the very minimum, to respect socio-economic rights. The difficulty, however, lies in distinguishing the levels of positive obligations among private actors considering that these actors are of different character and nature. This paper has suggested the adoption of the 'state action' benchmark in this regard.

With litigation and more research on the subject, it is definitely not impossible for precise obligations of non-state actors relating to socio-economic rights to emerge.

The means of enforcing these obligations range from the use of criminal law to environmental laws, consumer law and common law. However, it is argued that civil suits against private actors based directly on the Constitution should be permitted in order to give human rights their moral and legal force.

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HUMAN RIGHTS STANDARDS AND MULTINATIONAL CORPORATIONS: THE DILEMMA OF 'HOME' AND 'ROME'

SURYA DEVA*

> *'If Rome is a significantly different place, then standards that are appropriate at home do not necessarily apply there.'*[1]

1. Introduction

In recent times it is increasingly felt that multinational corporations (MNCs)[2], as real users of free market economy, should conduct their business with a human face or in a 'human rights friendly manner'.[3] Interestingly, such a feeling is shared by MNCs, states, international

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[1] John R Boatright, *Ethics and the Conduct of Business* (3rd edn., New Jersey: Prentice Hall, 2000), p. 379.

[2] The term 'MNCs' has been used in a wider sense to include both multinational corporations and transnational corporations (TNCs). Although MNCs and TNCs are often used interchangeably, there is a distinction between the two. Korten observes: 'A multinational corporation takes on many national identities, maintaining a relatively autonomous production and sales facilities in individual countries .... The trend of transnationalism involves the integration of a firm's global operation around vertically integrated supplier networks.' David C Korten, *When Corporations Rule the World* (Connecticuit: Kumarian Press & Berrett-Koehler Publishers, 1995), p. 125.

[3] This is clear from the mass literature that has come up both in print form and on the web dealing with various aspects of the issue. In fact, now certain corporations are running the *business* of guiding the business community on how to behave as

organisations, non-government organisations (NGOs), academics and common people alike, though they differ on the reasons for this.[4] Therefore, the critical point of debate is no longer about *why* should MNCs respect human rights but *what* should they follow? Which standards of human rights – universal, national norms of the country of operation, or national norms of the parent company – should guide the conduct of MNCs? Moreover, should the 'shield' of cultural relativism be available to MNCs, which is often invoked with varying success by several states? Here it must be noted that this debate on standards is the direct result of globalisation[5] and growing influence of MNCs in international trade and governance.[6]

In response to the above debate, Boatright, as the quotation in the beginning reflects, and many others would suggest that MNCs are not bound, legally or morally, to apply universal standards of human rights, and that morally relevant local differences should be kept in mind.[7] In this article I would, however, show that the adoption of different human rights standards, in view of local differences, by the MNCs does not ensure effective protection of human rights. It rather allows them to violate human rights at will. Therefore, I would argue that MNCs should

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socially responsible corporations. In recent times, the evolution of the *Global Compact*, the European Union's *Green Paper on Corporate Social Responsibility* and the *UN Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2000 Revision of ILO and OECD Guidelines*, to name a few, are indicative of the same trend.

[4] MNCs, for example, may feel the need to respect human rights to maintain their good will, or in order to gain competitive advantage. International institutions and states, on the other hand, expect so because MNCs should behave like a responsible global citizen. Academics may perceive it as a necessary condition for MNCs' existence and carrying on of business. This spectrum of reasoning is just indicative of diversity and does not in any way suggest their mutual exclusiveness.

[5] The term 'globalisation' means different things to different people. In the present context it is used in a general sense to indicate the phenomena of liberalisation of economies through privatisation, shifting of power from state to private actors and removal of national barriers with reference to market, capital, services, governance, etc.

[6] MNCs exercise considerable influence in governance by influencing, at least, policy formulation regarding public health, child labour, workers' rights, consumer protection, foreign investment, environment protection, women's rights at workplace, indigenous peoples' rights, etc. The influence of MNCs on all these and such other policy questions has a direct bearing on governance.

[7] *Supra* note 1, pp. 378-87.

follow universal standards for universal human rights. Further, the plea of cultural relativism should not be available to MNCs even if it is invoked by states, whether rightly or wrongly. The MNCs, which sail on the principle of universalism to enhance trade, cannot claim parity with states due to various reasons discussed later. In other words, whether in 'Rome' or anywhere else, do as you would do at 'home', and for human rights purposes, the home of an MNC is not the country of incorporation but the whole *universe*.

Though there are various instances of MNCs applying different human rights standards at different places, in the present article I have picked up the *Bhopal* case[8] as an indicator of usual business practice followed by MNCs. This is done for three reasons. First, the Bhopal catastrophe is unparalleled in terms of gravity and long term implications and therefore, could be used as an effective indicator. Second, though more than eighteen years have passed since the tragic incident, the challenges posed by it in terms of developing effective legal strategies to avoid repetition of Bhopal are still unanswered. Third, my first hand experience of the miseries of Bhopal victims provides me with an insight which is not merely bookish.

2. The Search for International Business Standards

A search has been on for quite some time about the standards applicable to private actors who do business on the international or transnational level. As pointed out earlier, MNCs are the prime focus of this inquiry. Efforts are being made on institutional[9], regional[10]

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[8] Bhopal is a city in India where due to leakage of MIC gas from the pesticide manufacturing factory of UCIL, a subsidiary of UCC, on the night of 2-3 December 1984 more than three thousand people died and several thousands suffered serious injuries.

[9] By 'institutional' I mean the efforts made by individual corporations or group of corporations. Primarily, it would include Business Code of Conducts, which are becoming increasingly popular among MNCs.

[10] Such efforts are initiated by various regional bodies, e.g., EU, OECD, etc. See *Green Paper on Promoting a European Framework for Corporate Social Responsibility* (2001) and *OECD Guidelines for Multinational Enterprises* (1977/2000). Regional efforts are a compromise between national and international standards, and in a way reflect the inability to agree on international standards for the time being. However, more importantly they constitute one step closer to an ideal of international standards.

and international levels[11] for the evolution of standards. These efforts are the result of either voluntary assumption of responsibility by corporations, market coercion[12], or states' obligations under the International Bill of Rights. Such a wide spectrum of debate, at least, demonstrates the urgency for international business standards. I feel that it is essential to agree on international standards because only such standards can afford effective protection of universal human rights. The present article makes no attempt to analyse the diversified efforts being made in search of international standards, but only examines the two alternate approaches that guide the inquiry of standards. The two approaches are the 'business approach' and the 'human approach'. The former is based on varying standards, i.e., no *standard* standards, whereas the latter envisages universal standards. I would argue that the business approach should be discarded in favour of the human approach.

2.1 No 'Standard' Standards: The Business *Approach*

2.1.1 Business dilemma of choosing out of three standards

Even if a convincing case of corporate responsibility for human rights violations is made out, a major difficulty would be in the identification of the standards to be applied by corporations. This would be more in the case of those corporations which operate in different states, placed in different stages of development.[13] In such a situation, the MNCs face a business dilemma. Should they apply the 'host' standards or the 'home' standards or the 'international'

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[11] At the international level, the efforts are headed by international organisations like UNO and ILO. *UN Global Compact* (1999), *Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (2002), *ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy* (1977/2000) and *ILO Global Social Label* (1997), etc. are indicators of international efforts.

[12] Besides consumers' awareness, market coercion is also due to the role played by the media and NGOs. Globalisation of information technology has given impetus to this movement.

[13] Human Rights Program Harvard Law School, *Business and Human Rights – An Interdisciplinary Discussion held at Harvard Law School in December 1997* (Cambridge, MA: Harvard Law School Human Rights Program, 1999), pp. 9-10, 14-18. An argument is often made by the developing countries that the First World countries are trying to impose their standards on them.

standards? Duffield puts it as follows: 'Whether international standards that are generally applied in the home country of an MNC, by virtue of the domestic laws in operation there, should be applied where the domestic regulations are less thorough?'[14] It must be noted that Duffield is contemplating a situation where there is no difference in the 'home' and 'international' standards. But there can be situations where these two do not concur. This would be the case if the MNC is situated in a country where human rights standards are inferior to international norms.

The business dilemma of applicable standards is often resolved by the MNCs rather easily, notwithstanding that this may give the impression of hard choices to be made. By citing local practical difficulties, arising because of differences in culture, level of development, socio-politico system, etc., in following the home or uniform standards, the MNCs would settle for local standards. The common argument in terms of justification would run as follows: the *'business' of business is to do business and this is possible only by following host standards and practices*. On the adoption of such double standards Braithwaite argues that 'moral failure of the transnationals lies in their willingness to settle for much lower standards than at home'.[15] In fact, the application of the business approach results not in mere double standards but 'multiple standards'; the standards that an MNC may apply are not merely two but may be infinite as per the local conditions. Therefore, I prefer to call it a situation of 'no *standard* standards'. The guiding principle of the business approach is the profit of stockholders (not of stakeholders) and not the protection of human rights. The latter is not even considered as stakeholders' profit, or at least part of profit.

2.1.2 Was 'Bhopal' really different from 'home'?

'Bhopal'[16] signifies how the business dilemma of varying standards is resolved, rather easily, and how the business approach fails to

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[14] Clare Duffield, 'Multinational Corporations and Workers' Rights' in Stuart Rees and Shelley Wright (eds.), *Human Rights and Corporate Responsibility – A Dialogue* (Sydney: Pluto Press, 2000), p. 193.

[15] John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London: Routledge & Kegan Paul, 1984), p. 246.

[16] I have used the term 'Bhopal' to denote not only the tragedy that occurred on the night of 2-3 December 1984 but also to include what preceded and followed the tragedy.

protect even basic human rights. What standards of safety and technology should Union Carbide Corporation (UCC), a company incorporated in the US, apply in a MIC-based pesticides manufacturing plant in Bhopal, a city in a developing country? Since UCC already had one such plant in West Virginia, it had the choice of applying either the same, inferior or superior standards. But UCC, without any moral or legal hesitation, handed over an inferior technology to Union Carbide India Ltd. (UCIL) for the Bhopal factory. Application of *different and inferior* standards was not limited to mere technology. As compared to the Virginia plant, considerably lower standards were applied by UCC-UCIL in Bhopal even regarding equipment, storage, safety devices, training of workers, operational procedure, etc.[17] This inferiority in overall standards was driven by economic consideration not only in the beginning but also throughout the life of the plant; there was a direct link between UCIL's losses and lowering or non-compliance with standards.[18] And all this was done by an MNC and its subsidiary which had projected themselves as ambassadors of 'environmental excellence' and a 'builder of modern India'.[19]

Why should UCC, or any other MNC for that matter, apply different (read *inferior* in terms of developing countries) standards while operating away from home? The response of any MNC like UCC would be simple: it makes business sense to establish and operate a plant in India only if lower standards are applied, otherwise the corporation loses any possible economic advantage. I call this the 'business justification' of the business approach. The 'academic

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[17] See, for a detailed account, Paul Shrivastava, *Bhopal: Anatomy of a Crisis* (Massachusetts: Ballinger Publishing Co., 1987), pp. 42-57; Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993), pp. 18-25; and Kim Fortun, *Advocacy after Bhopal: Environmentalism, Disaster, New Global Orders* (Chicago: University of Chicago Press, 2001), pp. 121-131.

[18] Shrivastava, *supra* note 17, pp. 49-52, Boatright, *supra* note 1, p.377 and Arthur Sharplin, 'Union Carbide Limited and the Bhopal Gas Incident: Issues and Commentary' in W Michael Hoffman, *et al* (eds.), *The Corporation, Ethics and the Environment* (Westport: Quorum Books. 1990), pp. 129-30.

[19] UCC gave such advertisements in several leading magazines. This continued even after the Bhopal accident. See, for some of these advertisements, Fortun, *supra* note 17, pp. 94-97, 345.

justification' of this business approach would, however, be not as simple. The explanation may range from different local conditions to varying stages of development, from cultural relativism to voluntary acceptance of different standards by the concerned country. For example, justifying disparity in standards in the Bhopal plant as compared to Virginia plant, Boatright writes:

> *'If Rome is a significantly different place, then standards that are appropriate at home do not necessarily apply there. Consumer and worker safety standards in the developed world, for example, are very stringent, reflecting greater affluence and a greater willingness to pay for more safety. The standards of these countries are not always appropriate in poorer, less developed countries with fewer resources and more pressing needs. It may be rational for a government like that of India to prefer a plant design that increases jobs and reduces the price of goods at the expense of safety. The United States government made different trade offs between safety and other values at earlier stages of the country's economic development. On the other hand, the marketing of hazardous consumer products abroad or the exposure of workers to easily prevented workplace hazards may be considered a violation of basic human rights.'*[20]

The crux of Boatright's argument is that the host place was materially different from home and therefore, UCC was justified in adopting different standards in Bhopal. In other words, morally relevant local differences of 'Rome' (Bhopal) necessitated the approach of 'when in Rome, do as Romans do'.[21] Before analysing the 'human rights value'[22] of above Boatright's observation, let us try to find out, first, how Rome was different from home and second, whether those differences were really *relevant*, even though they may be 'material' as Boatright suggests, to determine the issue of different standards.[23]

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[20] *Supra* note 1, p. 379. (emphasis added)

[21] *Id.*, pp. 378-79.

[22] The 'value' of the statement in terms of the protection it affords to human rights.

[23] It does not follow necessarily that 'material' differences are always 'relevant' for a particular issue.

Bhopal was, and is, different from West Virginia in many ways. It was a small city in the heart of India, striving for industrial development. The infrastructure of transport, safety, health, communication, etc., had no comparison with Virginia. In terms of employment opportunities, wages and working conditions, people of *Rome* stood nowhere near to populace of *home*.[24] Besides, there were many slum/hut dwellers, with no bargaining power, who had migrated from different parts of the country in search of jobs. The people, who constituted much of the work force in the plant, were generally poor and illiterate. The regulatory legal framework relating to the use of hazardous technology, working conditions, health and safety of workers, environment, etc., was either non-existent or non-enforceable.[25]

Boatright is, therefore, right when he observes that in terms of local conditions Bhopal was materially different from Virginia. But were these *material* differences *relevant* to determine what standards UCC-UCIL should apply in the Bhopal plant? The answer should be clearly in the negative. After all, what was at 'risk', that too of very high magnitude, by the lowering of standards? It was nothing but the right to life; to health; to a safe place of work; to information; to livelihood[26]; to a clean environment; and to receive *just* and speedy relief, to name but a few. Can such rights be subject to varying local conditions? The answer should again be in the negative, for these rights constitute the 'core' of universal human rights.

Here one must also not lose sight of the fact that the risk was generated and imposed not by an ignorant and incapable entity; UCC was both aware of the risks and capable of averting them.

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[24] See generally, for an economic and safety gap between developed and developing countries, Cassels, *supra* note 17, pp. 35-45.

[25] India enacted its comprehensive environment related legislation [Environment Protection Act] only in 1986, i.e., after the Bhopal tragedy. There were some legislations dealing with industrial safety [Factories Act, 1948], air pollution [Air (Prevention and Control of Pollution) Act, 1981] and insecticides [Insecticides Act, 1968], but there were either outdated or lacked implementation. See C M Abraham and A Rosencranz, 'An Evaluation of Pollution Control Legislation in India', (1986) 11 *Columbia Journal of Environmental Law* 101.

[26] There were many families whose survival depended solely on the wages of the earning member. So, indirectly incapacity or death of the earning member due to lower standards meant impairing the survival of the whole family. Moreover, this nexus was not beyond the reasonable foresight of UCC-UCIL management.

Different considerations may, however, apply when, first, one cannot reasonably foresee the risk generated by one's action[27] and second, one does not have the technical and/or economic resources to avoid it. In the Bhopal case, neither of these two factors were attracted. UCC was not naïve of the composition and toxic nature of MIC. It had spent millions of dollars in research on MIC and had admitted itself as a 'pioneer' in technology.[28] In fact, Edward Munoz, the technical representatives of UCC, in a letter to the Government of India, had claimed that 'during the last three years, Union Carbide Corporation has made dramatic improvements in the production technology of the miseries of its victims.'[29] On the second count also, the economic and technological capacity of UCC had undoubtedly placed it in a position where it could have adopted the same or superior standards in Bhopal plant.[30]

A natural query would be about the test to judge 'relevancy' of local differences. I suggest that relevancy is to be determined with reference to the protection of universal human rights. If by adopting a different standard as per the local difference, a universal human right is violated or even a reasonable prospect of violation is created, then such local difference, howsoever material it might be for that place, becomes irrelevant. On the other hand, if by application of a different, *not inferior*, standard, to suit the local difference, universal human rights are promoted, then such local difference is relevant. For example, a higher level of unemployment (a local difference) should not be exploited for paying unreasonably low wages. Similarly, the undeveloped environmental regime of a country should not become a license to emit more pollutants in the air. However, the presence of a large number of Muslim workers (again a local

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[27] This is possible if the state of art does not conceive any risk in the activity.

[28] See Union of India Complaint in the case filed in New York District Court, U Baxi and Thomas Paul (eds.), *Mass Disasters and Multinational Liability: The Bhopal Case* (Bombay: N M Tripathi Pvt. Ltd., 1986), pp. 3-4. The complaint mentions that *'defendant [UCC] represented to plaintiff that it was a pioneer in pesticide research and development with extensive research facilities ....'* It should be noted that this assertion was not contested by the UCC in its Motion.

[29] *Id.*, p. 66.

[30] UCC was the seventh largest chemical company in the US, with both assets and annual sales approaching $10 billion. It owned and operated business in forty countries. See Shrivastava, *supra* note 17, p. 35.

difference) may justify a provision for a separate place of worship inside the factory for the offering of daily prayers (a different standard).

Now we can try to discover the 'human rights value' of Boatright's observation, in the light of above discussion. I argue that the academic justification as reflected in the observation does not hold much water on closer scrutiny. First, 'Rome' was not a different place from home, as demonstrated above. The differences might be material but not *relevant*. How can differences be morally relevant, as Boatright seems to argue, when they lead to a violation of human rights? Second, even if we assume that UCC was justified in applying lower standards in the Bhopal plant, the fact remains that the accident occurred not because of lower standards but because of non-compliance with even those lower standards.[31] The UCC could have reasonably foreseen that failure to comply with even minimum safety standards would lead to massive deaths, and injury not only in the present but also the *future*.[32] Third, the Indian government could be interested in the production of pesticides at low cost (which country would not wish for that?) but that does not justify the almost total relinquishment of safety standards, especially when UCC claimed to be pioneer in safety and environment protection. Fourth, the plant design was never preferred by the Indian government, as claimed above. It was, in fact, chosen by UCC to lower its investment in infrastructure. It also exploited the weakness of the Indian legal framework of environmental protection. Fifth, a violation of 'basic human rights' arises in the Bhopal case even by Boatright's standards because for many initial years MIC was marketed from the US. Sixth, Boatright refers to 'greater affluence' and 'greater willingness to pay' of consumers of developed countries, to get better safety standards. But do, and should, human rights depend upon the paying capacity? The standards of human rights are not available for sale in the market on price determined by market principles. Last but

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[31] At the time of accident none of the safety devices in the plant were working. See Cassels, *supra* note 17, p. 19 and Shrivastava, *supra* note 17, pp. 56-57.

[32] In many instances the consequences of the tragedy continued to haunt future generations. See Cassels, *supra* note 17, pp. 5-6. In fact, in one case the Indian Supreme Court even granted compensation for the injury caused to a child in the mother's womb at the time of accident.

not the least, any argument which makes a distinction between the value of life in developed and developing countries is immoral *per se* and inconsistent with the notion of human rights.

2.1.3 Analysis of the business approach in the context of Bhopal and beyond

The above analysis exposes the inadequacy of the 'business approach' to suggest any guiding principle to agree on international standards for business. This inadequacy, in terms of Bhopal, is reflected in the following propositions which can be deduced from what was discussed earlier:

- UCC admittedly applied lower standards of technology and safety in the Bhopal plant as compared to Virginia.
- UCC applied lower standards despite knowledge of the risk of high magnitude and its capability to avert it.
- The adoption of inferior standards was driven by the profit principle.
- The local conditions of Bhopal were materially different from Virginia, but even material differences cease to remain *relevant* when universal human rights are at stake. Therefore, despite local differences, Rome (Bhopal) was not *really* different from home (Virginia).
- The relevancy of local differences is to be judged with reference to the effect, positive or negative, on the promotion of universal human rights.
- In spite of no *relevant* differences between Rome and home, UCC applied inferior standards in Bhopal, under the guise of 'when in Rome, do as Romans do'.
- UCC adopted the business approach to arrive on applicable lower standards in the Bhopal plant, which resulted in the violation of even basic universal human rights.

If one moves, firstly, from Bhopal-specific to the general paradigm and secondly, from 'is' to 'ought',[33] the above-stated propositions can be summed up thus: an MNC should disregard irrelevant local, even if material, differences and apply universal standards in its activities

[33] 'Is' denotes what MNCs actually do by following the business approach, whereas 'ought' signifies what should they do in terms of expectations of society.

all over the world, whether in Rome or home. For the adoption of different standards, only those local differences which promote universal human rights should be kept in mind.

Thus, with the help of the Bhopal case I have tried to show that both 'business' and 'academic' justifications of the business approach are unsound since they fail to protect even bare minimum human rights.[34] What is bare minimum for survival and human development constitute the 'core' of human rights, which cannot be subjected to any other condition. Failure of the business approach to effectively resolve the issue of standards compels us to explore other alternatives. I would argue that one of the alternatives could be in the form of the human approach, discussed below.

2.2 *Universal Standards for Universal Human Rights: the* Human *Approach*

2.2.1 Why discard the business approach?

The adverse consequences of following the business approach, which results in the adoption of varying standards by MNCs, are not limited to any one constituent but extend to all three broad participants of the business process: people (consumers, suppliers, general public, etc.), MNCs (the company and its subsidiaries as such, management, shareholders, etc.) and governments. Bhopal itself is a very good example of this. The lower standards at the Bhopal plant were reflected not only in technology, design, safety norms and operation but also in the training of personnel. All this led to an increase in 'risk' of the accident as well as the extent of harm. Even by a modest calculation, over 3,000 people died within the first two days of the accident and several more thousands suffered incurable diseases. The extent of the long term effects of exposure to MIC and other toxic gases in terms of breathlessness, dry cough, chest pains, nausea, respiratory diseases, abdominal pain, menstrual disorders, etc., is still uncertain.[35] Even the settlement of the case with UCC in terms of overall compensation failed to deliver justice to many victims. In short, the saga of miseries – medical, legal,

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[34] In the Bhopal case at least the right to life, health and safety, the right to information and the right to a clean environment were the bare minimum

[35] See Shrivastava, *supra* note 17, pp. 64-70 and Cassels, *supra* note 17, pp. 5-6.

economic and social – generated by 'no standard standards' for *generations* of victims that started on the night of 2nd and 3rd December 1984 is still continuing unabated.[36]

Even the proponents of varying standards are not immune from adverse consequences. MNCs' choice for lower standards is usually driven by short-term gains which often overshadow long-term gains. This myopic vision may prove fatal for the concerned MNC and its subsidiaries. In fact, the Bhopal accident had threatened the very survival of UCC-UCIL. Shrivastava sums up the effects on UCC thus:

> *'In its [Bhopal accident's] aftermath, the company was subject to worldwide humiliation. ... The company's reputation came under intense attack by the news media worldwide. ... [T]he public image of Union Carbide as a responsible company was seriously questioned. ... From a pre-accident level of $48 a share, the stock dropped to a low of $32.75 within a few weeks. ... Standard and Poors dropped the company's debt rating to the lowest investment grade. ... It was estimated that by the end of December 1985, 30 per cent of the company's stock had passed into the hands of takeover speculators.'*[37]

What Shrivastava states above is not something peculiar that happened to UCC, but this is what has happened or can happen to any other MNC having a negative balance-sheet on human rights.[38] This is bound to increase in time to come because of increasing

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[36] Many victims have still not received full compensation. The cases are still pending in US courts under the Alien Tort Claims Act.

[37] Shrivastava, *supra* note 17, pp. 76-77. In fact, UCC was later on taken over by Dow Chemicals.

[38] The examples of Shell, Body Shop and Nestle Baby Food are worth noting. In fact, now many big MNCS have become human rights conscious, *at least in their appearance*, a fact which is reflected in their Code of Ethics, advertisements, and investment in community welfare schemes. See, for example, the advertisement given in newspapers and TV by Shell to reaffirm its commitment to environment and sustainable development; *Sydney Morning Herald*, 7 September 2002, Good Weekend section, p. 23. See also John Harrison, *et al*, *Ethics for Australian Business* (Frenchs Forest: Prentice Hall-SprintPrint, 2001), pp. 1-9 and the material cited therein.

awareness regarding the issue generated by the 'partnership' of the media[39], NGOs[40] and the judiciary[41] in the era of information technology. Therefore, it is not in the interest of even MNCs, at least in the long run, to follow the business approach of varying standards about human rights.

There is, however, another important dimension of the issue, though largely unexplored. It is often suggested that MNCs have no option but to follow varying standards as by following universal standards they would lose their 'competitive advantage' vis-à-vis other MNCs. In other words, why should an MNC observe universal standards when it is not sure about the behaviour of its competitors? This fear is best illustrated, with a slight modification, in the Prisoner's Dilemma situation. This is a situation involving at least two corporations (let us assume 'X' and 'Y'). Both X and Y would have two choices: to follow universal standards or not to follow them. The possible results could be as follows:

1) X follows universal standards but Y does not follow them
2) Both X and Y follow universal standards
3) X does not follow universal standards but Y still follows them
4) Both X and Y do not follow universal standards

In situation 1, X may lose its competitive advantage qua Y, whereas in situation 3, Y may lose its competitive advantage qua X. In situations 2 and 4 neither of them may have competitive advantage over the other, though both may or may not have (depending upon

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[39] Newspapers and magazines play a key role in exposing instances of human rights violations by corporations. It is interesting to note that one generalist from Bhopal was writing about lack of safety and possible accident in UCIL Bhopal plant well before the actual accident. His voice was, however, unheard unfortunately. Such role played by the media is increasing and in fact, there is a feeling of competition among various newspapers to become 'first' to report the incident of human rights abuse. A recent example can be given of *The Indian Express* (11 August 2002) reporting how big corporations had plastered their advertisements on precious rocks on the Manali-Rohtang road.

[40] The efforts made by Amnesty International, Greenpeace, Lawyers Committee for Human Rights, Commonwealth Human Research Initiative, to name a few, are really commendable.

[41] The partnership of the judiciary results in taking *suo moto* cognizance of such incidents, evolving suitable remedies, and delivering speedy justice.

circumstances) a competitive advantage qua other corporations. It is apparent that fear of losing competitive advantage over competitors by following universal standards arise only because of uncertainty about the decision of the other party. It is, therefore, necessary to avoid this uncertainty to dispel any fear of losing competitive advantage. One way of removing 'uncertainty' could be by curtailing the options of MNCs regarding standards. The fear of losing competitive advantage is automatically taken care of if we discard varying standards and agree on universal standards.

Lastly, the business approach of varying standards is hazardous from the perspective of states as well. This is more in the case of states which are undeveloped or developing in terms of economic development and/or the legal framework for human rights. Since development demands foreign investment, MNCs take advantage of the vulnerable position of such countries and bargain for lower standards regarding workers' rights, public health, safety, consumer protection, environment, etc.[42] Duffield suggests that MNCs exploit the fear of governments of losing investment.[43] More often than not, the developing countries face a Hobson's choice and may bow under the might of MNCs. This situation of unequal bargaining power can, however, be remedied if we reject the business approach of varying standards and settle for universal standards. In case the non-negotiable nature of universal standards of human rights is accepted, MNCs would no longer be able to coerce developing countries for lower standards. This in turn would lead to the equitable development of the world in place of the 'selected' development at the cost of the 'neglected'.

Since the application of the business approach of varying standards to an inquiry of human rights standards for international business adversely affects every participant of the business process and not merely decision makers, it is a reason compelling enough to discard this approach in favour of the human approach.

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[42] See, for example, the advertisement given by the Philippines Government in *Fortune*: *'To attract companies like yours ... we have felled mountains, razed jungles, filled swamps, moved rivers, relocated towns ... all to make it easier for you and your business to do business here'*, as quoted in Korten, *supra* note 2, p. 159.

[43] *Supra* note 14, p.194.

2.2.2 Towards universal standards for universal human right

In contrast with the business approach, the 'human' approach of human rights standards views human rights above the profit principle and trade considerations. The *humanness* of this approach lies in the fact that it treats the 'human' as an end in itself.[44] Since the existence of human beings is a prerequisite for anything else, including business, interests of human beings cannot be subordinated to anything inferior to them; their interests can be balanced or subordinated only to something which is similar or superior in status.[45] Human rights constitute the core of interests of human beings, for human beings lose their 'human' character when devoid of human rights.[46] The *human* element consists of recognition of individual worth and treatment of human beings with equal respect and dignity. Since the business approach of varying standards subordinates these elements to profit, it needs to be replaced with the human approach which postulates universal standards for universal human rights. The adoption of universal standards would ensure equal treatment by disregarding irrelevant local differences.

The standards for universal human rights need to be universal, otherwise their *universality* is eroded. Universal human rights do not remain 'universal' if varying standards are applied, they lose their 'human' character if they assign different values to different people, and they cannot be considered 'right' if conditioned to local conditions or if their enforcement is at the mercy of violators. Presently, we are primarily concerned with the universal character of such rights. The universal nature of human rights is emphasised

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[44] One of the leading proponents of this was Kant; see Lerome J Shestack, 'The Philosophical Foundation of Human Rights' in Janusz Symonides (ed.), *Human rights: Concepts and Standards* (Aldershot: Ashgate/Dartmouth, 2000), p. 45. Korten also argues that development should be *'people centred'*, people being both the purpose and the primary instrument; *supra* note 2, p. 5.

[45] Since interests of fellow human beings would be equal in status, the human rights of one human can be balanced with equal human rights of others.

[46] Czerny writes: *'Human rights translate the human condition into those fundamental, essential, non-negotiable and enforceable terms which are necessary in order that life might be life, that is, in order that life must begin, grow, develop and flourish in all its attributes'* (emphasis added); Michael F Czerny, 'Liberation Theology and Human Rights' in Kathleen E Mahoney and Paul Mahoney (eds.), *Human Rights in the Twenty-first Century* (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 36.

by all major international conventions/declarations, e.g., the UN Charter,[47] the Universal Declaration of Human Rights,[48] the International Covenant on Civil and Political Rights,[49] the International Covenant on Economic, Social and Cultural Rights.[50] This has been reaffirmed by the Vienna Declaration[51] and by the recent Draft Norms on Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights (UN Draft Norms).[52] The universality embedded in these declarations is also asserted by many scholars. Sidorsky, for example, observes that 'the phrase universal human rights is used to assert that universal norms or standards are applicable to all human societies.'[53]

A reference to the above treaties makes it abundantly clear that the international community regards certain human rights as possessing a universal character. Now the question is whether these universal rights can be effectively realised with varying standards. The answer should be in the negative, for the application of different standards as per local differences would open a floodgate of uncertainties. Moreover, universal human rights are based upon the premise that the creation of basic attributes needs to be protected all over the world, without any local distinction, to ensure human development. If we fail to agree on universal standards, it goes against the very thesis that certain rights are beyond national differences. For example, if we agree on a right to a safe and healthy working environment, then why should standards of safety or clean air be different in the US and India? Would not settling for lower standards for Indian workers vis-à-vis the US workers result in accepting that Indian workers are lesser humans than the US workers

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[47] 1 UNTS xvi, entered into force 24 October 1945. See Articles 1(3), 55(c) and 62(2).

[48] UN Doc. A/810 (1948), entered into force 10 December 1948. See the Preamble in particular.

[49] UN Doc. A/6316 (1966), entered into force 23 March 1976.

[50] UN Doc. A/6316 (1966), entered into force3 January 1976.

[51] A/CONF.157/23, entered into force 12 July 1993.

[52] E/CN.4/Sub.2/2002/13. See also Anne F Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century* (Hague: Kluwer Law International, 2000), p. 333.

[53] David Sidorsky, 'Contemporary Reinterpretation of the Concept of Human Rights', as quoted in Henery J Steiner and Philip Alston, *International Human rights in Context: Law. Politics, Morals* (2nd edn., New York: Oxford University Press, 2000), p. 327.

are? Furthermore, should different yardsticks govern the supply of harmful or potentially harmful products by an MNC in a developing country merely because its legal framework is not strong or its consumers are comparatively ignorant?

Such examples can be multiplied by involving other human rights, but the underlying point remains the same: human rights issues involving MNCs can only be resolved if MNCs are put under a mandatory obligation to apply universal standards for universal human rights. Such an obligation is also consistent, in one way, with the business approach of MNCs, i.e., removal of national boundaries. Rees argues that corporations rely on 'universalism' to enhance free trade but do not accept the same base for human rights.[54] This dichotomy needs to be exposed to give business a human face.

The universal standards apply everywhere in accordance with states' adherence to international law, or in accordance with the *jus cogens* quality that human rights have. If we can agree on common international standards regarding trade, intellectual property rights, arbitration, and so on, then why not regarding human rights? In this context any disagreement on universal principles for human rights would send a signal that human rights are of lesser concern than trade-related issues. The choice is with us whether we are willing to realise and accept this.

The thesis of universality can be supported by another argument as well. Any debate of varying standards focuses on vital differences between Rome and home; local conditions of Rome demand different standards as compared to home. But where is the home of MNCs? Should it be the country of incorporation, or the *real* place of operation through subsidiaries? I have argued above that as far as human rights are concerned, there are no relevant differences between Rome and home. Moreover, chances of human rights violations are greater in the area of operation than in the area of incorporation. Therefore, the 'home' of MNCs for the purpose of inquiry into human rights standards, as discussed below, should not be the country of incorporation but the whole world.

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[54] Stuart Rees, 'Omissions in the 20th Century: Priorities for the 21s' in Stuart Rees and Shelley Wright (eds.), *Human Rights and Corporate Responsibility – A Dialogue* (Sydney: Pluto Press, 2000), p. 298.

2.2.3 Operational issues of universal standards

Once we agree on universal standards for universal human rights, two issues related with the operationalisation of standards require consideration. First, what is the nature of the obligation? Is the obligation on MNCs merely negative (not to violate human rights) or does it also extend to taking positive steps? Second, how can those standards be agreed upon? Can the 'core' of human rights work as a starting point? I would argue below that the obligation of MNCs vis-à-vis human rights is both positive and negative. On the second count, I would argue that since an agreement on universal standards of human rights is full of complexities, the 'core' human rights could be taken as the starting point.

The presence of rights in human beings postulates the imposition of duties on 'someone'. Who would that someone be? That someone could only be such an entity which is both in a position to perform and is capable to perform duties. The 'position' is bestowed on someone because of a legal, moral, social or contractual duty, whereas the 'capacity' arises due to the presence of resources at their disposal. Does an MNC possess both these attributes to qualify as 'someone'? The response should be in the affirmative, for MNCs undoubtedly have both position and capacity. The position arises not only because of a moral and social duty but also because of a legal obligation to follow human rights. The capacity of MNCs to fulfill the required duties is self-evident; some MNCs are more capable than many states.

If MNCs qualify as bearers of duties, what should be the nature and extent of these duties? The nature and extent should be decided keeping in mind the objective for the imposition of duties. The objective could be nothing but ensuring the fullest realisation of human rights. That objective can be achieved only if duties are extensive, i.e., both positive and negative. Therefore, MNCs are under a dual obligation – the duty to respect human rights and the duty not to impede human rights.[55] Imposition of dual duties is necessary because rights can be violated both by an action as well as by omission. Mill very aptly argued that a person may cause evil to

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[55] Michael K Addo, 'Human Rights and Transnational Corporations – An Introduction' in Michael K Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Hague: Kluwer Law International, 1999), p. 27.

others not only by his actions but also by his inactions, and in either case he is justly accountable to them for the injury.[56]

Many scholars may not agree with the imposition of such extensive duties on MNCs. Donaldson, for example, draws a list of fundamental international rights[57] and suggests that the 'corporation is an economic animal' and therefore, 'it would be unfair, not to mention unreasonable, to hold corporations to the same standards of charity and love as human individuals'.[58] He agrees with Shue regarding three correlative duties possible for any right,[59] but argues that duties of corporations do not extend to protecting from deprivation or aiding the deprived. Such duties, he feels, are within the province of governments.[60]

I would, however, argue, *contra* Donaldson, that the imposition of positive duties on MNCs is essential to protect human rights. It is true that positive obligations regarding human rights are primarily on states, though denied at one point of time. But this is no argument to deny the positive obligations of MNCs. Both states and MNCs can have positive obligations at the same time; duties on states do not dispense duties on other *similar* entities. Obligations arise, as stated above, because of position and capacity and not because of any 'charity'. It is again true that MNCs are driven by profit, but how do they earn profit? MNCs are dependent on investors, consumers, government and society as such for fulfilling their primary (or sole, as some would say) objective. The roots of profit lie in society; society is an integral part of the life cycle of corporations. Can corporations still earn profit if investors do not invest in them, or consumers do not buy (or are incapable of buying) their products, or government does not support their venture? Therefore, since MNCs use societal resources and are dependent on people to run and earn,

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[56] J S Mill, 'On Liberty' in M Warnock, *Utilitarianism* (London: Fontana, 1960), p. 74.

[57] Thomas Donaldson, *The Ethics of International Business* (New York: Oxford University Press, 1989), p. 81.

[58] *Id.*, p. 84.

[59] Three duties are: (1) to avoid depriving; (2) to help protect from deprivation; and (3) to aid the deprived. See Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980), p.57.

[60] *Supra* note 57, pp. 83-84.

they need to assist in the realisation of human rights even by taking positive obligations.

The positive obligations of MNCs may not be similar to or as extensive as that of states, but they should do their part as a *social* entity performing public functions, at least regarding 'core' human rights, as discussed below. For example, an MNC manufacturing life-saving medicines should be under an obligation to make available such medicines at a reasonably affordable price (not free or at nominal price as the obligation on the government might be), for failure to do so would violate the right to life and health. Similarly, an MNC should take positive steps in the form of affirmative action to integrate neglected sections of society in the mainstream, for failure to do so would violate the right to equality and equal respect.

In this regard, it may not be out of place to make a reference to the recent UN Draft Norms which mark an advancement over the conventional approach of mere negative obligations of MNCs. Para 12 lays down:

> *'Transnational corporations and other business enterprises shall respect civil, cultural, economic and social rights and contribute to their realisation, in particular the rights to development; adequate food and drinking water; the highest attainable standard of physical and mental health; adequate housing; education; freedom of thought, conscience and religion; and freedom of opinion and expression; ....'*[61]

This development further strengthens the argument of recognising positive obligations of MNCs regarding universal human rights.

The second operational issue relates to the process of evolving universal standards. Before proceeding further, the meaning of 'standards' should be understood. Standards are guiding principles against which the conduct of MNCs is to be judged. Despite universality of principles, the actual benchmark may differ from country to country. The principle of reasonable subsistence wages, for example, would not demand the same wages for workers in Virginia and Bhopal. It only requires that the factors which are taken into consideration to fix wages should be the same in both

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[61] *Supra* note 52. (emphasis added)

places.[62] Boatright also agrees with this when he observes that *'the disparity is not unjust if the same mechanism for setting wages is employed in both cases.'*[63] On the other hand, the principle of a safe and healthy working place, or the prohibition of forced and child labour would demand the same standards everywhere regarding a particular industry. Thus, the universal principles do not provide unreasonable or arbitrary yardsticks but merely seek to establish an equitable base for universal human rights.

The International Bill of Rights provides an exhaustive framework for universal human rights and it would be ideal if universal standards could be agreed upon regarding all human rights contained in the Bill. But as the task involves tough decisions to be made and does not seem to be achievable quickly, I suggest that MNCs should be bound to follow the universal standards at least regarding the core universal human rights. This would begin the process towards universal standards for universal human rights.[64]

The 'core' of international human rights is difficult to define or agree upon as it necessarily involves a hierarchy or grading of human rights. Meron points out that some human rights are obviously more important than others, but except in a few cases (right to life, freedom from torture) the choice is exceedingly difficult.[65] The difficulty in choice, however, does not establish that the 'core' does not exist or that it cannot be agreed upon. Donaldson, while making a distinction between minimum and maximum duties of corporations,[66] draws a list of ten fundamental international rights. The list contains rights

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[62] *Id.* UN Draft Norms (para 8) lay down that *'transnational corporations and other business enterprises shall compensate workers with remuneration that ensures an adequate standard of living for them and their families.'*

[63] *Supra* note 1, p. 379. (emphasis in original)

[64] Skogly observes that using the 'core content' of human rights would be a good starting point for agreeing on minimal standards; Sigrun I Skogly, 'Economic and Social Human Rights, Private Actors and International Obligations' in Michael K Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Hague: Kluwer Law International, 1999), pp. 255-56.

[65] Theodor Meron, 'On a Hierarchy of International Human Rights' in Philips Alston (ed.), *Human Rights Law* (Adershot: Dartmouth, 1996), p. 80. He argues that the UN Charter, UDHR, ICCPR, etc., have used the terms 'fundamental human rights' and 'human rights' interchangeably.

[66] *Supra* note 57, p. 62.

to freedom of physical movement, ownership of property, freedom from torture, fair trial, non-discriminatory treatment, physical security, freedom of speech and expression, minimum level of education, political participation, and the right to subsistence.[67]

Without being exhaustive or specific, it can reasonably be argued that any human right which is the bare minimum for survival and development is 'core'. The UNDHR and the UN Draft Norms could throw the necessary guiding light on the search of a 'core'. As the core human rights cannot be conditioned by any other condition, the standards regarding them need to be universal.

It must, however, be noted that the purpose of defining certain universal human rights in terms of 'core' is not to classify universal human rights into two categories and in turn degrading the status of what is not core. The attempt only marks the beginning to accomplish an end which envisages that the worth of human beings is the same all over the world and is not subject to man-made variations.[68]

2.2.4 'Home' of MNCs

Both the guiding principles – 'when in Rome, do as Romans do' and 'when in Rome or anywhere else, do as you would do at home'[69] – raise a presumption about the 'home' of MNCs. It is assumed that the home of an MNC, or even a corporation, is the country of its incorporation.[70] Such a *fictitious*[71] assumption is necessitated by

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[67] *Id.*, p. 81. The list is reached by applying the following three conditions: (1) the right must protect something of very great importance; (2) the right must be subject to substantial and recurrent threats; and (3) the obligations imposed by the rights must satisfy a fairness-affordability test.

[68] Dispute can arise as to what is man-made. For example, whether the religious texts which authorise, if at all as often argued, subordination of women are man made or God created? Similarly, what would be the status of customs which permit *Sati* (widow burning) or mandate sacrifice of children to avert divine displeasure?

[69] *Supra* note 1, p. 382.

[70] This is based upon, what Blumberg calls, the nationality principle and territorial principle. See Philip I Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York: Oxford University Press, 1993), pp. 171-76.

[71] I treat recognition of the separate personality of the corporation as a legal fiction. If the corporation itself is a fiction, any assumption about its 'home' should necessarily be a fiction.

various reasons. For example, which laws of which country should govern the constitution, running of internal affairs and business activities of an MNC? Moreover, where should it be liable for payment of taxes? One way of resolving these and such other issues was to agree on the principle that laws of the 'home' country should guide all affairs of an MNC. This resolution was again based upon a hypothesis that the municipal legal regime is the best available way of controlling the activities of MNCs. This underlying assumption is, however, increasingly exposed under the new world order. With some possible exceptions,[72] the municipal legal framework of even developed countries suffers from natural limitations arising from peculiar *modus operandi* of MNCs. Accepting incorporation as a determinative factor for the 'home' of a corporation could be considered reasonable at a time when corporations ordinarily confined their operations to one country, but not now when MNCs operate at the transnational level.[73] This regulatory incapacity of the municipal framework to hold MNCs accountable for human rights violations compels us to look for alternatives.

I argue that one of the alternatives lies in redefining the *home* of MNCs. Since the area of activities of MNCs defies any notion of boundaries and since they expect a uniform international yardstick regarding international trade, it is a necessary corollary that their 'home' is no longer limited to the country of incorporation. Rather, it now extends to the whole world, for otherwise how could MNCs ask for *homely* treatment in the 'house of their neighbor'? When MNCs reap the benefits of trade in a borderless world, they should also be accountable to a borderless framework of human rights. Such an international regime of accountability should be based on the premise that the 'home' of an MNC is not the country of incorporation but the whole world. It must, however, be noted that the suggested redefinition of 'home' applies to the issue of human rights alone; the home of MNCs for human rights violations and for other purposes may differ.

The above reconceptualisation of the 'home' of MNCs would not only provide a sound basis for the acceptance of universal standards but

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[72] Reference can be made to the use of the Alien Tort Claims Act in the US and tort cases dealt with by the UK courts.

[73] *Supra* note 70, pp. 171-72.

would also help in regulating the *liberty* of MNCs to move and operate in any part of the world without any limitation of boundaries.[74] When there is no longer any difference in standards in home and Rome, the liberty of MNCs to choose Rome and then commute from one Rome to another Rome is regulated to some extent, for the possibility of adopting lower standards at a particular place is ousted.

3. MNCs and Cultural Relativism

A possible challenge to universal standards of human rights for MNCs can be based on 'cultural relativism', an argument which is often resorted to by states. It is outside the province of the present article to deliberate upon the question whether states are justified or not in making the plea of cultural relativism.[75] It analyses the issue from the angle of MNCs alone. Cultural relativism is based upon the belief that local cultural conditions determine the existence and scope of human rights enjoyed by the people in a given society. Fernando points out that 'a central tenet of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.'[76]

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[74] This often happens when one of the MNC's subsidiaries is involved in a human rights violation in one country and the parent company may transfer the assets of 'involved' company to some safer company.

[75] See, for discussion on this issue, generally Henry J Steiner and Philip Alston (eds.), *International Human Rights in Context: Law, Morals, Politics* (Oxford: Clarendon Press, 1996), pp. 192-255; Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', 76 *American Political Science Review* 303 (1982); Yash Ghai, 'Human Rights and Governance: The Asian Debate', 15 *Australian Year Book of International Law* 1 (1994); Abdullahi Ahmad An-Na'im, 'Human Rights in Muslim World: Socio-Political Conditions and Scriptural Imperatives' 3 *Harvard Human Rights Journal* 13 (1990); A D Renteln, *International Human Rights: Universalism versus Relativism* (London: Sage Publications, 1990); Rein Mullerson, 'Universal Human Rights in the Multicultural World: Reasons and Excuses for, and Circumstances Conducive to their Gross and Systemic Violation' in Meghnad Desai and Paul Redfern (eds.), *Global Governance: Ethics and Economics of the World Order* (London: Pinter, 1995), p. 133; and Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002), pp. 77-118.

[76] Fernando R Teson, 'International Human Rights and Cultural Relativism' in Philips Alston (ed.), *Human Rights Law* (Adershot: Dartmouth, 1996), pp. 118-9. See also Harrison, *et al*, *supra* note 38, pp. 41-44.

Donaldson writes that cultural relativism asserts that words such as 'right', 'wrong', 'justice' and 'injustice' derive their meaning from the attitudes of a given culture.[77] In sum, the argument challenges the universal character of both human rights and their standards; human rights standards are culture-specific and not trans-cultural. I would, however, argue that MNCs could not use cultural relativism as a shield for applying varying standards of human rights.

The fallacy in the argument of cultural relativism does not lie in the 'factum' of differences amongst cultures but in the 'effect' of such differences on human rights. Differences do exist in different cultures, but all those differences, though material on occasion, are not relevant for the purposes of universal human rights. Only those cultural differences should be kept in mind which do not conflict with universal human rights, or may, in fact, promote human rights. Moreover, it can also reasonably be argued that regarding 'core' human rights, people of different cultures hardly differ. For example, people of all cultures everywhere need food to eat, clothes to wear, houses to live in, clean air to breathe, access to medicines for cure, though they may differ drastically about the *content* of these basic attributes.

MNCs, therefore, should not rely upon relativism to justify relative standards for, at least, three reasons. First, the *culture* of human rights, which is based upon equal worth and respect of human beings irrespective of distinctions and differences, is superior to different cultures prevailing in the world, for the latter do not *always* afford equal respect to all human beings.[78] Second, since MNCs rely upon universalism, and not relativism, for pleading uniformity regarding rules and regulations governing international trade, it would be immoral for them to discard universalism when it comes to human rights. Third, MNCs hardly keep variable cultures in mind when taking management decisions and in fact, are driven by only one culture, i.e., the profit culture.

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[77] *Supra* note 57, p. 14.

[78] The Harare Declaration on Human Rights stresses the importance of developing 'a culture of respect for internationally stated human rights', as quoted in Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993), p. 3.

The argument that MNCs should disregard cultural relativism and adopt universal standards of human rights may give the impression of being unreasonable, for it demands from MNCs more than what is accepted by states. After all, why should MNCs, primarily established to maximise profit, comply with universal norms when even states, which have primary responsibility for the realisation of human rights, are reluctant to abide by such yardstick? This challenge sounds impressive but can be overcome by understanding the distinctions in composition, nature and modus operandi of MNCs and states. First, the state is a creation of people who control its policies and actions by various modes. MNCs, on the other hand, are not created either by people or state, though the corporation is a creation of the state. Because of this difference, neither the state nor the people, as the ultimate beneficiary of the creation of a corporation, have any effective control over the actions of the MNC.[79] Second, the nature of the separate legal personality of the state, as distinguished from the people behind it, is different from the separate personality of the MNC. Though both are the result of a legal fiction, there is a vital difference between the two. Heavy inroads have been made both into the doctrine of sovereignty of state and of fixing liability directly on state officials, independent of the state.[80] On the contrary, the fiction of the separate personality of the MNC, qua its management as well as subsidiaries is still running wild, for the piercing of the corporate veil is proving to be an inadequate tool. Third, the sole motive of an MNC is maximisation of profit, whereas a state acts beyond the profit principle. The central concern of a state is still the welfare of its people. Fourth, an MNC, unlike a state, operates at the transnational level. Since an MNC has no defined boundaries, its appearance as well as its

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[79] Here one must make a distinction between people and shareholders. Shareholders might have the power to control the actions of MNCs, but one must not lose sight of the shareholders' motive, as compared with the people's motives, in exercising such control.

[80] See the changes made by the Crown Proceedings Act (UK), 1947. See also the Indian Supreme Court judgments in *N Nagendra Rao & Co.* v. *State of AP* (1994) 6 SCC 205: AIR 1994 SC 1663; *Rudul Shah* v. *State of Bihar* (1983) 4 SCC 141; *Nilabati Behra* v. *State of Orissa* (1993) 2 SCC 746; and *Common Cause* v. *Union of India* AIR 1999 SC 2979.

disappearance can be deceptive. Fifth, an MNC operates through a web of parent and subsidiary companies, which is not the case with a state. In view of above differences, cultural relativism is no argument for MNCs even if invoked, rightly or wrongly, by states. MNCs cannot claim parity with states merely because they are performing like a state or state's functions. In fact, their claim of parity with states may boomerang to their detriment.

4. Conclusion

The human rights movement has reached a stage when it is not limited to imposing obligations merely on states not to violate and to respect human rights. Now it is vigorously argued, I think rightly, that even non-state actors, including MNCs, should be under a legal obligation to respect human rights. But such an extension of duties presents its own difficulties. One of the critical issues in this area relates to the nature of applicable human rights standards to MNCs. Since MNCs, unlike states, operate at the transnational level, they have the choice to apply different standards in different places of operation. More often than not, this freedom to choose standards results in the adoption of inferior standards of the host countries (mostly under developed or developing) as compared to the home country.

In this article I have tried to demonstrate, with the help of the Bhopal case, that the business approach of 'no standard standards' is unsound as it fails to protect even basic human rights. Therefore, the business approach should be rejected in favour of the human approach of universal standards. The standards regarding universal human rights need to be universal, for by application of varying standards they lose their universal character. They no longer remain 'human' if they assign different values to different people and cannot be considered 'rights' if their realisation is subjected to any other condition of lesser value. In other words, whether in 'Rome or anywhere else' the MNCs should do what they do at 'home'. For human rights purposes the *home* of MNCs is not the country of incorporation but the whole world as the nature and extent of their activities defies any conventional boundary of home. I have further argued that even the plea of cultural relativism cannot support the claim of MNCs to adopt varying standards.

It is true that the task of reaching an agreement on universal

human rights standards for MNCs is full of complexities.[81] But the importance of the objective involved in the process is a sufficient justification to grapple with those complexities. I believe that discarding double standards and agreeing on universal standards would not only dispel the fear of MNCs of 'loosing economic competitiveness' but would also lead to the equitable development of the world as developing countries would no longer have to relax their human rights norms just to attract foreign investment. The present article makes a humble attempt to build up a case for the evolution of universal human rights standards for MNCs.

[81] This is evident from the fact that dispute still exists regarding the application of universal standards by states. But, as suggested earlier, lack of consensus on such standards for states is no bar or hindrance to the evolution of universal standards for MNCs, since MNCs differ distinctly from states.

RESPONSIBLE BUSINESS CONDUCT – AN EMPLOYER'S PERSPECTIVE

HELGA ELLUL*

1. Introduction

It is certainly truthful and I believe, acceptable for me to state that the reason for the existence as well as the primary role of businesses is to make profits. It is in fact a prime *responsibility* of business to make profits. If businesses do not make money, they will fail in their objectives, they will fail the shareholders that have invested and they will also fail their employees. However, it is a fact that there is more and more pressure from customers, from society in general, from governments as well as voluntary recognition by companies that these profits should be sought in a manner that corresponds to the expectations of society. Of course, there are various ways of doing this. Differences occur according to the sector and type of company concerned.

Being a practical person, I do in fact believe that many companies act responsibly without actually realising it. One obvious example of this is the role that companies play in the development of people's knowledge and skills. In the context of growing globalisation and increasing competitiveness, there is much scope for encouraging companies to invest further in training their people and to create the appropriate conditions for skilled people to innovate.

Without getting into the complex debate about the definition of corporate social responsibility or CSR, it is important for me to draw a distinction between 'a business engaging in society' and secondly 'ensuring that business is carried out in a responsible manner'. Whilst I will attempt to delve further into this difference in the first part of my presentation, let me state that the former implies the involvement of a company in society to build firm partnerships with

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other actors. On the other hand, doing business in a responsible manner relates to how a company conducts its operations. This means anything from the way that it employs and manages its workforce to the way it handles product recalls.

The second aspect of my presentation will focus on a discussion regarding the benefits of CSR. It is a major challenge that it is not possible to quantify with precise measurement the business benefits of doing business in a responsible way. One of the ways we continue to improve as well as innovate at Brandstätter is by benchmarking with other companies. Many times, it is difficult to measure precise results of such initiatives. That is why I would here like to quote as an example and benchmark the philosophy at Johnson & Johnson. This is based on the belief that a responsible approach to business is not only beneficial for their reputation but it also plays an essential role in a number of areas; these include, attracting the right people, adding value to their products and services, as well as managing risks. They do not see CSR as a specific corporate department or functional responsibility, but rather as a set of horizontal values which affect all areas of a company's operations. Such companies do not 'do CSR' but rather seek to change the way they do things within their companies and towards their employees. The commitment for CSR is at a strategic level and implemented through all areas of the organisation.

Of course, in today's political and economic context, there is a need for companies to communicate what they do and to see transparency as a key component of corporate governance. This does not mean compiling glossy CSR reports without substance! It is much more important to make a concrete commitment to CSR and to focus on real achievements in the countries within which companies may operate.

The third and final part of my presentation will then focus on responsible business practices that companies carry out. I would like to emphasise here that CSR clearly extends beyond the doors of the company into the local community within which the company operates and involves a wide range of stakeholders. Yet, there is clearly also a very important internal dimension which cannot be underestimated. While companies increasingly are recognising their social responsibility, many of them have yet to adopt holistic management practices that reflect this. There is a need for companies to integrate this responsibility in the day-to-day management

involving their whole supply chain, and their employees. To be truly successful, management needs appropriate training and retraining to be able to obtain the necessary skills and competence. The dissemination of good practice such as that which I have already referred to, is another important consideration.

2. Overview of Business and CSR. What are the options?

As companies themselves face the challenges of a dynamic environment in the context of increasing globalisation as well as rapid changes in the internal market, they tend to become more aware of CSR. They understand how it can be of direct economic value. Being socially responsible means not only fulfilling legal expectations; it extends beyond compliance and investing even more into what has been termed 'human capital'. Companies are recognising social responsibility towards their stakeholders, towards their natural environment and towards general social welfare, in varying degrees.

As a matter of interest, I would like to share some distinct organisational approaches to social responsibility. Each of these approaches varies in the degree of social responsibility taken. The first approach is recognised as the *obstructionist approach*. It is the lowest degree of social responsibility to be taken by a company. This is an approach to social responsibility in which companies do as little as possible to solve social or environmental problems. Such companies may in fact be involved in cover-ups of their activities. A slightly improved stance is known as the defensive approach. Here the organisation is likely to do everything that is required of it legally, but nothing more. Such companies could be tobacco producers who, as we know, are involved in huge health debates. A third approach is recognised as the accommodative approach. The organisation is here likely to meet its basic legal and ethical obligations. It might also go beyond in some cases but still there is always a need for further convincing. The highest stance in this classification is taken by those companies that take up a *proactive approach*. These are the organisations that view themselves as citizens in society and that also proactively seek opportunities to contribute to that society.

This classification is obviously a theoretical perspective to the different stances that organisations may take to CSR. It is however an interesting one and could provide a benchmark as to where

organisations 'fit' into the descriptions made and therefore, how they can improve their approach to CSR.

Attempts to do this have shown me that many times it is difficult to 'fit' an organisation neatly in one category as real live organisations operating in changing environments can be as dynamic and as versatile as the scenarios within which they operate.

Also, companies and their stakeholders influence each other in many ways – directly or indirectly – so that companies seeking to be more proactive in assuming CSR may be affected by the behaviour of governments and other partners. Let me give an example of the way businesses and government influence each other.

The government undoubtedly influences business through a number of factors including:

- Environmental protection legislation
- Consumer protection legislation
- Employee protection legislation and
- Taxation.

Of course, businesses influence government in their own way through:

- Personal contacts and networks
- Lobbying
- Influence tactics.

It is clear that where CSR is undertaken as a *process* through which companies manage their relationships with a variety of stakeholders, the business case for CSR becomes more and more apparent. This is important because these stakeholders can have a real influence on their licence to operate, and hence, on their futures.

3. What are the benefits of taking on Corporate Social Responsibility?

As I have stated earlier, being responsible as a business, is much more than fulfilling legal expectations. It goes beyond compliance and means investing more in the people who work for the company, investing more in the environment and in relationships with stakeholders. There is much debate that suggests that this can contribute to a company's competitiveness. Going beyond basic legal obligations in the employment and social area, for example, through understanding that the way one's workforce is managed and

developed can directly impact on productivity and business success, is one aspect of acting responsibly. In this manner training, working conditions and management-employee relations are recognised as key elements of responsible corporate behaviour that have a direct impact on the business's operations. For many organisations this may open a way of managing the essential change processes and of matching social development with improved competitiveness.

I must emphasise that CSR should never be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation.

One way, for example, that companies investing in less developed countries can place their efforts in improving social rights and/or environmental standards is through the promotion of and adherence to an agreed code of business practices. Through this voluntary approach international companies can adopt good practice in a number of areas including proper housing, child labour and overtime pay, within a local framework. In this way, principles can be developed and evolved, perhaps also leading to changes in the legislation of the respective countries.

In reality, a number of companies with good social and environmental records in a global environment show that these practices can actually result in improved performance and can generate more profits and growth. Yet for many companies, especially in Malta, CSR is still a new concept which many still see as being a costly business rather than bringing added value to the organisation. Longer-term evaluation remains to be done. Perhaps, the economic impact of CSR can be broken down into direct and indirect effects. It is argued that positive direct results may, for example, derive from a better working environment, which leads to a more committed and productive workforce or more efficient use of natural resources.

I suppose I could here quote our experience at Brandstätter where our long term belief and commitment to the involvement of our workforce in the workplace, to the ongoing investment in the development of our people, as well as to the introduction and practice of professional people management, have brought immeasurable benefit. It is indeed unfortunate that many of the benefits are not really measurable. Yet today I am fully aware that our corporate success is due in no small way to the commitment and skill development that we have managed to instil within our workforce. It is no mean feat. From management's side, it requires commitment,

consistency and transparency. It requires a truly proactive and professional approach. There has, of course, also been recognition of our responsibilities in the environmental area. I personally have taken a commitment to energy-saving approaches within our company – both in electricity and water consumption, as well as generally, in the reduction of waste. It is a responsibility that we have striven to make our employees also more aware of. This has been possible through the commitment of our professional management team but also through a number of initiatives such as our suggestion scheme Brainmobil, which has focussed on this area a number of times. Such a focus is given more importance amongst our employees through the granting of double points for suggestions relating to energy-saving issues within a specific period. This helps to raise awareness besides achieving results.

On the other hand, indirect benefits result from the growing attention of consumers and investors on the manner in which a business behaves. Inversely, there can sometimes be a negative impact on a business's reputation due to criticism of business practices, such as the employment of children and the neglect of safety issues. These can affect the core assets of a company – including its brands and image.

Generally, there are a number of arguments that can be found in favour of companies taking up more active social responsibility. Such community arguments include the frequent considerations that:

- Business may create problems and should therefore help solve them
- Businesses are 'citizens' in a society
- Business often has the resources necessary to solve problems
- Business is a partner in society, along with the government and the general population.

The other side of the coin presents those who argue against businesses taking up a more active role socially. This criticism is generally levelled as it is believed that:

- Business lacks the expertise to manage social programmes
- Involvement in social programmes gives business too much 'power'
- There is potential for conflicts of interest
- The purpose of business is to generate profit

By now you are probably aware that I do feel, however, that the balance tends to dip towards the arguments in favour of enhancing the social responsibility of businesses – properly actioned and, if necessary, guided and watched.

Whilst CSR may be seen to be promoted mainly by a number of large or multinational companies such as Johnson and Johnson, internationally or even Brandstätter, locally – I do want to point out that CSR is relevant to all types of businesses and in all sectors of activity. In fact, the wider application of CSR in SMEs, including micro-organisations, is of central importance given that they are such a significant contributor to the economy and employment, both abroad and in Malta. Although I do believe that many such micro and small organisations already take up their social responsibility, particularly through involvement in the community within which they operate, further awareness-raising and support to disseminate good practice could help promote CSR further.

This September's issue of *The Director* magazine which is a firm favourite of mine, in fact featured how small companies fail to publicise their good works....

They showed how many SMEs are involved in CSR but when it comes to promoting their community activities or green credentials, they allow the biggest UK businesses to take the limelight. This feature also showed how small companies as well as larger ones saw employment issues becoming the biggest CSR issue, with environmental issues taking less priority – perhaps because more legal measures will be put in place. What is however obvious is that the desire for micro and SMEs to become involved in CSR may be just as great as the corporates. The difference is that they simply lack the necessary resources. A final point in this regard is about worker co-operatives and participation schemes, as well as any other forms of co-operative.

I feel that these types of organisations are more likely to structurally integrate other stakeholder interests and take up spontaneous social and civil responsibilities due to their very nature, and therefore such associations may be worth pursuing.

I am also aware that financial institutions are making more use of social and environmental checklists to evaluate the risks of loans to, and investments in, companies. Overall, however, there is a need for better knowledge and further research on the impact of CSR on business performance. This might be a field for further research

between companies, public authorities and academic institutions. It is obviously very difficult for any company to assess the extent to which their CSR commitment will be justified and sustainable.

Questions which businesses are bound to ask include:

- What cost will be added to the company by taking on further responsibilities?
- Are these costs optional or will legislation require them anyway?
- Are the costs likely to be borne by competitors?
- What are the benefits to the business in adopting these responsibilities?
- Are expenditures justified?

It might be a narrow view that is rightly criticised by members of society. Yet it is a reality. It is also likely that both in the public and the private sector, these questions are more closely scrutinised. Businesses are always asked to be more explicit about the cost/benefit balance of any expenditure. However, overall I do feel that the realisation is hitting home that it is not really a question of costs but one of investment for future performance and success.

4. Internal and External dimensions of Corporate Social Responsibility

The final part of my presentation in fact focuses further on how the company can act responsibly, both internally as well as externally.

I will first give an overview of what can be the main socially responsible practices within the company. These involve employees and relate to issues such as human resource management, health and safety, as well as managing change. Environmentally responsible practices relate mainly to the management of natural resources used in production. It is not really possible for me to delve into each of these areas in much depth - allow me simply to emphasise key issues.

Human Resources Management

A major challenge for companies today is to attract and retain skilled employees. Therefore relevant measures, strategically introduced and professionally managed, cover a long list. These include:

- lifelong learning opportunities,
- involvement of employees at the workplace,
- better information throughout the company,
- improved balance between work, family and leisure,
- greater workforce diversity,
- equal pay and career growth for women,
- concern for employability as well as
- job security.

Responsible recruitment and employee relations' practices can definitely facilitate the commitment and retention of employees within the company. I state this with conviction and experience. I also emphasise the need for a holistic approach, which has the whole–hearted commitment of the most senior management.

Health and Safety at Work

Health and safety at work have traditionally been approached mainly by means of legislation and enforcement measures. There are still arguments as to whether this is a cost rather than a benefit. Yet today there is growing awareness by companies, governments and sector organisations who are looking at additional ways of promoting health and safety, not only to use these as criteria in procuring products and services from other companies but also as enhancing the health of their workforce leading to less sick and injury incidents and improved performance. In this way health and safety can be seen more as an investment in the work environment, in the workforce and sometimes also, in the marketing of products and services.

Adaptation to change

The widespread restructuring taking place in Malta as well as abroad, raises concern for all employees and other stakeholders. The closure of a factory or a heavy cut in any workforce, involves serious economic, social or political repercussions in any community. Few companies escape the need to restructure. The challenge however, is to restructure in a socially responsible manner, to be able to balance and to take into consideration the interests and concerns of all those who are affected by the changes and decisions.

Experience of major restructuring operations in Europe and in

Malta, shows that successful restructuring can be better achieved through joint efforts involving the public authorities, companies and employees' representatives.

Management of environmental impacts and natural resources

In general, reducing the consumption of resources or reducing polluting emissions and waste can actually reduce environmental impact. It can also be good for the business by reducing energy and waste disposal bills, as in the Brandstätter example I briefly mentioned earlier. Brandstätter like many other companies has found that less use can lead to increased profitability and competitiveness. These are really what I would call 'win-win' opportunities for the business and for the environment.

Yet CSR is not only limited to within our businesses – the external dimension, as we are all well aware is just as important. It extends to the local community and involves many stakeholders in addition to the employees. These stakeholders include business partners and suppliers, customers, public authorities and NGOs, as well as the environment.

Local Communities

CSR is also about the integration of companies in their local environment – wherever and whatever that may be. Businesses contribute to their communities, especially to local communities, by providing employment, wages and benefits, and tax revenues. I must also mention however, that companies do also depend on the health, stability and prosperity of the communities in which they operate. That is one of the reasons why, for example a company like Playmobil which recruits from the local labour market, has a direct interest in the local availability of the skills that we need and why we get actively involved in this issue through various means. Furthermore, micro-organisations and SMEs especially, often find most of their clients in the vicinity. Therefore, the reputation of a company at its location, its image as an employer and producer, as well as an actor in the local scene, certainly influence its ability to compete.

Businesses also interact with the local physical environment. They rely directly on this for their production, the availability of water, or accessibility for the services they offer. On the other hand, businesses can be responsible for polluting activities including noise,

water, air emissions, transport congestion and waste disposal. This is one reason why some companies which are environmentally aware do get involved in the environmental education of the community. Other than this, many companies get involved in numerous community initiatives including charity events, sponsorships, and so on. The development of positive relations with the local community and the benefits to be gained from these, are argued to be particularly important for non-local companies. This is so because through their involvement companies can become part of the community. Also, as these companies become more familiar with the local actors, the local environment traditions and strengths, they acquire more strength and are more able to compete.

Business partners, suppliers and consumers

By working closely with business partners through numerous ways, many times, innovative ones, companies are able to reduce complexity and costs. They are also able to increase quality in the way they do things. This is definitely one of the aspects of our business at the Brandstätter Group – Malta. We are continually seeking to improve even further. In the longer-term, building relationships may result not only in a more satisfactory relationship but also in fair prices, terms and expectations along with quality and reliable delivery. This, I feel, however must always be subject to applicable legislation and not a substitute to legal requirements.

A particular experience, which we are going through at the Brandstätter Group here in Malta, is the ripple effect of CSR on our economic partners. Let me explain further: as we increase our outsourcing of our production and services to nearly twenty local companies, we do feel the additional responsibility with regard to these suppliers and their workforce. Also, as we understand that in many instances, the economic welfare of these companies, usually micro and SMEs does depend primarily on us, we have striven to make them less dependent on us and more competitive in their own stride. This has been possible through a number of initiatives we have taken. These include a good and open relationship, sharing of standards and benchmarking, support for access to other markets, and mentoring. We feel, this is necessary for two reasons. Primarily, following our strategy to work with these companies so that we could concentrate on our core business and our high value adding processes

and hence becoming more competitive and flexible. Secondly, due to the support we have actually received from these companies and their workforce and hence our responsibility towards them.

In fact a number of businesses, especially abroad but increasingly also in Malta, are acting as mentors, business angels of entrepreneurial initiatives in their area.

The initiatives taken by IPSE and ETC in the Business Incubation Centre and in the Mentoring Scheme, respectively are local examples of this. They provide a way of assistance to smaller companies and can provide advantages to both partners, including a better grip on innovative developments for the larger company and easier access to financial resources and to the market for smaller companies.

I must also mention here what I feel is a most serious responsibility we have as businesses: to provide products and services which consumers need and want, in an efficient, ethical and environmentally-aware manner. Companies, which build lasting relationships with customers by focusing their whole organisation on understanding what customers (all customers) really need and want – and then by providing them with superior quality, safety, reliability and service – are generally expected to be more successful and profitable. It is a strong value which we have striven to develop within our group through numerous initiatives and which I feel, now enjoys the commitment of our workforce. It is also however, an area which requires constant development, re-evaluation, and setting the right example from the very top of the organisation.

Human Rights

CSR has also a strong human rights dimension, particularly in relation to international operations and the more global supply chains. This is recognised in many international instruments and frameworks with which I am sure you are more familiar than I am. The issue of human rights is undoubtedly a very complex one, presenting political, legal and moral dilemmas.

In this respect, it is argued that businesses face challenging questions, including: how to identify where their areas of responsibility lie as distinct from those of governments, how to monitor whether their business partners are complying with their core values, and how to approach and operate in countries where human rights violations are widespread.

Indeed, a complex issue. International frameworks and agreements have been drafted and introduced with respect to many serious issues. These include the need to ensure the respect of standards across areas, to protect the environment, to fight corruption, to cover working conditions, to promote codes of conduct and also to verify the implementation and compliance with such codes.

Global Environment Concerns

Through the crossing of so many boundaries, businesses are, either voluntarily or else made to be more aware, of the effect they have on both global environmental problems and their consumption of resources from across the world. In fact, the debate on the role of business in achieving sustainable development is gaining importance on the global stage. This is an area, where I am sure, further developments will also be focussed.

5. Concluding thoughts

In conclusion, I must admit that whilst many businesses increasingly do recognise their responsibilities, many of us still have to adopt management practices that reflect it. Networking and benchmarking, both locally and abroad, can only help to improve this situation and disseminate best practice. Research activities between industry, academia and government authorities can be another plus, if concrete and practical results emerge. The push for businesses to behave more responsibly is coming from many areas. Sometimes, this does come from companies themselves, and I do feel this is more and more so, but it also comes from employees, consumers and investors amongst other stakeholders. We must look to the future, and as businesses we have no option but to do so, if we want to survive. We must be proactive.

Businesses must continue to ask themselves some key questions regarding the way in which they view and act upon the CSR dimensions and values I have discussed in this presentation.

Every so often, we get a new fad in the business world. Some companies take this on; others might be scared or do not know what they should do to change the way they do things. I do not believe that CSR should simply be hype. It should be a new way of thinking business and investing. It is very much a long-term vision for

business, which requires commitment right from the top, and training for its management. I do believe it will enable a company to better manage investor expectations as well as meet stakeholder demands. In this way, there can truly be benefits for all.

THE EFFECTS OF CSR FOR THE PROTECTION OF HUMAN RIGHTS

RADU MARES*

1. Introduction

I will speak about the relationship between TNCs and human rights in the third world. My focus will be on three aspects: first, the rise of an *informal norm* (the norm of effectiveness) which I perceive as a new and more pragmatic approach to complex human rights issues; second, the possible *systemic effects* of corporate voluntary initiatives; and third, the necessity of a more *holistic view* of the link between TNCs and human rights. The main question behind this whole argument is how some TNCs could advance internationally agreed human rights standards.

My understanding is that corporations violate human rights in developing countries because the legal system malfunctions and poverty is widespread. In other words corporate misbehaviour appears against the background of significant governance gaps. Such gaps allow for human rights violations to also occur *independently* of corporate activities: governments are unaccountable to their populations, often design inappropriate developmental policies, misallocate scarce resources, or sometimes have insufficient resources and then we have an issue of international governance. The relationship between business and human rights then turns to an examination of how a TNC relates to these governance gaps: does it take advantage of the gaps or not, does it attempt to narrow the gaps or not?

Some corporations conduct their operations in a harmful way for their workers or their surrounding communities - such TNCs can be labelled, for lack of a better term, 'abusive' (ATNCs to be

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differentiated from 'responsible' TNCs - RTNCs) because they *abuse* the governance gaps that exist in many host countries. Examples of such TNCs can be found in the clothing industry and in the natural resources industry. ATNCs have been the main object of concern for human rights experts, fuelled boycotts and advocacy, have been drawn in transnational litigation, and are the target of proposals for tort legislation. *Some other* corporations operate in industries where human rights violations are not so pervasive as in the industries just mentioned. Such TNCs do not harm stakeholders, they do not abuse the governance gap, they are just *indifferent* to it. They can therefore be labelled 'indifferent' TNCs (ITNCs to be differentiated from RTNCs). This categorisation of TNCs corresponds to the expectation articulated by the UN Global Compact for TNCs to 'respect' and 'support' human rights, and reflects the various links between TNCs and human rights.

Corporations face a difficult task in deciding how to relate to human rights issues. I think human rights *standards* are relatively simple to understand and to find in treaties and national laws. However their *implementation* (by states or TNCs) raises very complex issues, the further one goes away from the parent, down the supply chain, and into the wider local community. Managers need guidance as to how to approach such complexity and how to reduce it to manageable dimensions in order to fulfil their legal mandate. Various informal norms have been proposed in debates on CSR and herein I will outline the emerging norm of effectiveness and some of its implications.

2. Emerging norm of effectiveness

A norm is a social rule that does not depend on government for either promulgation or enforcement.[1] 'Norm' can be taken to mean what people normally do, as opposed to what deviants do.[2] In dealing with the complexity of the business environment, one option is

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[1] Richard A. Posner, Eric B. Rasmusen, 'Creating and Enforcing Norms, With Special Reference to Sanctions', International Review of Law and Economics, 1999.

[2] Robert D. Cooter, 'Decentralized Law for a Complex Economy: the Structural Approach to Adjudicating the New Law Merchant', Symposium: Law, Economics, & Norms, *University of Pennsylvania Law Review*, May, 1996.

provided by an informal norm that advises managers to rely on the states to set the rules of the game, and on markets to communicate pressing social demands. Its merits notwithstanding, this norm has dissuaded managers from better understanding the social environment of their business (with its threats and opportunities). The experience of Shell and Nike is illustrative of taking too literally the 'business of business is business' norm. Another norm (carried forward by business ethics through stakeholder argumentation) prompts managers to scan the social environment and balance the interests of stakeholders. Unobjectionable as such, this norm is often accompanied by a principled line of argumentation aloof of consequences. This is the antagonism between Milton Friedman and business ethicists. Still, both these norms seem animated by a hope of finding silver-bullets to reduce complexity for both managers and evaluators. Grounded in some theories of justice, these norms perpetuate the illusion that factual complexity can be tackled *mechanistically* by obeying the *dictates* of either law and markets, or of some moral imperatives.

The effectiveness *norm* recognises the constraints under which corporations operate and also prompts managers to scan the environment, but it aims to simplify complexity for decision-makers in a different way. This *approach* gives up the hope of finding silver-bullets. Instead it aims to facilitate attuned balancing acts by focusing on understanding the peculiarities of each context, and on providing tools to measure, report and verify corporate impacts. The focus is not on off-shelf *solutions* or judgements to complex problems, but on off-shelf *tools* for approaching each setting. It emphasises the necessity and inevitability of social *innovation* by all actors instead of simple, *mechanistic* applications of preconceived roles and notions about corporations and human rights. The emerging approach draws on the understanding that the values that people subscribe to, only influence their actual behaviour to a rather limited extent. As some psychologists say, 'To put values into practice, desirable behaviour needs to be reinforced by rewards, education, regulation, social images and desirable identities, and by providing information and appropriate options.'[3] Instead of feeding on *polarisation*,

[3] Minu Hemmati, Felix Dodds, Jasmin Enayati, Jan McHarry, *Multi-stakeholder Processes for Governance and Sustainability*, 2002, 39.

pragmatic approaches guided by the effectiveness norm attempt to identify areas of conceptual *agreement*: pressing social needs, resource constraints, valuable contributions, necessity of viable tools for assessing impacts. The emerging norm of effectiveness is inseparable from its underlying approach, which proposes that 'there is very little generic development knowledge—that all knowledge has to be gathered and then analysed, modified, disassembled and recombined to fit local needs'.[4]

The new norm of effectiveness is applicable to all actors in the developmental debate: it requires them to look afresh at the *means* they can use in order to achieve their respective *goals* more effectively. It poses that in the current tensional climate of opinion surrounding globalisation, it is the role of managers to scan for CSR threats and opportunities in order to fulfil effectively their legal fiduciary duties. It is the task of human rights experts to examine what opportunities corporations present for strengthening human rights protection. It is the role of law-makers to develop more effective regulation to achieve public goals, and of international development agencies to use aid more effectively to fulfil their developmental mandate. It is the role of recipient states to move towards good governance in order to discharge their human rights obligations by using available resources more effectively, and of NGOs to promote their public-interest objectives through diversified and attuned advocacy. The informal norm of effectiveness furthers a view of human rights not merely in the *ethical* dimension of their value and necessity, but in the *political* and *technical* dimension of their implementation through policies and strategies. CSR thus belongs to a more comprehensive package aimed to stimulate the sustainable development of poor countries; the emphasis on cooperative ways of discharging CSR belongs to a more general trend toward coordination and increased effectiveness of public policies.

For business, the norm of effectiveness implies that, in various contexts and various forms, managers need to be aware, open for partnering, and socially innovative to enhance the beneficial impact of their corporations. This is the *general* standard, which is better

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[4] Sakiko Fukuda-Parr, Carlos Lopes, Khalid Malik, 'Institutional Innovations for Capacity Development', in *Capacity for Development: New Solutions to Old Problems*, Fukuda-Parr, Lopes, Malik (eds.), Earthscan and UNDP, 2002, 17-18.

specified by the emerging good practices of RTNCs, against which corporate efforts and impacts are assessed. What has been customarily seen as not being the concern of business may become the business of business after some leading TNCs recognise the need to deal with some pressing problems perpetuated by governance gaps. RTNCs provide *examples* and *tools* for dealing with governance gaps, which facilitate replication and innovation by reducing costs and providing inspiration for other corporations. This new norm posits that (in as much as it is feasible in the circumstances of the respective case) it might be the business of business to see that the governmental forces provide security without abusing human rights; that it might be the business of business to see that taxes paid are used for development and poverty reduction (as shown by revenue sharing regimes and by corporate initiatives to disclose the taxes paid to host governments)[5]; that it is not enough to create jobs, but it might be the business of business to protect minimum labour standards in the workplace; that it might be the business of business to work with public and private partners to mobilise resources and extend such infrastructure (be it water, energy, or communications) to the poor; that it might be the business of business to promote enterprise development through training, credits, and business contacts. All these are just a few of the ways of discharging CSR.

As examples of such corporate stories, both successful and failed, accumulate, a *simplistic* application of the 'business of business is business' norm holds a diminished usefulness as a guiding, simplifying tool to approach growing complexity. It was the Association of British Insurers that noted the complexity of the business environment with its threats and opportunities, and that best captured features of CSR risks.[6] It is only recently that there is huge willingness to engage corporations coming from highest level

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[5] Kathryn Gordon, *Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses*, Working papers on international investment, Number 2002/1, OECD, 20-1, http://www.oecd.org/pdf/M00030000/M00030496.pdf; Juliette Bennett, *Revenue Sharing Regimes*, paper prepared for the UN Global Compact, 2002, 22, http://65.214.34.30/un/gc/unweb.nsf/550d4b46b29f68a8852568660081f938/85256aef00564bcb85256ac00065f845/$FILE/RevenueSharingRegimes.pdf

[6] *Investing in Social Responsibility - Risks and Opportunities*, Association of British Insurers, 2001, http://www.abi.org.uk/Display/File/85/CSR_FullReport.pdf

in the UN, from states and from some important NGOs. Also it is only recently that there are sustained efforts by leading TNCs and other actors to systematically develop and disseminate good and viable practices. At the same time, the public awareness of corporate impacts in poor countries has grown exponentially, and so did expectations as well. Corporate ignorance and inaction are the proof of irresponsibility that is growing politically harder to refute in this changing context.

When I was writing this paper about the norm of effectiveness and pragmatic approaches to CSR, I received a small story through email that struck me as quite relevant to our theme. You might have received it as well, the story of an ethical dilemma that was once actually used as part of a job application. It goes like this. You are driving along in your car on a wild, stormy night. You pass by a bus stop, and you see three people waiting for the bus:

a. An old lady who looks as if she is about to die.
b. An old friend who once saved your life.
c. The perfect man (or) woman you have been dreaming about.

Which one would you choose to offer a ride to, knowing that there could only be one passenger in your car? You could pick up the old lady, because she is going to die, and thus you should save her first; or you could take the old friend because he once saved your life, and this would be the perfect chance to pay him back. However, you may never be able to find your perfect dream lover again. Allegedly, the candidate who was hired (out of 200 applicants) answered: 'I would give the car keys to my old friend, and let him take the lady to the hospital. I would stay behind and wait for the bus with the woman of my dreams.'

But to come back to business, how does the norm of effectiveness affect *self-proclaimed* RTNCs and those TNCs that *refuse to engage* (ATNCs and ITNCs)? I will take these two aspects in turn.

3. How effectiveness controls supposedly RTNCs

In the eyes of critics, voluntarism fails to ensure the accountability of the TNCs which have chosen to engage. If the effectiveness norm holds ground, this criticism may be too harsh as there are various ways of obtaining accountability at various levels. The UN Draft Guidelines on a Human Rights Approach to Poverty Reduction

Strategies note that rights and obligations demand accountability and there can be judicial and non-judicial mechanisms of accountability. Further: 'While duty-holders must determine for themselves which mechanisms of accountability are most appropriate in their particular case, all mechanisms must be *accessible*, *transparent* and *effective*.'[7] It is likely that a corporate strategy adopted by a supposedly RTNC that resumes itself to stating intentions and making unverifiable claims will currently backfire. Half-measures are not rational solutions as the evaluators of corporate performance are dead set to assess *concrete* results. If TNCs that engage voluntarily are indeed guided by the effectiveness norm, then the whole credibility of their involvement depends on their ability to document their performance in a credible fashion, with some kind of independent confirmation. Thus, significant levels of *accountability* may be obtained from the rational pursuit of self-interest complemented by the *effectiveness* norm and by viable assessment tools.

RTNCs discharge their CSR and thus achieve *operational* improvements for the targeted beneficiaries. Important as they are, these operational effects of CSR are complemented by important *systemic effects* of CSR which expand the range of beneficiaries. Such systemic effects result from the dissemination of corporate impacts through formal and informal channels that shape perceptions and strategies both within the business system and throughout its external environment. However, communication is a verified accountability mechanism as documented by disclosure regulations in many fields of law. The engagement of RTNCs is a voluntary one and corporate disclosures have sometimes backfired on well-intended corporations due to a polarised climate of opinion. These realities pose a trade-off at this incipient moment, in having communication delivering either *accountability* or further corporate *participation* in developing social involvement and assessment tools. Therefore, if one is after the innovation and participation gains, a balancing act is unavoidable and its outcome is decisive for the creation of an enabling or hostile social environment for voluntary initiatives to deliver.

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[7] *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, Office of the High Commissioner for Human Rights, 10 September 2002, par. 8, http://193.194.138.190/development/povertyfinal.html#*

4. How the systemic effects of CSR affect ATNCs and ITNCs

As critics of the Global Compact remind us, voluntarism may fail to force ATNCs into compliance.[8] The GC is an instrument for *engaging* corporations who voluntarily seek modalities to manage and improve their social impact. Designing *viable tools* for measuring and reporting the performance of TNCs which have voluntarily engaged, is the task of the Global Reporting Initiative. To ensure *credible verification* of corporations that report their performance according to GRI criteria is a job assumed by social accounting bodies using formats such as the AA1000. It appears that voluntary initiatives of RTNCs help create *a ladder* for voluntary engagement by offering managerial tools, inspirations and willingness in states and NGOs to engage. Furthermore, the voluntary involvement of hundreds of organisations (be they employers or trade organisations, developmental NGOs, governmental agencies) into flexible networks disseminate to much larger audiences the challenges, processes and outcomes of the GC and GRI.

It is for corporations themselves to make choices as to how far to advance up the ladder. However, it also leaves TNCs with the burden, indeed the responsibility, to explain by themselves their choices. Such explanations will have to be offered in the light of consequences of corporate inaction, against the performance of other corporations in comparable settings, and in a context favouring increasing transparency. Indeed, as experience generated by RTNCs' practices accumulates and assessments become more attuned to the business context, the main demand on which various sectors converge is for TNCs to state and explain their CSR policy and performance. Businesses at the 2002 World Economic Forum observed that 'One of the most consistent demands that companies are facing from different stakeholders, ranging from institutional investors to social and environmental activists, is to be more transparent about their wider economic, social and environmental performance.'[9]

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[8] Peter Utting, 'The Global Compact and Civil Society: Averting a Collision Course', *Development in Practice*, Volume 12, Number 5, November 2002, http://www.unrisd.org/80256B3C005BE6B5/search/E58C1A77E37FA9F0C1256C7E00490304?OpenDocument&cntxt=19A11&cookielang=en#top

[9] *Global Corporate Citizenship: The Leadership Challenge for CEOs and Boards*, World Economic Forum, 2002, 9, http://www.iblf.org/csr/CSRWebAssist.nsf/707de05d244f22378525695b001612d5/80256adc002b820480256b570061dbd7/$FILE/ATTDQCYO/Final_Statement.pdf

This *bottom-up process* of standard-setting and awareness-raising has powerful implications for social change and carries a great potential to advance the realisation of human rights. The standards and good practices ensuing from this participative process can be put to use voluntarily by TNCs, find their way into contracts, be promoted through advocacy or even be consecrated into legislation. *Other market actors* have their own perception of the public expectation, and of the risks and opportunities that it entails. Such actors (for example, insurers, institutional investors, stock exchanges, consultancies, trade associations, public purchasers, development banks, market regulators etc), in the pursuit of their purely economic mandate, follow the efforts of RTNCs to attune their self-interest to evolving realities and do judge corporations against their more responsible peers. Such market actors may *demand information* from reluctant corporations and could *issue guidelines* for managing threats and opportunities as inspired by RTNC practices. For example, the Association of British Insurers issued guidelines that take the form of disclosures expected to be included in the annual report of listed companies.[10]

Pressure for increasing communication comes also from states. The EU Parliament recently stated that 'providing and using information on the social, environmental and economic impacts of companies in a format that is authoritative, accessible and transparent, and as far as possible in a manner that facilitates inter-company comparisons of effectiveness, would be an effective foundation to promote corporate social responsibility throughout the European Union.'[11] There are already social disclosure laws in France, Belgium, Germany, Australia, but the most high profile is the 2000 UK Occupational Pension Schemes Regulations which obliges pension funds to report the extent, if at all, to which they take into account social, environmental and ethical considerations in their investment decisions.[12]

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[10] supra 6.

[11] EU Parliament - REPORT on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, 30 April 2002.

[12] Art 11A of The Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) Amendment Regulations, 1999.

Involvement of TNCs with human rights issues in the absence of legal liability, public policy incentives, or obvious self-interest has been and remains a stumbling block in CSR thinking. The *business case* can be best comprehended and developed by businesses themselves, especially when enough technical and non-technical capacity has been built, but there is a difference in what motivates different corporations to pursue CSR strategies. On one hand, *market leaders* in their respective industries have stronger incentives to experiment with CSR in order to enhance and preserve their competitive advantage. On another hand, it is the emerging business norm of effectiveness that motivates *other corporations* to follow (and join) leaders in CSR matters because of the risks of being placed at a competitive disadvantage in various contexts, if they are seen as disregarding the effectiveness norm. Such contexts could be auctions for governmental concessions and contracts (both in the host and home states), relationships with concerned TNCs, the demands for information placed by institutional investors or listing requirements on stock exchanges, relationships with a potentially hostile and disruptive local community, personal embarrassment against peers in collegial settings, poor image with atomised actors such as individual consumers and talented employees and so on.

Thus, the availability of engagement forums, viable tools, and the existence of definable options allow accountability to be negotiated in a myriad of specific contexts. As such, the systemic effects of voluntary initiatives do not provide a centralised forum where clear outcomes can be counted on in advance and where corporate liability can be easily claimed and obtained. It is mistaken to think of CSR (codes of conduct and partnerships) as a conceptual alternative to law. Law and CSR interact, and the practices of RTNCs facilitate states discharging their human rights responsibilities. Furthermore, the issues raised by CSR are not simply what can law do to enhance corporate performance, but also how good practices of corporations help define relevant standards and facilitate their adoption into law, and how CSR supports and enhance the capacity of host states to raise to their human rights responsibilities. Therefore, one can look at the effects of voluntary engagement on good governance in the host state.

5. Effects of RTNCs on good governance

For a corporation, the success and credibility of its human rights policies depends on partners such as national and local authorities, NGOs and community bodies, international development agencies and international governmental organisations. The other side of the coin is equally important: successful cooperation with RTNCs demands capacities, effectiveness and accountability from each partner. As various studies of partnerships suggest, effective partnerships are far from diminishing or making redundant the role of government. Interactions with RTNCs may positively influence public authorities in the direction of good governance. Habitually the key question is what incentives can the state adopt to further stimulate CSR practices by making them economically attractive? But given the weakness of many *host governments* and the understanding that CSR is indeed intrinsically linked to governance gaps, the question can be put the other way around: how can CSR stimulate the host state to perform its responsibilities?

In regard to non-state actors such as NGOs, which also strive to improve governance, partnerships with business offer to NGOs a new avenue where to employ their comparative advantage, and thus to fulfil their mandate more effectively. The idea behind trisector partnerships involving TNCs, civil society and government is that each party should bring in its *core complementary competencies* – as argued by Business Partners for Development,[13] the program started by the World Bank. Corporations need partners, and best practice in partnering reveals sometimes corporations making efforts to build community capacity in order to enable meaningful participation and negotiation.

6. Broader concept of CSR

As I argued before, it is important to grasp that the effects of CSR are far from being confined between the RTNC and its targeted beneficiaries. Besides these *operational* and localised effects, certain

[13] *Putting Partnering to Work, Tri-sector Partnership Results and Recommendations*, Business Partners for Development, 1998–2001, http://www.bpdweb.org/docs/main1or5.pdf

systemic effects appear because of the effectiveness norm being widely disseminated through formal and informal channels. A focus on values, principles and corporate responsibilities draws attention to the *ethical* aspects of CSR; an emphasis on manageability and effectiveness is compatible with ethical reasoning, but it also reveals the *technical* and *political* nature of CSR. The emerging norm of effectiveness does not prompt for clearer definitions of corporate *responsibility* (given the infinite and diverse corporate impacts on host states). It does prompt for discovering corporate *irresponsibility* revealed by violations and by a lack of effort to increase awareness, to engage with stakeholders and to replicate good practices established in the industry. It is an illusion to strive for a CSR abstractly defined and ready for implementation if only political or managerial will can be summoned. Thirty years of efforts to more clearly define the concept of CSR have hopelessly failed: there is no one single and accepted formula or stable boundaries, but pressing human rights issues, infinite contexts, great complexity, evolving realities, and consequences. But CSR practices need to be manageable and effective in order not to appear as window dressing or simply inadequate for the magnitude of the human rights problems.

This way of approaching CSR proposes that the relationship TNCs-human rights is not simply one involving a corporation and its workers, local communities, or the environment. It is not merely a relationship of *infringement*, but also one of *support* through contributions to sustainable development and poverty alleviation. Voluntary corporate initiatives are not limited to codes of conduct that aim to prevent corporate violations, but contain also partnerships for development aimed at realising human rights through joint efforts with other social actors. Poverty is multidimensional and development agencies accept now a broader understanding of poverty than simply a lack of income.[14] This opens wide spaces for human rights reasoning in the developmental context and in how developmental policies are constructed. Therefore, evaluations of TNCs need to account for the multifaceted corporate contributions to the host state; similarly, evaluations of voluntary initiatives need

[14] *Guidelines on Poverty Reduction*, Executive Summary, Development Assistance Committee, OECD, 2001, http://www1.oecd.org/dac/htm/g-pov.htm

to account for both their operational and systemic effects. Such investigation should not be a revisionist attempt guided by ideological leanings, but a sensible attempt to understand a variety of contexts where business rationality manifests itself in various ways, and to better grasp the complex process of social change that law aims to facilitate.

There is no reason why an analysis from a 'human rights perspective' should account only for torts. It might backfire if one sees human rights simply as principles and values that are infringed, and not as standards that serve as focal points for policies articulated, often in a concerted fashion, by various actors. Corporate violations are indeed the most pressing; but narrowing the relationship in this way, while needed and legitimate for certain purposes, might lead to *over reliance on state action* and on the deterrent function of law. In addition, it might artificially and detrimentally narrow understanding of the *broader context* in which voluntary initiatives create positive pressures and incrementally change the rules of the game. Some TNCs could or indeed do act as agents who advance human rights in areas where international human rights law (IHRL) and grass roots local NGOs fall short. Because voluntary initiatives can reinforce the role of states and NGOs, it is the *interaction* among various actors that may make a great difference for those in need of protection. Indeed, evidence gathers that more corporations make efforts to improve their social impact and learn at a fast pace. Even more, as governments and corporations pursue their developmental strategies in the same space, they forge new and innovative connections and their interaction increases steeply.

Therefore, I propose that it is important to have an *encompassing concept of CSR* dealing with *all kinds* of TNCs. Some of its unifying elements would be: first, the *informal norm of effectiveness*. It covers both respect and support for human rights, and it accounts for the systemic effects of CSR. Second, alleviation of *poverty* in its many manifestations is pursued thorough various types of voluntary initiatives – be they codes of conduct, partnerships for development or other modalities. Third, CSR aims to address certain governance gaps and is thus linked to *good governance* in host countries, a point on which IHRL, international developmental strategies, and grass-root activism converge in seeing as essential for human rights and development. Fourth, *laws and policies* are needed to encourage

reflection[15] and innovation within the business system, such as sensible disclosure regulation, especially at home country level.

To conclude, the understanding of the interplay between voluntary corporate initiatives and law/policy is essential in making sense of the link TNCs-human rights from a legal perspective. I propose that this is a way of approaching TNC-human rights issues in the tradition of human rights, as they are institutionalised in international law, while remaining in touch with the political, social and economic realities of the time.

[15] G. Teubner, 'Corporate Fiduciary Duties and Their Beneficiaries, A Functional Approach to the Legal Institutionalization of Corporate Responsibility', in K. Hopt, G. Teubner (eds), *Corporate governance and directors' liabilities*, Berlin, 1985, 149-177.

THE GLOBAL COMPACT – FACT OR FICTION?

JOHN PACE*

On 31 January 1999, Kofi Annan, the Secretary-General of the United Nations, delivered a speech before the World Economic Forum, Davos, in which he launched what was to become known as "the Global Compact". In this speech, the Secretary-General challenged the business community to observe nine principles. These nine principles are:

Human Rights

Principle 1 Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence;

Principle 2 Make sure that they are not complicit in human rights abuses.

Labour Standards

Principle 3 Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4 the elimination of all forms of forced and compulsory labour;

Principle 5 the effective abolition of child labour; and

Principle 6 eliminate discrimination in respect of employment and occupation.

Environment

Principle 7 Businesses should support a precautionary approach to environmental challenges;

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Principle 8 undertake initiatives to promote greater environmental responsibility; and

Principle 9 encourage the development and diffusion of environmentally friendly

On 26 July 2000, the Global Compact's operational phase was launched at the UN Headquarters in New York at a meeting, chaired by the Secretary-General, which brought together senior executives from some 50 major corporations and the leaders of labour, human rights, environment and development organizations.

The official UN Website describes the Global Compact as "a network. At its core are the Global Compact Office (at UN Headquarters) and four UN institutions: the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Environment Programme (UNEP), the International Labour Organisation (ILO) and the United Nations Development Programme (UNDP). The Global Compact involves all the relevant social actors: governments, who defined the principles on which the initiative is based; companies, whose actions it seeks to inform; labour, in whose hands the concrete process of global production takes place; civil society organizations, representing the wider community of stakeholders; and the United Nations, the world's only truly global political forum, as an authoritative convener and facilitator."

The Global Compact is not a multilateral agreement; it is based on unilateral commitment and related self-regulation. The basis of the Global Compact is therefore different from that underlying international institutional arrangements; these result from an inter-governmental agreement or from a decision of an inter-governmental institution and are based on the exercise of an act of State sovereignty. The Global Compact shares the same objectives of the inter-governmental system, and indeed seeks to build on the purposes and principles of the institutions that make up the UN system, and principally those of the OHCHR, UNEP and ILO. There is therefore a necessary complementarity of objectives between the Global Compact and the United Nations system.

The Global Compact may also be said to be inspired by the principle of corporate social responsibility,[1] which manifests itself in a wide

[1] Global Compact WebPage < http://www.unglobalcompact.org>, at "Overview": "United Nations Secretary-General Kofi Annan first proposed the Global Compact

range of activities, from sponsoring local soccer teams, to major projects involving considerable resources.

The activities of the business private sector, and in particular the multinational corporations, have never been considered compatible with international human rights standards, for a variety of reasons. Until the Secretary-General's speech in 1999 in Davos, international business and international standards on human rights, including labour and environment followed independent courses. They did not meet – at least not in a positive sense. Many will surely recall the negative context in which the activities of multinational corporations were held in the colonisation, decolonisation, and post-decolonisation periods in the last century. Traditionally, the activities of the private sector – at least as far as the multinationals are concerned – were held to be an obstacle to the efforts of the international community aimed at defining and implementing common standards on human rights, including labour and the environment.

For the same reason, the launching of the Global Compact in 1999 gave rise to much scepticism, criticism and outright hostility in some quarters, and especially among the non-governmental community in developing countries. The demonstrations against the World Economic Forum, as well as the criticism of the procedures and practices of World Trade Organisation are symptomatic of this continuing hostility to these institutions that – rightly or wrongly – are held as the epitome of the unjust nature of the international economic and social order. The fact that the Global Compact is a

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in an address to The World Economic Forum on 31 January 1999. Amid a backdrop of rising concerns about the effects of globalization, the Secretary-General called on business leaders to join an international initiative - the Global Compact - that would bring companies together with UN agencies, labour, non-governmental organizations and other civil-society actors to foster action and partnerships in the pursuit of good corporate citizenship."

"The Secretary-General understood that while corporate citizenship - also referred to as "corporate responsibility", "sustainable growth", and the "triple bottom line", among other terms - was emerging as a business trend, there existed no international framework to assist companies in the development and promotion of global, values-based management. By rooting the Global Compact in internationally accepted principles, participants could feel confident that their actions were being guided by values that are universally supported and endorsed"

"voluntary corporate citizenship initiative" and is based on the principle of self-regulation is another criticism of its true nature The Global Compact has come in for some severe criticism.[2]

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[2] See for instance, "Globalisation and the United Nations" (International Forum on Globalisation) – A brief history of corporate vs citizen power under the UN (<www.portoalegre2003.org>),

"Undermining the UN's Original Mandate and Authority: The Global Compact. Now more than ever, the world needs to charge a reformed UN with the strengthened mandate to resubordinate the BWIs. The new political context resulting from globalization, where corporations can exercise great power over national governments, may also require that an empowered UN contain an additional binding code of conduct for global corporations.

"Most people do not know that under the existing UN system, there is already a world class set of human rights (the Covenant on Economic, Social, and Cultural Rights and the Covenant on Civil and Political Rights), labor rights (the hundreds of agreements of the International Labor Organization), and environmental protections (hundreds of international environmental agreements). The problem is that, although governments approved many of them years ago, they have largely failed to ratify and implement these rights domestically. Energy needs to be focused on getting all national governments to implement the standing conventions and treaties to which they have already agreed. The role of the UN should be to, where needed and agreed, enforce those obligations for the global common good.

"Yet with the existing set of peoples' rights already negotiated and agreed to internationally by governments under UN auspices, Secretary General Kofi Annan has now undermined the UN's own accomplishments by issuing a set of voluntary and unenforceable principles called the Global Compact. When understood in this historical context, Annan's recently unveiled deal between himself, some of the world's largest corporations, and a few hand-picked "representatives" of civil society, is nothing more than a feeble and cynical attempt to diffuse the backlash to global corporate power that was so evident on the streets of Seattle. The Global Compact ignores the original mandate of the UN, legitimizing the corporate highjack of peoples' protections chartered under the UN some fifty years ago. Today, the World Bank, International Monetary Fund, and World Trade Organization institutionally subordinate the citizens' rights embodied in the UN. This is why people must begin to focus on the relationship of the BWIs to the UN system, with a view to resubordinating the BWIs back to their original and rightful place."

See also at the same source: Walden Bello, "From Melbourne to Prague""*The Davos Process II: Coopting the United Nations.*

"As important as the rhetoric in the Davos response is the process of bringing people onto the bandwagon. This would be achieved through dialogue, consultation, and the formation of "partnerships" between TNCs, governments, the United Nations, and civil society organizations.

"The UN was a piece of cake. Discussions with Secretary General Kofi Annan produced the "Global Compact" that has become the centerpiece of the United Nations' Millennial Celebrations. Signed by 44 TNCs, the Compact has been

The purpose of this presentation is to assess whether the Global Compact is indeed necessary and/or useful in the realisation of international standards on human rights, including labour and the environment, or whether it is simply a futile exercise which serves big business in its pursuit of maximum profits regardless of these standards, if not to their detriment.

In introducing the initiative, the Secretary-General had stated that:

> *"globalisation is a fact of life ...but I believe that we have underestimated its fragility. The problem is: the spread of markets outpaces the abilities of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political worlds can never be sustained for very long."*

A report published in July 2002 by the UN's Global Compact Office further elaborates on the purpose of the Global Compact:

> *"As the global era of interdependence accelerates its pace and complexity, the need for effective cooperative responses to common economic and social problems becomes more compelling. To make globalisaton both more stable and inclusive, the Secretary-General challenged the private*

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promoted by Annan as a major step forward for it supposedly commits its signatories to respect human, labor, and environmental rights and provide positive examples of such behavior. To many NGOs, on the other hand, the Global Compact is turning out to be one of the UN's biggest blunders for the following reasons:

"Despite a Compact provision that membership in the Compact will not be given to business entities complicit in human rights violations, the founding membership includes the worst corporate transgressors of human rights, environmental rights, and labor rights: Nike, Rio Tinto, Shell, Novartis, and BP Amoco.

"The Compact will provide a great public relations venue for these corporations to promote a clean image very different from the reality since compliance with the Compact will be self-monitored and no sanctions exist for violating the Compact's principles.

"The Corporations will be able to use the UN logo as a seal of corporate responsibility, thus appropriating the UN's image of international civil service "not only for short-term profit but also for the long-term business goal of positive brand image."

sector to enhance its commitment to the public interest... The Compact seeks to make globalisation more equitable – and thus more sustainable – for the vast numbers currently excluded from the international market place."

Again, addressing an audience of international business leaders in April 2002, the Secretary-General explained:

"I see the Compact as a chance for the UN to renew itself from within, and to gain greater relevance in the twenty-first century."

That the Global Compact presents a formidable challenge is perhaps an understatement, and the immensity of the objective it seeks to achieve cannot be calculated. It implies a modification in the traditional view that business thrives when it maximizes profits by suggesting that this maximisation should henceforth be above a threshold set by norms and standards established by the inter-governmental community over decades and with very active participation, influence and input of civil society. By implication, the Global Compact proposes to add the private sector to the traditional actors in the formulation and implementation of human rights standards.

In the time since its inception, and more precisely, since the official launch on 26 July 2002, the Global Compact initiative has been the subject of activities at the national level in no less than 43 countries – and the number of countries continues to expand. Wide as the range may be in geo-political terms, these activities have yet to acquire substantive depth. Most of these activities – perhaps understandably – are aimed at introducing the concept of the Global Compact in various communities. The activities at the international level include the establishment of an Advisory Council, which convened for the first time on 8 January 2002. The members of the Advisory Council were asked by the Secretary-General to address four priorities:

(1) Safeguard the integrity of the initiative,
(2) Serve as advocates of the Compact,
(3) Provide expertise, and
(4) Offer advice on policy and strategy.

So far, a large number of companies have signified their

participation in the Global Compact;[3] the number of trade unions and non-governmental organisations is less[4,5].

The General Assembly of the United Nations has also supported

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[3] The following is taken from the Global Compact Official WebSite:

Participating Companies:

Below is a list of companies that are participating in the Global Compact. To be considered a "participant", and have its name posted on the website, a company must submit an Example of how it is integrating one or more of the nine principles into its business operations.

There are two requirements for participation in the Global Compact -a letter of intent from the company CEO to the Secretary-General, and the annual submission of efforts undertaken to advance the Compact's nine principles. The list below provides the names of the companies that fulfilled these requirements in 2001.

As of January 2002, companies who send a letter to the Secretary-General and submit an example through the new on-line template will be added to this list:

ABB
Aluminium Bahrain
Amazon Caribbean Guyana
Aracruz
Aventis
BASF
Bayer AG
BMW
Bohica Medical (SME - Australia)
BP
BT
Business Research & Development Initiative
Cargo Lifter AG
China Petroleum and Chemical Corporation
Cisco Systems
Credit Suisse Group
DaimlerChrysler
Deloitte Touche Tohmatsu
Deutsche Bank
Deutsche Telekom
DuPont
Electricité de France (EDF)
Ericsson
Eskom
Esquel
France Telecom
Gerling Group
Hindustan Organic Chemicals Ltd.
H&M Hennes & Mauritz AB
Indian Oil Corporation
ISS
Junyao Group
Ketchum
Kikkoman Corporation
LUCITÀ
Martha Tilaar Group
Morley Fund Managment
PT Mega Kelola Promoindo (SME - Indonesia)
National Thermal Power Corporation
Natura Cosméticos S/A
Nexen
Nike
Nogatec International
Novartis
Now for Future Pty Ltd
Organizaċöes Globo
Pearson plc
Placer Dome
Power Finance Corporation
PT Mega Kelola Promoindo
Pulsar Informatica Ltd.
Regis Engineering (SME - Tanzania)
Reputation Qest
Rio Tinto
SAP

Serendip Productions (SME - Pakistan)
Shell International Ltd.
Skanska AB
Ssovitex Design (SME - Uganda)
Standard Chartered Bank
Statoil
ST Microelectronics
Storebrand
Suez
Tata Iron and Steel Company
Telenor ASA
Translation City
Transnational Supply & Service
Trimtab Management Systems
UBS AG
Unilever
Volvo
William E. Connor & Associates
Yawal System (SME - Poland)

[4] The following organisations are listed under "Labour" in the Global Compact WebSite:

- The International Confederation of Free Trade Unions (ICFTU), with approximately 156 million members (organised in 221 national trade union centres from 148 countries and territories).
- International Federation of Chemical, Energy, Mine and General Worker's Union ICEM
- Union Network International UNI
- Trade Union Advisory Commitee TUAC
- IMA

[5] The following is taken from the official Global Compact WebSite:

"...

"Civil society organizations have been an integral part of the Global Compact since its creation. Their perspectives, expertise and partnership-building capabilities are indispensable in the evolution and impact of the Global Compact.

Human Rights:
Amnesty International
Human Rights Watch
Lawyers Committee for Human Rights
Environment:
World Wide Fund for Nature (WWF)
The World Conservation Union (IUCN)
World Resources Institute
International Institute for Environment and Development
Conservation International
Development, Others:
Regional International Networking Group
Global Reporting Initiative (GRI)
Transparency International
The Save the Children Alliance
SA 8000
Global Sullivan Principles
The Copenhagen Centre
European Business Campaign 2005 for CSR
International Center for Alcohol Policies (ICAP)
GoodCorporation
International Telecommnuication Academy

the Global Compact.[6] It may indeed be said from the foregoing that the Global Compact has been a worthwhile initiative. On the other hand the Global Compact needs to be approached with caution. In the first place, the corporate culture of maximisation of profits is still regarded as over-riding any other value in many corporations. Several have yet to declare their support and adherence to the Global Compact. Secondly, among those who have expressed a commitment to the Global Compact, there are several who have yet to make this commitment meaningful in a real, working sense. Thirdly, the composition of large corporations, made up of multiple business units makes it virtually impossible for the commitment made by the top directorate to translate itself in practical action on the ground; many such business units, are autonomous and not bound by the commitment made by the top direction. Fourthly, making the commitment is always tempting for its public relations potential, with the risk that the Global Compact serves as a convenient advertising tool to the detriment of any meaningful action.

The Advisory Council is established to address several of these risks, and it is comforting to note that the UN is not unaware of the ever-present risk of hijacking the excellent principles which the Global Compact is intended to bring to the corporate sector.

If the Global Compact is to prove a worthwhile initiative, it requires constant monitoring to keep it relevant and effective. At the UN level, this monitoring is entrusted to the UN's Global Compact Office at UNHQ, located close to the SG, who continues to follow the evolution of the Global Compact initiative closely. The principal UN institutions associated with the Global Compact do not appear to have dedicated the priority that the Global Compact needs and deserves.

Since this Conference specifically focuses on human rights the first two of the nine principles are of particular relevance to us

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The Aspen Institute Initiative for Social Innovation through Business
Academic Institutions
Numerous leading think tanks from around the world.
National Associations
Ethos
Fundaćão Abrinq pelos Direitos da Crianća
Entreprises pour l'Environnement

[6] See UN document A/56/323; and General Assembly resolution 55/215

today. In order to better appreciate the initiative, it is relevant to take a closer look at the role of the OHCHR in the development of the Global Compact. This Office has an over-arching responsibility for human rights in the UN system.

The role played by OHCHR thus far, in connection with the development of the Global Compact appears somewhat limited; the Office has produced very little beyond a couple of reports and speeches by the High Commissioner.[7] Is this symptomatic of the gap that still separates human rights realities and the noble ideals of the Global Compact? Is it because the UN system is perhaps not yet ready to grapple with the challenge presented by the Global Compact? Is it because the Global Compact is no more than the product of wishful thinking?

These questions need to be answered to help us in determining whether, indeed, the Global Compact belongs to the realm of fact or of fiction. To answer these questions, it is relevant to place it in the context of the evolution of the work of the UN in the area of human rights.

According to the Global Compact, principles one and two state that

> *"businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence' and "make sure that they are not complicit in human rights abuses."*

Which are the "internationally proclaimed human rights" that businesses are to "support and respect," and what is "their sphere of influence"?

What are the "human rights abuses" that businesses are to "make sure that they are not complicit in"?

The internationally proclaimed human rights may be said to consist of the International Bill of Human Rights, and the international conventions that have been drawn up within its overall ambit. Of these conventions, there are six conventions that envisage a mechanism for monitoring States parties' conduct in carrying out their international obligations incurred as a result of

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[7] OHCHR reports and info on HC's activities

ratifying these conventions.[8] States are required to submit reports on measures they take to carry out their international obligations at the national level. States have primary responsibility for the protection of the individuals in their jurisdiction. The subject of international human rights law is the individual, and the State has the primary responsibility for the protection of his/her rights as spelled out in international human rights law. Since businesses are not States, they do not have to report to any supervisory body, and therefore the Global Compact asks businesses to support – presumably to support the protection of the individual. This is confirmed by Principle 2 which asks businesses to "make sure" that they are not complicit in human rights abuses. Again, therefore, the test is the protection of the individual. It may be deduced from this, that businesses will need to give priority to the protection of the individual and in so doing, it is conceivable that they might run into problems with Governments, on whom they depend for their business to function.

The United Nations has seen a distinct evolution in the drawing up of the international human rights norms; their implementation has followed a similar pattern. Since the World Conference on Human Rights – the second human rights conference in the history of the UN – in 1993, the work of the UN in human rights witnessed a dramatic acceleration. It will be recalled that this work, which was initiated with the drafting and adoption of the Universal Declaration of Human Rights in 1948, had been painfully slow in developing the network of international human rights law (the International Bill of Human Rights being the core of this network). The international convention on human rights that was to be the back-bone of international human rights law as a binding international instrument to have legal effect on States who ratified it, barely survived the drafting process – indeed did not survive at all as one convention. In 1952, the UN had to – artificially – divide human rights into two groups (Economic Social and Cultural, on one hand and Civil and Political on the other), and to draft a Covenant on each group of these rights, and even then the drafts were not completed until 1966.

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[8] The ICCPR is monitored by the HRC, the ICESCR is monitored by the CESCR, the Convention Against Torture is monitored by the CAT, the CEDAW is monitored by the CEDAW, and the CRC is monitored by the CRC.

Another ten years passed before the thirty-five ratifications were received which enabled them to come into force (in 1977). It therefore took thirty years before the treaty implementation procedures, conceived in 1948, were to start functioning.

This long process is illustrative of the low level of the international political will when it comes to making international human rights norms meaningful in day-to-day realities. For a number of reasons, and principally owing to the changing configuration of UN membership due to the de-colonisation process, the UN developed other tools in addition to the system of implementation of international human rights norms through conventions; the shift, as of 1967,[9] to ad hoc inquiry of specific situations – now known as the "extra-conventional" or "special procedure" system which buttresses the conventions and which enables the CHR to look into certain situations directly. This in turn led to the development of the idea of technical assistance in human rights, and extra-budgetary resources were authorised as of 1987, as was the development of training and educational materials shortly thereafter. We thus saw the emergence of a 'prevention' approach to the implementation of international human rights norms, in addition to the 'protection' that had been the main thrust of the earlier years.

But this work was carried out in a context of compartmentalisation. The international system concentrated on individual sectors, without any real interaction among the various institutions. Human rights work in the Commission on Human Rights, other than standard-setting, was largely focused on civil and political rights and isolated from the work on economic and social rights undertaken elsewhere in the UN system.

It was this system that gradually generated a movement towards mainstreaming, and in the eighties, we saw the emergence of terms such as "good governance" and "sustainable development", indicating the need to address development within an overall human rights context.

The establishment of a High Commissioner in 1994 provided an opportunity to concentrate action in human rights in a special institution. It was therefore a matter of time for the UN to address the main problem in this area, viz, the fragmentation of the

[9] CHR resolution 2(XXIII) of.. March 1967

institutions that made up the UN system, and the isolation of the human rights programme from the rest of the system. The High Commissioner was to provide the catalyst that would re-integrate the work of the UN, consistent with the purposes and principles of the UN Charter.

In better placing the Global Compact in its true context, therefore, it is relevant to underline the importance of the SG's Reform Proposals in 1997,[10] followed up by Phase II announced last September. Both stages of the proposed reform target the UN work on human rights. The first stage aimed at placing human rights at the level of all Executive Committees established under that reform,[11] whereas the second targets internal priorities and reforms, consistent with the inter-dependence of human rights norms.

The work of integrating the system around human rights further accelerated with the setting up of a Development Assistance Frame Work (UNDAF) within one of the Executive Committees, the United Nations Development Group (UNDG). UNDAF is intended to enable countries to prepare a coherent programme of technical assistance through the coordinated efforts of governments and of the UN system through consultations in the country in question and with the HQ based inter-agency teams. It is a significant improvement in the manner in which the UN system carries out its mission and consistent with the Purposes and Principles set out in the Charter, constituting the *raison d'etre* of the United Nations system.

Of equal significance is the development in 1999, of the Comprehensive Development Framework by the World Bank, a formula similar to UNDAF in its basic concept of an integrated approach in addressing development needs.[12] The importance of this development is further underlined by the fact that with this approach, the World Bank had hitherto avoided involvement in human rights issues, on the grounds that its Articles of Agreement envisaged an economic – as distinct from human rights – institution.[13]

There are other, equally significant factors that show the evolution of this trend to adopt measures aimed at making the work of

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[10] See UN document A/51/950 of 14 July 1997
[11] See UN document A/57/387 of 9 September 2002
[12] World Bank CDF announcement
[13] ADD REF RE WB IN VIENNA

individual sectors of the international system relevant to its mission under the Charter and therefore increasingly inclusive of international human rights standards. One such example is the drawing up of sizeable projects involving UNDP and OHCHR (known as HURIST or "Human Rights Strengthening")[14] which envisages joint technical cooperation projects in several countries involving various "windows" aimed at strengthening governance-related institutions in recipient countries.

The years preceding 1999 saw several such steps; these steps established the intergovernmental institutions as front line actors in the process of implementation of international human rights standards, together with governments and non-governmental organisations.

It was therefore a matter of time until the opening was made to the private sector, which is now considered as the fourth actor in the human rights implementation process. The challenges to the development and implementation have been – and continue to be – formidable. On the other hand, the Global Compact should prove an important step in the process of advancing the implementation of international human rights standards, as it encompasses a sector whose activities are inexorably linked with the enjoyment of these international human rights standards. One cannot underestimate the nature of this challenge; think, for instance, of the contradiction between the tobacco industry and the right to health, indeed to life.

A crucial consideration in assessing the Global Compact is the reconciliation of the fundamental principle of State responsibility for the protection of the human rights of the individuals within its jurisdiction, with the power of the private corporate sector.

Perhaps the greatest challenge to the Global Compact is not just the private sector, but the international system itself. The human rights programme of the United Nations system is badly in need of reform, above all in the treaty implementation area. The Secretary-General, to his credit, has recognised this, and in his recent proposals has given priority to this reform. The heart of the problem this reform will face is the continuing separation in the treatment of civil and political rights from economic, social and cultural rights, which is both artificial and detrimental to the meaningful implementation

[14] HURIST reference

or realisation of human rights. How could it be expected to monitor the conduct of the private sector when the mechanism for monitoring State compliance is still in such a dire need for reform?

The telling factor in determining whether the Global Compact is fact or fiction, will, ironically, come from the international human rights mechanisms themselves and the speed with which the Secretary-General's reforms are undertaken.

OECD INSTRUMENTS ON CORPORATE GOVERNANCE, INTEGRITY AND RESPONSIBILITY

FABRIZIO PAGANI*

1. Introduction

The Organisation for Economic Co-operation and Development (OECD), as the international organisation that groups the most developed market economies, plays a leading role in setting international standards for corporate conduct. The OECD has worked on these issues since the 1970s and, in 1976, one finds the first international document on corporate responsibility: the OECD Guidelines for Multinational Enterprises. A parallel work on the drafting of a Code of Conduct on Transnational Corporations was started by the UNCTAD Centre on Transnational Corporations (UNCTC), but was never completed, due to the differences between industrialised and developing countries. At that time, the confrontational ambience in the United Nations prevented a compromise on such a divisive issue, while the more homogenous membership of the OECD – in fact the source of most of the world's direct investment flows and home to most multinational enterprises – facilitated consensus.[1]

Over time, the OECD extended its mandate of fostering good governance from public service to corporate activity and developed

* OECD Legal Directorate. The views expressed are those of the author and do not necessarily reflect the views of the OECD or of its Member States.

[1] For a short account of the development of the concept of corporate responsibility, see OECD, *Corporate Responsibility – Private Initiatives and Public Goals,* Paris, 2001. See also, A. Kolk, R. van Tulder, C. Welters, 'International Codes of Conduct and Corporate responsibility: Can Transnational Corporations Regulate Themselves?', *Transnational Corporations*, vol. 8, no. 1 (April 1999).

other instruments. When corporate conduct reappeared on the international agenda in the 1990s, the Organisation held negotiations which led to the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In 1999 the Principles of Corporate Governance were adopted and in 2000 the Guidelines for Multinational Enterprises were widely amended and updated.

Although these instruments may be heterogeneous in their addressees, and in their legal and political nature, however, they constitute a network of principles defines the regulatory environment for responsible business conduct worldwide.

2. The OECD Principles of Corporate Governance

The OECD Principles of Corporate Governance do not deal expressly with corporate responsibility, but they do constitute a benchmark for governments and private sector parties concerning the control, direction, and management of enterprises and particularly of traded companies. They focus mainly on the governance issues that result from the separation of ownership and control.[2] They address the rights of shareholders, their equitable treatment, the role of stakeholders, the principles of disclosure and transparency, and the responsibilities of the board. These principles are relevant for corporate responsibility for two reasons.

First, they recognise that companies, besides their business interests, may also pursue ethical or environmental interests. For example, Principle III, on the role of stakeholders, goes further than simply recalling that

> *'the corporate governance framework should recognise the rights of stakeholders as established by law'.*

It also encourages the development of a societal dimension in corporate conduct, by encouraging

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[2] For a review of the issue of the separation of ownership from control and of the relationship between corporate governance and corporate responsibility in the United States, see D. M. Branson, 'Corporate Governance 'Reform' and the New Corporate Social Responsibility', *University of Pittsburgh Law Review*, Vol. 62, 2001, pp. 605 – 647.

'active co-operation between corporations and stakeholders in creating wealth, jobs, and sustainability of financially sound enterprises'.

Second, only a properly run company – transparent and accountable to shareholders – is likely to be socially responsible towards the communities in which it operates. In this sense, the OECD Principles set standards to achieve the preconditions for a socially responsible company, i.e. a proper legal, institutional and regulatory framework for corporate control, organization and management.

The Principles are not intended for direct implementation by OECD Members: they are non-binding and are quite general in character. Rather they are a model, both for Members and non-Members alike. Thus, there is no formal compliance mechanism for this instrument. However, a specific OECD body, the Steering Group on Corporate Governance, surveys the role that the Principles play in OECD Member countries[3] and, in co-operation with the World Bank, promotes their use in corporate governance reform efforts worldwide.[4]

3. OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD started work on bribery of foreign officials in the early 1990s.[5] In its effort to have this type of corruption treated as illegal, the OECD achieved a first result in 1994, with the adoption of a Council Recommendation.[6] This was followed in 1996 by a second

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[3] A general assessment of the Principles is foreseen for 2004.

[4] This activity brought to the establishment of Regional Roundtables in Asia, Eurasia, Latin America, the Russian Federation, and South Eastern Europe. They work as a continuous framework for policy-dialogue and multilateral exchange of experience. A White Paper at the end of the Roundtable process provides for policy recommendations and priority formulation, see, for example, OECD, *White Paper on Corporate Governance in Russia*, Paris, 2002.

[5] On the OECD work on bribery and on the efforts to combat corruption worldwide, see the comprehensive OECD, *No Longer Business as Usual. Fighting Bribery and Corruption*, Paris, 2000.

[6] Recommendation on Bribery in International Business Transactions then revised by the 1997 OECD Council Revised Recommendation on Combating Bribery in International Business Transactions.

Council Recommendation[7] denying deductibility of bribes of foreign officials, which in turn opened the way for the negotiations which led to the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997.[8]

It deals exclusively with 'active corruption', which means the offence committed by the person or company which promises or gives the bribe. The Convention obliges the Parties to introduce the criminal offence of 'active bribery' of foreign public officials into their national legislation and consequently foresees a number of provisions for prosecuting the offence (sanctions, jurisdiction, enforcement, statute of limitations), and includes legal co-operation among the Parties (mutual legal assistance, extradition).

The Convention entered into force in February 1999 and now has 35 Parties.[9]. The OECD Working Group on Bribery assures compliance with the Convention. In a first phase, this watchdog reviews the implementing legislation of each Party, and, in a second phase, examines how this legislation is applied. For each review, two other Parties, assisted by the OECD Secretariat, carry out a first examination and present their findings to the whole Working Group, which then collectively continues the review and adopts a report with recommendations.[10] A similar, although simpler, mechanism, has been set up for monitoring the 1996 Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.

The relevance of the Convention in the enhancing of corporate responsibility is evident. The traditional business practice, particularly by multinationals in developing countries, of gaining advantages, such as public contracts or privileged fiscal conditions, through bribing public officers contributes to weakening public

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[7] OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.

[8] The literature on the Convention is extensive, for a recent review see C. Pacini, J. A. Swingen, H. Rogers, 'The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials', *Journal of Business Ethics*, Vol. 37(4), June 2002, pp. 385 ff.

[9] Besides, the 30 OECD Members, Argentina, Brazil, Bulgaria, Chile and Slovenia are Party to the Convention.

[10] The country Reports are available on the OECD web site (www.oecd.org).

policies and undermining the ethics of public life. By outlawing the use of corruption as a legitimate means of doing business in international transactions, the Convention contributes to the integrity and transparency of business. [11]

4. OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are the oldest and most articulated international instrument of corporate responsibility. They were adopted in 1976 as part of the OECD Declaration on International Investment and Multinational Enterprises,[12] amended several times[13] and widely revised in 2000. The new text, negotiated with inputs from business, trade unions, and civil society organisations, introduces several important changes both in the substantive provisions and in the monitoring mechanism. The thirty OECD members and seven other countries have to date adhered to this document and to the OECD Declaration more generally[14]. Several other applications for adherence to the Declaration are being considered.

The Guidelines comprise a set of substantive recommendations that governments address to multinational enterprises, and an OECD Council Decision on promoting and monitoring their implementation. The aim of the Guidelines is

> *'to ensure that the operations of multinational enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign*

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[11] See J. Pope, *Confronting Corruption: The Elements of a National Integrity System*, Transparency International Source Book, 2000; Business for Social Responsibility, *White paper on Corruption and Bribery*, 2001.

[12] The Guidelines are part of an articulated instrument, the OECD Declaration on International Investment and Multinational Enterprises, which comprises also a Decision on National Treatment, a Decision on Conflicting Requirements and a Decision on International Investment Incentives and Disincentives.

[13] For an examination of the first text of the Guidelines, see H.W. Baade, The Legal Effects of Code of Conduct for Multinational Enterprises', in *German Yearbook of International Law*, 1979, pp. 11 ff.

[14] At the end of 2002 these countries were: Argentina, Brazil, Chile, Estonia, Israel, Lithuania, Slovenia.

> *investment climate and to enhance the contribution to sustainable development made by multinational enterprises'.*

Observance of the Guidelines by enterprises is voluntary and not legally enforceable. At the same time, the OECD Council Decision on the monitoring mechanism foresees the setting up a National Contact Point (NCP) in each country. Countries have a certain freedom in organising it, but it is typically either a government office or a co-operative body where public officials sit alongside representatives of the business community, employee organisations and other interested parties. The NCP is called to:

- Disseminate information and promote the Guidelines at the national level;
- Co-operate and liaise with the other NCPs and the Committee on International Investment and Multinational Enterprises (CIME) – the OECD body responsible for the Guidelines;
- Manage issues relating to implementation of the Guidelines in specific instances. This is the most sensitive function, as interested parties can bring concerns relating to the implementation of the Guidelines before the NCP. After consulting with the parties, the NCP may play a conciliatory role in assisting them to deal with the issue. If this attempt fails, the NCP can release a public statement and make recommendations. As a general procedural guidance, the NCP after consultation with the parties, shall make the results of these procedures publicly available unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.

The concept of multinational enterprise encompasses companies which are

> *'established in more than one country and so linked that they may co-ordinate their operations'.*

Multinationals can conduct any type of business and can be of very different size, including small and medium sized enterprises.

Under the Guidelines, governments recommend that enterprises:

- Respect human rights: the Guidelines expressly address this issue by calling on enterprises to respect the human rights of

'those affected by their activities consistent with the host government's international obligations and commitments'.

As the general framework of the Guidelines is the 1948 Universal Declaration of Human Rights, they go further than merely advocating workers' rights. Multinationals are encouraged to respect human rights not only in their dealings with employees, but also on any other occasion on which human rights issues and business intersect, for example, when they set up security operations for the protection of employees and assets, especially in areas where this protection cannot be provided by the State, as in the case of civil war. Another example could be multinationals, especially in the extractive industry, becoming involved in conflicts with the local communities when they plan population resettlements or other forms of displacement of local activities. The Canadian NCP – in co-operation with the Swiss NCP – had a specific instance in which the

'central underlying issue was the impending removal of poor local farmers from company-owned land.'

The Canadian NCP report states the following about the conclusion of this case:

'To address this issue, the Canadian NCP facilitated a flow of communications between the company's headquarters in Canada and the Canadian office of the NGO...Both Canadian parties in turn communicated with their operations in Zambia where face-to-face meetings took place. While there was a variance in the facts and opinions reported on each side, a resolution was reached after the company met with groups from the affected communities and worked out an approach whereby the farmers could continue to use the land, at least for the short term';

- Respect labour rights and contribute to fair employment conditions and industrial relations: the Guidelines echo the fundamental principles elaborated within the International Labour Organisation, such as the 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the 1998 Declaration on Fundamental Principles and Rights at Work. Labour rights are the object of specific recommendations: the right of association and representation for employees, the prohibition

of child labour and of forced or compulsory labour, and non-discrimination in the workplace. One of the most debated provisions concerns changes in operation that multinationals make and may have a major effect on workers, e.g. the closure of an industrial plant. The Guidelines provide that enterprises should give reasonable notice of these changes and, if possible, prior to the final decision being taken. They should also co-operate with the relevant actors *'so as to mitigate to the maximum extent practicable adverse effects'* of their decisions. Recently, for instance, France's National Contact Point, after consultation with the interested parties, issued a communiqué expressing concern that a foreign retail company's decision to close down its activities in France had not been properly discussed with employee representatives.

- Take into due account the need to protect the environment: the recommendations on environmental performance are based on the Rio Declaration on Environment and Development. Enterprises are encouraged to establish an adequate system of environmental management, to regularly provide information on their environmental performance, to set up environmental assessment procedures and contingency plans in case of health and environmental damage. The Guidelines also encourage enterprises to work to raise the level of their environmental performance, even when this may not be formally required by existing regulations in the countries in which they operate.
- To conduct business in a fair and transparent manner: the Guidelines include chapters on:
  - o Bribery, with provisions which echo the OECD Convention on Combating Bribery and recommendations relating to private' bribery and bribery of political parties;
  - o Disclosure, with recommendations on the provision of transparent information, including accounting and auditing records, on the legal structure of the company and on its financial and non-financial performances. The OECD Principles on Corporate Governance are recommended with regard to corporate structure;
  - o Competition, with recommendations which promote fair competitive behaviour;
  - o Taxation, in which the Guidelines advocate fiscally responsible conduct by the enterprises;

- Science and technology, in which transfer of know-how, co-operation with local scientific institutions, and responsible intellectual property policies are recommended.

5. Varied Political and Legal Approaches for Increasing Effectiveness

The OECD instruments are heterogeneous in their legal and political nature and addresses and they exert their influence in quite different ways.

The Principles on Corporate Governance are non-binding and do not contain any detailed prescription for national legislation. They are addressed both to policy makers, as a point of reference for national legislation, and to enterprises, to help them to check their own practices. The Anti-Bribery Convention is an international treaty legally binding on the Parties. Its provisions have been incorporated into the Parties' national jurisdictions, often through the adoption of specific implementing legislation. While the Convention itself addresses only governments, the national implementing legislation establishes criminal offences for natural persons and companies. The Guidelines for Multinational Enterprises *per se* are recommendations that governments address to multinational enterprises and their observance is voluntary and not legally enforceable. However, the OECD Council Decision on implementation imposes legal obligations on governments, for example, the duty of setting up a National Contact Point.

The effectiveness of these instruments and the influence which they exercise vary and do not necessarily depend on their binding or non-binding legal nature.

The Principles on Corporate Governance have been successful, especially in those countries where corporate governance legislation is less developed or is under reform, and they have received new attention since the recent corporate scandals.[15] They have been

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[15] In the 'post – Enron' debate, the OECD Principles of Corporate Governance were widely taken as an example in the process of reform of the rules which govern the relationship between managers and shareholders. They have been, for example, praised as a possible global 'gold standard' for shareholders protection, see J. Shinn, P. Gourevitch, *How Shareholders Reforms Can Pay Foreign Policy Dividends*, New York 2002 (a paper of the Council on Foreign Relations).

endorsed by several national and international bodies. For example, they have been included as one of the twelve core standards recognised by the Financial Stability Forum, and the Emerging Markets Committee of the International Organization of Securities Commission (IOSCO) recommended them as a benchmark to its members.

The Anti-Bribery Convention has been very successful in terms of the number of ratifications and the timeframe for the adoption of implementing legislation. The OECD monitoring mechanism is fully established, the first phase of the reviews has already been completed, and the second phase started in 2002. While some loopholes have been identified, for example uncertainties about the Convention's cover of the activities of foreign subsidiaries, or the corruption of influential political figures who cannot be formally considered 'public officials', it is deemed to be an effective instrument in curbing bribery in international business. Some national courts have already addressed cases on the basis of offences established by the Convention.[16] The 1996 Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials has been equally effective, and specific legislation disallowing deductions for bribes to foreign officials has been adopted in most of the OECD Members. The effectiveness of these instruments is reinforced by other initiatives, both within the OECD, such as the commitments to deter bribery in officially supported export credits,[17] and in Member countries, where proposals to bar companies implicated in corruption from participating in public procurement have been circulated.

The Guidelines have played an important historical role: they constituted the first international document on corporate responsibility. They have been a point of reference for any subsequent work in the field, either by other international organisations, such as the UN Global Compact, or by business

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[16] See the 2002 CIME Report to Ministers on the Implementation of the Convention and the Revised Recommendation, which is available on the OECD website (www.oecd.org).

[17] See the Action Statement on Bribery and Officially Supported Export Credit of the OECD Working Party on Export Credits and Credit Guarantees, December 2000, OECD website (www.oecd.org).

groups, such as the Caux Principles for Business or the Global Sullivan Principles.[18]

Significant progress has been made in promoting use of the Guidelines since the 2002 Review. Indicators include the thousands of non-OECD web pages now dealing with the Guidelines and the fact that the Guidelines have been translated into at least 25 languages. The Guidelines are now mentioned in international agreements and declarations, including most recently the EU-Chile Association Agreement. The relevance of the 2000 revised Guidelines also depends on the capacity of National Contact Points and particularly on their credibility in dealing with specific issues. Evidence suggests that the Guidelines are starting to make a difference. The 'specific instance' procedure has been used about 25 times. Governments have addressed such sensitive issues as resettlement in Zambia, labour management in outsourcing operations in Guatemala and respect of human rights in the vicinity of a nature gas pipeline in Myanmar.

Another test for the Guidelines will be the extent to which the business community accepts and implements them. Certain enterprises have incorporated them, or some of their provisions, into their corporate codes of conduct, while others are co-operating actively with the NCPs in promoting them. There is as yet only limited research on whether this new corporate culture permeates the different levels of corporate decision – making and to what extent it is influencing the way companies operate.

The effectiveness of these instruments is also a major concern and area of activity for future work. Each of the OECD bodies responsible for monitoring the application of these instruments is also engaged in a debate on how to reinforce them. The Steering Group on Corporate Governance received a mandate from the 2002 OECD Ministerial Meeting to start an assessment of the Principles of Corporate Governance in 2004 and this process is likely to entail a review of the Principles. Those working on the Anti-Bribery Convention have identified five issues of concern needing further work in order to reinforce its effectiveness and this could lead to a

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[18] For a comparison between the Guidelines and these other instruments, see OECD, *OECD Guidelines for Multinational Enterprises. Global Instruments for Corporate Responsibility. Annual Report 2001*, Paris, 2001, pp. 57 ff.

formal revision of the text. The extension of the Convention to new areas, such as the bribing of international sport organisations has also been proposed. As far as the Guidelines are concerned, the room for further improvement in the functioning of the network of NCPs is under closely scrutiny by adhering countries.

6. Conclusions

OECD's work on corporate responsibility has developed over more than twenty years. These sectoral programs have shown a remarkable, although not always planned, policy coherence. These different efforts are now leading to a consistent *corpus* of principles on corporate governance, integrity and responsibility and, although the progressive build-up of this *corpus* did not respond to a specific policy agenda, it has recently received endorsement at the highest political level. At the recent OECD Ministerial Meetings, the various activities on corporate governance, integrity and responsibility have been addressed more and more unitarily. For example, 2002 Ministerial Meeting Communiqué accorded a chapter on *'ensuring integrity and transparency in the international economy'*. At many levels, both within and outside the Organisation and its the Member countries, the comprehensive role that the OECD is playing in setting international standards for business conduct is becoming more and more evident.

CORPORATE SOCIAL RESPONSIBILITY AND CODES OF CONDUCT: THE NOÖ-ETHICAL PERSPECTIVE

ZELIM SKURBATY*

1. The New Spin to the Old Corporate Fad: the Codes of Conduct and their Role as Mediators in Creating a Balance of Interest Between all the Stakeholders in Industries and Larger Communities

The need for Codes of Conduct, which is a self-imposed ethical guidance for businesses, is a spin-off of the larger issue of Corporate Social Responsibility (CSR). The latter gains significance with every passing day in view of the challenges and opportunities posed by sustainable development and the three fundamental pillars it is based on: the generation of economic wealth, environmental improvement and social responsibility. It was no other than Kofi Annan who has voiced, back in 1999, the heavy burden of an ethical choice faced by the global business community:

> *'We have to choose between a global market driven by calculation of short-term profit, and one which has a human face. Between a world which condemns a quarter of the human race to starvation and squalor, and one which offers everyone at least a chance o prosperity, in a healthy environment. Between a selfish free-for-all in which we ignore the fate of the losers and a future in which the strong and successful accept their responsibilities, showing global vision and leadership.'*[1]

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* *The Danish Centre for Human Rights*

1 R. Holme, Ph. Watts, *Corporate Social Responsibility: Making Good Sense*. Report of the WBCSD, Geneva, January 2000, inside cover page.

Although the concept of social responsibility is firmly anchored in international policy discourse, the universally accepted definition is yet to emerge, and points more to the dynamic and interactive *process* of clarification of the positionings and compromises of all the stakeholders than to the *destination* of final conceptual clarity. As a matter of generalization, one can say that the CSR is a process of self-imposition by businesses of ethical standards that can lead, in a most effective and elegant way to sustainable economic development and higher quality of life of both individuals and groups that are either involved in the businesses, or are affected one way or another, by their performances.

To consolidate their commitment to behave ethically vis-à-vis all the stakeholders, corporations and businesses develop all kinds of so-called 'codes of conduct' designed to address the social dimension of companies' relations with their workforce, their families as well as the supply chain partners. They range from the principles enunciated by international organizations, like the UN Sub-Commission on the Promotion of Human Rights with its Draft Human Rights Principles for Business[2], Amnesty International Human Rights Principles for Companies[3] and OECD Guidelines on Multinational Enterprises, to the Global Sullivan Principles and Caux Principles for Business, to World Business Council for Sustainable Development's principles for *Corporate Social Responsibility: Making Good Sense,* to the American Apparel Production Manufacturers Association's 'Worldwide Responsible Apparel Production', to the Norwegian Confederation of Businesses' checklist for human rights practices. Of special importance in corporate codes of conduct is the issue of the use of force, in which case they usually refer to the United Nations Code of Conduct for Law Enforcement Officials as well as to the Basic Principles on its use.

The first *'P' (Profit)* addressed by the *Codes of Conduct* and the CSR at large is the issue of economic responsibility. Although the problem here revolves around the standards for reporting the financial performance and the accompanying standardization in methods providing for enhanced transparency and accountability

[2] www.business-humanrights.org/UN-Sub-Commission.htm
[3] AI January 1998, AI Index: ACT 70/01/199

(for which the Enron scandal provides a gruesome example), its hidden variables can be more readily found in the debate over the issue of the 'stakeholder *versus* stockholder'. Is the corporation's only, or primary, responsibility simply to maximize the value of its shareholders' investment? Or is it more appropriate to recognize that the modern corporation has a responsibility to serve the interests of multiple stakeholders, including not only its stockholders but also its employees, communities, customers, suppliers, and the broader society in which it is located?

This question takes on added salience in a world where capital is becoming increasingly more mobile, while multinational corporations develop multiple national allegiances. A stakeholder model would argue for more transparency and the development of new forms of corporate governance where these multiple interests are represented in organizational decision-making. This model assumes a long-run view of the corporation's and wider community's objectives, defying the strong tendency built into financial markets and institutions to maximize short-run profits. In contrast to the stockholder wealth-maximizing model, which would argue for a more laissez-faire or free market with an attendant lessened concern for community representation or welfare, the stakeholder model would broaden the scope of the corporation's responsibilities to its communities and work force and thus lead to a more harmonious *modus vivendi.*

The second *'P' (Planet)* is the *ecological dimension* of the CSR, which has gradually evolved into a significant competitive parameter. The parameter confers legitimacy (in broad terms) on businesses depending on their commitment to maximize the use of 'clean' technologies as well as to quantitatively gauge and balance their environmental impact. Of equal importance is that this brand of environmental stewardship should include the compliance of businesses with environmental legislation and regulations at the national and regional levels. Despite poor enforcement capacity of some governments and the heavy economic burden involved in upgrading dated industries, businesses abiding by the principles of CSR and Codes of Conduct are expected to improve their environmental performance by working on low cost technology transfer schemes (LCTTS) and further exploration of self-monitoring techniques, cushioning the lax government infrastructure.

The third *'P' (People)* is the closest to the thrust of the CSR and is expressly concerned with the 'human dimension' of the *problematique.*

This dimension comprises *inter alia* the rights of employees as well as responsibilities towards the members of the local communities, including responsibilities for skills training and maintenance of health and safety systems. The value systems operative in this dimension can be found primarily in international human rights instruments, such as the International Bill of Rights, relevant ILO documents, and so on. The question that seems important here is whether we should push for a set of minimum standards regarded as 'common' or accept a more 'decentralized' problem-, company- and region-specific set of rights and values. The trend as it is discernible at present, especially the development and expansion of the UN Global Compact and the Global Reporting Initiative (GRI), points to the gradual acceptance of the global set of standards in this area.

2. The Dual Approach to Corporate Social Responsibility and Codes of Conduct:

(a) Reactive or Issue-Based Approach
The first type of approach to fashion Codes of Conduct is of a *reactive* nature and stems from the unsavory experience of many companies with child labour (e.g. the cases of Nike in China and Indonesia as a case in point), environmental issues, and so forth. The one-sided front these companies put up towards public opinion can shield them temporarily from criticism, but proves to be ineffective as a means to respond to the multitude of challenges posed by real-life situations.

(b) Proactive or Human Rights-Based Approach
To meet these kinds of needs, the most viable policy for companies can be a resort to a more comprehensive set of guiding principles to be found in international human rights instruments. This so-called human rights-based approach is of a *proactive* nature in that it rallies the internationally recognized human rights standards to meet diverse challenges likely to be posed both internally, i.e. within corporations, such as labour conditions, for the employees; and externally, like the environmental and community-based issues raised during economic operations abroad. Virtually the whole armory of international human rights standards can be called to the task of defining the scope of the human rights responsibilities of corporations,

reflected in their Codes of Conduct and other human-rights oriented policy papers.

APPENDIX:

The Emergence of NOÖ-Ethics and its Prospective Role in the Operationalization of the Human Rights-Based Approach in Corporate Codes of Conduct

The new science and art of NOÖ-Ethics, we believe, can contribute to the generation of options and choices for all the stakeholders, if it is applied with due knowledge of all the procedures involved. In the section that follows, we present the major aspects of NOÖ-Ethics, the paradigm shifts it can entail as a result of its application and the exposition of its major tenets, for those who are not versed in it. The latter part is best understood if one could run through the seven stages that the methodology contains, any specific issue related to Corporate Social Responsibility:

I. Paradigm Shifts

The Limitations of the Traditional Approach: Rules-Application and Authoritative Decision-Making Process Schools of Thought

(1) It is a *rule application* procedure as opposed to processional *on-going decision-making process.*

Paradigm Shift: to put the application of human rights in the perspective of an on-going and dynamic *decision making process* in each and every case

(2) The issues of *values and meanings* are considered as self-evident in human rights instruments, ready to internalized and applied.

Paradigm Shift: The question of values, meanings and worldviews should be clarified, internalized and made operative in each and every case

a. A dichotomy is assumed between the shareholders' and stakeholders' perspectives: one is opposed to and detracts from the other.

Paradigm Shift: Strategically, it is in the shareholders' best

interests – even in terms of a bottom-line profit – to take into account the interests of other stakeholders

b. Outside (*Rules*) – In (*Corporations, Personnel*) Approach

Paradigm Shift: Inside (*Corporations, Personnel*) – Out (*Rules*) Approach

II. The Art and Science of NOÖ-Ethics

(1) What is NOÖ-Ethics (from Greek *NOOS*, meaning *Mind + Ethics* – i.e. the Ethical Guidance for the Mind)?

There are various possible definitions:

- It is a Value-Driven Change-Mediation Technology
- It is a Framework Methodology for Life-Enhancing Possibility Thinking
- It is a Framework Methodology for Identification of the Perspectives Controlling the Problem Situation and their Maximization or Minimization in order to Generate Behaviors and Attitudes Leading to the Experience of 'More Life'

However, NOÖ-Ethics is *not*:

- A Ready-Made Recipe or 'Final' Solution Provider
- Esoteric Mumbo-Jumbo, Cult-Like Teaching or Fad
- A Good Old, Pseudo-Scholastic-Type Abstract Learning, Cramming or Parroting
- A Substitute for a Mainstream Academic Schooling

NOÖ-Ethical Assumptions

1. The primary human right in noö-ethics is the right to choose, and in order to exercise this right you have to either discover or create the choices.
2. You are *many* (This requires one to put aside for a while his one and only identity, which he believes he has and explore other potential identities)
3. The problem situation and possible solutions to it are *many* (This requires the person to put aside for a while his positioning towards or solution to a problem which is believed by the person

to be the only truth or possibility. One should then proceed to discover all possible open and hidden perspectives to the problem situation and possible solutions to it – apart from the original one perceived)

4. Think in Terms of: 'what if this were possible or true'; 'how would this problem situation look like if we assumed this is true or false'; 'what other perspectives are at play here' and so on.
5. There is no inherent meaning, Truth or compelling force in anything: we create them.
6. When engaged in noö-ethical procedure, one should mainly use his rational intelligence (left brain), emotional intelligence (right brain) and physical intelligence (your body) – all at once if possible.
7. In Sum: one should not defend one's position, but rather try to expand the menu of perspectives you hold towards yourself and the problem situation.

NOO-Ethics: Overview of the 7-Steps Procedure:

1. 'Personal Meaning': Discover what personal meaning this problem situation holds for you.
2. 'Values': Make operational agreement on values with all the stakeholders.
3. 'Paradigms': Identify the perspectives that control the problem situation
4. 'Value Check': Check the identified perspectives against the values you agreed upon
5. 'Disputation': Dispute the wordviews and maximize or minimize the identified perspectives depending on their alignment with your values
6. 'Projection': Project your maximized and minimized perspectives on the problem situation
7. 'Reality' and 'Ecology' Test: test your noö-ethical gains in real life situations.

ARE PROFITABILITY AND CORPORATE SOCIAL RESPONSIBILITY COMPATIBLE?

JOSEPH F X ZAHRA*

1. Introduction

Recent months have not been happy ones for the reputation of the corporate sector. The spectacular failures of Enron, Anderson, Tyco and WorldCom has led to a general marking down of shares as investors have wondered how far the rot has penetrated. Clearly, after the failure of Arthur Andersen there is a need to enhance the current corporate governance guidelines. The recent volatility in stock markets have exacerbated the pensions funding problem – a reminder that, whereas many people think of companies as the preserve of bureaucrats and tycoons, the reality is that the major source of investment for most businesses is the pensions savings of millions of ordinary investors. Due to these recent events, there has been a renewed interest in corporate socio-responsibility.

2. The Concept of Corporate Social Responsibility

The concept of Corporate Social Responsibility (CSR) has been developing since the early 1970s. Corporate Social Responsibility encompasses an array of meanings and intended applications that have undergone substantial modifications over time. Thus, there has been no single, commonly accepted definition of Corporate Social Responsibility.

The European Union Green Paper 'Promoting a European framework for Corporate Social Responsibility' defines CSR as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.

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In general, it refers to a collection of policies and practices linked to relationships with key stakeholders, value, compliance with legal requirements and respect for people, communities and the environment. It is the commitment of business to contribute to sustainable development to improve quality of life of stakeholders. In this context, an increasing number of organisations have embraced the CSR culture within this scenario. A large consensus on its main features are:

- CSR is behaviour by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest;
- CSR is intrinsically linked to the concept of sustainable development: businesses need to integrate the economic, social and environmental impact in their operations;
- CSR is not an optional 'add-on' to businesses' core activities – but about the way in which businesses are managed.

3. Corporate Social Responsibility and Business

As companies themselves face the challenges of a changing environment in the context of globalisation, they are increasingly becoming aware that corporate social responsibility is of *direct economic value*. Although the prime responsibility of a company is to generate profits, companies can at the same time contribute to social and environmental objectives through integrating corporate social responsibility as a strategic investment in their core business strategy, their management tools and their operations. Due to the importance and real influence the different stakeholders have on business organisation, management is increasingly considering corporate social responsibility as an investment rather than as a cost: much like quality management.

In Western Europe, Japan and North America, an increasing number of companies are finding that it makes good business sense to fully integrate into corporate strategies, the interest and needs of customers, employees, suppliers, communities and the environment – as well as those of shareholders. Over the long term, this approach can generate more profits and growth.

Sometimes referred to as the *'stakeholder concept'*, this implies that management's task is to seek an optimum balance in responding

to the diverse needs of the various interest groups and constituencies affected by its decisions, that is, by those that have a 'stake' in the business. By including societal actors – not just financial interests – the stakeholder model assumes that the enterprise upholds social responsibility.

Corporate Social Responsibility is essentially a concept whereby companies decide voluntarily to contribute to a better society and a clearer environment. There are many factors which are driving corporate social responsibility, including:

- New concerns and expectations from citizens, customers, public authorities and investors in the context of globalisation and large scale industrial change;
- Social criteria are increasingly influencing the investment decisions of individuals and institutions both as consumers and as investors;
- Increased concern about the damage caused by economic activity to the environment;
- Transparency of business activities brought about by the media and modern information and communication technologies.

Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and *investing 'more' into human capital, the environment and the relations with stakeholders.* The experience and investment in environmentally responsible technology and business practices suggests that going beyond legal compliance can contribute to organisation competitiveness. Going beyond basic legal obligations in the social area, for example: training, working conditions, management-employees relations, can also have a direct impact on productivity. It opens a way of managing change and of reconciling social development with improved competitiveness. I would now like to expand on the relationship of business with the main stakeholders: customers, employees, business partners, the community and investors.

4. Customers

Successful companies build lasting relationships with customers by focusing their whole organisation on understanding what the customers want and on providing them with superior quality, reliability and service. Management guru Tom Peters refers to this

as *'having a passion for customers.'* The reason why business is focusing on customers is the increasing evidence that the ethical conduct and environmental and social consciousness of companies make a difference in purchasing decisions. This evidence is supported by research of the Council on Economic Priorities (CEP), a non-profit, USA-based, public service research organisation founded in 1969 to carry out accurate and impartial analysis of the social and environmental records of corporations.

The Council on Economic Priorities offers information on over 700 companies and its availability empowers consumers, investors, and activists to cast their economic vote with knowledge of corporations' performance on such factors as environment, community outreach, quality of life in the workplace, information disclosure, and the advancement of women and minorities. The reputation of companies in these and other areas does influence consumers' choice of brands and producers and often leads to switching brands even if there is a price differential. Basically, it encompasses the task of considering the consumer as a citizen.

5. Employees

Certainly, employees are the most important asset businesses have, since human capital is the most important determining factor in an organisation's competitive edge. The quality of life in the workplace and on the job, affects our whole life as well as that of our families. Socially responsible businesses are doing more to provide work which is meaningful and which helps employees develop and realize their potential. They are seeking to provide fair wages, a healthy and safe work environment, and a climate of respect.

Management practices and human resource policies often include empowerment of middle management and employees; better information sharing and communication throughout the company; better balance between work, family, and leisure; greater work force diversity; continual education and training; and concern for employability as well as job security.

Companies are also finding that profit sharing and share ownership can enhance motivation and productivity and decrease employee turnover, such as the Bank of Valletta employee foundation whereby employees are given share units, which can be converted into cash on retirement.

6. Business partner

Suppliers in some areas of the world violate fundamental human rights in such areas as child labor and working conditions. With increasing pressure from consumer groups, some companies are acting to insist upon respect for human rights on the part of their suppliers and are taking action to monitor performance in this area.

7. Communities

Nowadays, companies can make important contributions to these communities, and especially to local communities, through providing meaningful jobs, fair wages and benefits, and tax revenues. The success of business is linked to the health, stability, and prosperity of the society and of the communities in which it operates. If education is neglected, or not relevant to the needs of business, as is too often the case, companies cannot have a competitive work force. Community-focused businesses like banks, retailers, and newspapers cannot prosper in declining localities.

So the problems of education, health, crime, unemployment, and drugs dramatically affect business. While business has traditionally considered these to be the exclusive domain of government, today more and more business leaders are accepting part of the responsibility to improve the communities in which they do business. We, at Bank of Valletta, take this to heart and have included it within our mission statement which states ' We are committed to enhance the prosperity of the communities in which we operate with absolute integrity and to support further the development of the Maltese economy'.

8. Socially Responsible Investment

Many economists, business leaders and investors say that the purpose of business is to maximise shareholder wealth. Truly world class companies are generally able to show well above average returns and be environmentally and socially responsible. Furthermore, they are more conscious of the need to invest for future growth and profits and for the sustainability of their enterprises. They are also aware that satisfying the other stakeholders can be a source of competitive advantage. This brings us to an emerging group of shareholders

referred to as ethical investors, or as socially and environmentally conscious investors, whose factor ethical and moral considerations are reflected in their investment making process. Modern ethical investing began in the United States in 1969, centring at that time around issues like the war in Vietnam and Ralph Nader's attacks on poor safety of automobiles. Today, one of the questions frequently raised about activities and strategies in social responsibility is whether they detract from a company's financial performance.

There is increasing evidence, though perhaps not conclusive for sceptics, that social responsibility correlates positively with financial performance. One encouraging bit of evidence for this proposition is the performance of the shares of companies, which have passed social and environmental screens. The 'Domini 400 Social Index' is an index of the share prices of 400 common stocks of American companies, which were chosen based on their performance on environmental and social performance screens. Socially and environmentally responsible policies provide investors with a good indication of sound internal and external management. They contribute to minimise risks by helping to anticipate or even prevent crises that can affect the reputation of the organisation and cause a dramatic drop in the share price.

Following my discussion on the relationship of corporate social responsibility with the main stakeholders, I would like to further develop my argument on what makes a good corporate citizen and what are the determining factors in Corporate Social Responsibility and human rights.

9. What makes a good corporate citizen?

In responding to the increased globalisation of the world economy, companies have recognised that they need to be globally competitive in order to survive. Good managerial practice and appropriate strategies to establish sustainable business over the long term have become essential tools for effective competition. At the same time, pressure on companies from investors, governments, local community groups and campaigning NGOs to monitor, manage and report on their impact on social, health and environmental issues is increasing. From a company viewpoint, the development and protection of reputation and the recognition and management of risk are key issues.

Companies are therefore increasingly looking at their business strategies in terms of the values which underpin them, their relationships with a broad range of stakeholders, and the impact of business on the local communities and environments in which they operate. Such 'good corporate citizenship' can be seen as a natural progression of good managerial practice, but experience has shown that in order for it to be successful, it must be an integral part of business strategy and core business practices.

A recent definition for corporate citizenship that came out of the World Business Council on Sustainable Development is that:

> *'Corporate citizenship is the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve the quality of life of all their stakeholders.'*

10. The relationship between CSR and human rights

Corporate social responsibility has a strong human rights dimension, particularly in relation to international operations and global supply chains. This is recognised in international organisations, such as the International Labour Organisation's Tripartite Declaration of Principles concerning multinational enterprises and social policy. Human rights are a very complex issue presenting political, legal and moral dilemmas. Companies face challenging questions, including how to identify where their areas of responsibility lie as distinct from those of governments, how to monitor whether their business partners are complying with core values, and how to approach and operate in countries where human rights violations are widespread.

Under increasing pressure from NGOs and consumer groups, companies and sectors are increasingly adopting codes of conduct covering working conditions, human rights and environmental aspects, in particular those of their subcontractors and suppliers. They do so for various reasons, notably to improve their corporate image and reduce the risk of negative consumer reaction. It is increasingly recognised that the impact of a company's activities on the human rights of its workers and local communities extends beyond issues of labour rights.

With respect to human rights, there is a need for ongoing verification where the implementation and compliance with codes is concerned. The verification should be developed and performed following carefully defined standards and rules that should apply to organisations and individuals undertaking the so-called 'social-auditing'. Monitoring, which should involve stakeholders such as public authorities, trade unions and NGOs, is important to secure the credibility of codes of conduct. A balance between internal and external verification schemes could improve their cost-effectiveness. As a result, there is a need to ensure greater transparency and improved reporting mechanisms in codes of conducts.

11. Corporate Socially Responsible: What approach?

A socially responsible approach to business cannot be enforced on an organisation's operations: it needs to be built into the culture of the organisation. The recent European Union Green Paper on Corporate Social Responsibility is a step in the right direction but should not be the means to an end by imposing a tight framework with which all organisations would need to comply.

Development of a CSR policy is a dynamic process, influenced by market conditions, the local setting, national frameworks, cultural and historical aspects, and so on. Each company must therefore be able to choose and define its own approach to corporate responsibility. This having been said, it needs to be noted, of course, that common principles for responsible business conduct have been established at international level, within the framework of OECD, ILO and the UN.

These initiatives are widely recognised in the business community and often considered a source of inspiration when companies draw up their own approaches. It should be recalled that CSR refers to responsible business practices and goes beyond compliance with legislation in force in the countries of operation. CSR policies are being increasingly developed as an element of competitiveness. The diversity of approaches and instruments is an expression of the innovative and dynamic character of companies' CSR initiatives and a reflection of the multiple different contexts in which companies operate. Taking this into account, the diversity of CSR practices and instruments cannot be regarded as a potential source for market distortion.

I therefore recommend that the following Union of Industrial and Employers' Confederations of Europe recommendation be taken into consideration:

- *CSR is voluntary and business-driven.* Companies perform their social function first and foremost through the creation of wealth and employment; they do this within the existing legal framework. In parallel to its statutory obligations, each company can develop other social or environmental activities to the service of society. However, this additional effort must remain voluntary.
- *There is no 'one-size-fits-all' approach to CSR.* In order to be successful, CSR policies must be developed from within the organisation and be adapted to its specific characteristics and circumstances. Moreover, these policies will not be static, but develop and be refined on a continuous basis, as new situations and challenges arise.
- *CSR is inextricably linked to the three pillars of sustainability relating to economic, social and environmental considerations.* The multi-disciplinary character of responsible business conduct and its potential for improving companies' total performance makes CSR an important issue.
- *CSR is not about shifting public responsibilities on to private companies.* A debate on CSR has to respect the distribution of roles between governments and companies: it should not overlook the responsibilities of governments and multilateral organisations *themselves* when it comes to the promotion of democracy and human rights, and the creation of a climate conducive to social and economic progress.

These points add up to a strong case for mutual self-interest between stakeholders in the exercise of corporate social responsibility.

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