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Towards Normative Transformation: Re-conceptualising Business and Human Rights

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Abstract

Towards Normative Transformation: Re-conceptualising Business and Human Rights

This dissertation examines the ongoing problem of business actors violating human rights and the regulatory attempts to deal with the problem at the international level. In particular, it considers the work of the UN Secretary-General's Special Representative on Business Human Rights, John Ruggie and the 'Protect, Respect and Remedy' framework as elaborated in the 2011 UN Guiding Principles on Business and Human Rights. It also critically analyses the UN Global Compact, the OECD Guidelines on Multinational Enterprises as well as developments in the European Union in this area. Each of these regulatory mechanisms demonstrates elements of new governance, hybrid or third way models of regulation such as voluntarism, wide participation through multistakeholder structures and subsidiarity, all of which are useful soft law techniques that contribute to a culture of human rights or human rights norm internalisation. Nevertheless, they fall down in failing to provide a normative regulatory framework which would address human rights abuses by business actors which remain unresponsive to soft law models of regulation. Specifically, there is a lack of redress for the victims of human rights abuses by business actors and the current regulatory models do not offer a deterrent to or punishment of such abuses. This dissertation argues that the international community must thus re-conceptualise the business and human rights problem and move towards a mandatory international legal paradigm.

New governance models have emerged from a changing international legal paradigm and they represent a move away from State-centric regulation towards the complementary co-existence of hard and soft rules in one domain. While many of the new governance techniques offer useful means of internalising a human rights culture within the business community and thus helping to prevent human rights abuses, nevertheless, the lack of normative rules means that no binding redress mechanisms or remedies are available. A true new governance approach allows both normative and non-normative standards to co-exist. Given that the voluntary business and human rights initiatives alone have failed to address the problem adequately, a new international normative approach is

necessary. This thesis posits that re-conceptualising business actors as human rights dutyholders does not require a major paradigm shift. International law has always recognised business actors as subjects of international law, or alternatively, participants at minimum, and there is no good reason why they cannot be subject to human rights obligations. This thesis advocates the application of a horizontal approach to human rights which encompasses human rights violations by business actors. At present, a conservative, positivist and State-centric perspective of international law prevails, which prioritises the maintenance of State sovereignty over the rights of individuals not to be abused by business actors.

The law is correct as of October 2011.

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Sorcha MacLeod
Sheffield, November 2011

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Printed name: Sorch MacLeod

Abbreviations

ACHR	American Convention on Human Rights
African Charter	African Charter on Human and Peoples' Rights
AI	Amnesty International
AJIL	American Journal of International Law
All ER	All England Law Reports
Art.	Article
ATS	Alien Tort Statute (USA)
BERR	UK Department for Business Enterprise and Regulatory Reform (replaced by BIS in June 2009)
BIAC	Business and Industry Advisory Council (OECD)
BIS	UK Department for Business, Innovation and Skills
chpt.	chapter
CHRGJ	Center for Human Rights and Global Justice
COP	Communication on Progress (UN Global Compact)
CORE	The Corporate Responsibility Coalition (NGO)
CSR	Corporate Social Responsibility
doc.	document
DRC	Democratic Republic of Congo
ECCJ	European Coalition for Corporate Justice (NGO)
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ed.	editor
eds	editors
e.g.	for example

EJIL	European Journal of International Law
EU	European Union
FDI	Foreign Direct Investment
FT	Financial Times
HCHR	UN High Commissioner for Human Rights
HRC	Human Rights Council
HRCttee	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
LDC	Lesser Developed Country
LNTS	League of Nations Treaty Series
MNC	Multinational Corporation
MNE	Multinational Enterprise
NCP	National Contact Point (OECD)
NGO	Non-governmental Organisation
NIEO	New International Economic Order
NMT	Nuremberg Military Tribunal

Norms	UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights
OECD	Organisation for Economic Cooperation and Development
OECD Guidelines	OECD Guidelines on Multinational Enterprises
OHCHR	Office of the UN High Commissioner for Human Rights
para.	paragraph
PCIJ	Permanent Court of International Justice
PRR	Protect, Respect, Remedy framework
PSNR	Permanent Sovereignty over Natural Resources
RAID	Rights and Accountability in Development (NGO)
Res.	Resolution
RIIA	Royal Institute for International Affairs
RIAA	Reports of International Arbitral Awards
SGSR	UN Secretary-General's Special Representative on Business and Human Rights
SIP	Specific Instance Procedure (OECD)
SMEs	Small and medium-sized enterprises
Supp.	Supplement
TLR	Times Law Reports
TNC	Transnational Corporation
TUAC	Trade Unions Advisory Council (OECD)
TUC	Trades Union Congress
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations

UNCTAD	UN Conference on Trade and Development
UNCTC	UN Commission on Transnational Corporations
UNDP	UN Development Programme
UNGA	UN General Assembly
UNGC	UN Global Compact
UN GPs	UN Guiding Principles on Business and Human Rights
UNSC	UN Security Council
UNTS	UN Treaty Series
USA	United States of America
WG	Working Group

Chapter 1

Defining the Business and Human Rights Problem: Actors, History, Context

*The world has been challenging multinational companies on many fronts – the use of coerced labor, of child labor, and challenges to companies for encouraging a government to relocate a few million people so the company can build a pipeline. These challenges require sorting out the relationship between the responsibility of companies and what the international system ought to do about it.*¹

1.0 Introduction

The purpose of this dissertation is to analyse the effectiveness of some past and present international business and human rights or Corporate Social Responsibility (CSR) initiatives by measuring them against the UN Secretary-General's Special Representative (SGSR) John Ruggie's standards of Protect, Respect and Remedy.² After nearly four decades of disparate responses to the issue of private business actors and human rights, SGSR Ruggie's work represents the most comprehensive, up-to-date and widely disseminated analysis in the field. It therefore, makes sense to examine business and human rights initiatives in light of his work. That is not to say that this dissertation agrees with SGSR Ruggie on all matters, quite the contrary, rather his exertions provide a useful yardstick against which to measure the endeavours of the United Nations, the Organisation for Economic Cooperation and Development and the European Union. As the pre-eminent inter-governmental organisation, the UN has been attempting to address the issues arising from transnational business activities since the 1970s with varying degrees of success. The OECD and the EU represent opposite ends of the CSR spectrum with the former taking an active regulatory role in attempting to curtail bad business behaviour, while the latter has been content to rely upon industry self-regulation.

¹ L.Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' 25 Brook.J.Int'l L. 17 (1999) (hereinafter 'Henkin') at 23.

² Protect, Respect and Remedy: a Framework for Business and Human Rights,' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie A/HRC/8/5 7 April 2008 <http://198.170.85.29/Ruggie-report-7-Apr-2008.pdf> [last accessed 2.11.11] (hereinafter 'Protect, Respect and Remedy') at 4 para.5; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework,' A/HRC/17/31, 21 March 2011 (hereinafter 'Guiding Principles') <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [last accessed 2.11.11].

The dissertation assumes that business actors *do* have social responsibilities, human rights obligations in particular, and at the very least that they ought to do no harm to the communities upon which they rely. It takes a traditional international legal methodological approach and relies predominantly on a conventional analysis of primary legal materials including international agreements, jurisprudence and academic opinion. The nature of the topic means that it also draws heavily upon the work of international organisations, NGO reports, industry research, the views of civil society, the accounts of those affected by bad business practices, and of course, the representations of business actors themselves.

To that end the dissertation asks several overarching questions. To what extent do certain international business and human rights projects satisfy the Ruggie criteria for holding business to account for human rights violations? To what extent do they ensure respect for and protection of human rights? How do they provide redress for human rights violations committed by business, if at all? Ultimately it concludes that the existing self-regulatory frameworks are inadequate and that a complementary and binding global legal framework is necessary to act as a deterrent and to provide redress for those affected by the violations of human rights by business actors. It thus advocates a new governance or third way approach to business and human rights regulation where hard and soft regulatory options coexist and complement each other in a hybrid structure and which is characterised by broad participation, flexibility and subsidiarity.³ New governance represents a shift away from State-centric models of regulation.

This chapter, however, firstly defines the particular bodies which fall within the scope of this dissertation, that is, the private business actors who are alleged to be and are violating human rights standards. Secondly, it explains how the advent of globalisation has facilitated the creation of a world where the rights of individuals come a poor second to the rights of private business actors. Thirdly, it outlines the rise of the CSR paradigm. Finally, it examines the business response to the CSR challenge, followed finally, by an assessment of State and institutional responses.

³ On new governance see generally for example, D.M.Trubek & L.G.Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' 13 Colum. J. Eur. L. 539 (2006-2007); Conley, J.M. & Williams, C.A., 'Engage, Embed and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement' 31 J. of Corporation L. 1-38 (2005); J.Scott & D.Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' 8 European Law Journal 1-18 (2002).

1.1 Defining the Wrongdoers: Who or What is Violating Human Rights?

This dissertation uses the terms ‘business actors,’ ‘business entities’ and business enterprises’ interchangeably. Likewise, it refers to ‘commercial’ actors, entities and enterprises. In the same way that there are disparate initiatives which attempt to hold business actors accountable and, in some cases, responsible for human rights violations, there are also confusingly numerous terms and phrases used by States, inter-governmental organisations and civil society to describe the private entities whose accountability and responsibility is sought. The two most commonly used terms in recent times are Transnational Corporation (TNC) and Multinational Enterprise (MNE). While the former has been used at the UN, most notably its Commission and Centre for Transnational Corporations (UNCTC),⁴ the latter was adopted by the OECD in its Guidelines on Multinational Enterprises.⁵ Neither term is especially helpful and disorder prevails for two reasons. Firstly, the language used self-evidently describes both the particular *business model*, i.e. ‘corporation’ or ‘enterprise,’ and also, secondly, the *geographical nature* of the business activities undertaken, i.e. ‘transnational’ or ‘multinational.’ Users of such terminologies either assume, incorrectly, that there is common agreement as to their meaning and use them carelessly or they tie themselves in knots trying to justify the use of

⁴ UN Group of Eminent Persons, ‘The Impact of Multinational Corporations on Development and on International Relations’ UN Doc. E/5500/Add.1 (Part 1), 24 May 1974. See also UNCTC Terms of Reference: ECOSOC Res. 1913 sets out the UNCTC’s Terms of Reference: E/Res/1913/LVII, 5 December 1974, UNCTC, CTC Reporter 1, No.1 (December 1976) 3-4; see UNCTC, Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990. For an overview of the work of the UNCTC see e.g. T.Sagafi-nejad & J.H.Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Indiana University Press: Bloomington, 2008) (hereinafter Sagafi-nejad & Dunning) 89-123; P.T.Muchlinski, *Multinational Enterprises and the Law* (2nd ed.) (Oxford: OUP, 2007) (hereinafter ‘Muchlinski (2007)’) 119-120 and 660-662.

⁵ OECD, OECD Declaration on International Investment and Multinational Enterprises, of 21 June 1976, C (76)99(Final) (OECD, Paris, 1976) as amended in 2000: The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications DAF/IME/WPG(2000)15/FINAL, 31st October 2001; as amended in 2011: OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, <http://www.oecd.org/dataoecd/43/29/48004323.pdf> [last accessed 20.8.11] (hereinafter ‘OECD Guidelines 2011’). See also infra Chapter 5. For a general overview and history of the Guidelines see e.g. OECD Observer, Policy Brief: The OECD Guidelines for Multinational Enterprises, (OECD, 2001); J.Karl, ‘The OECD Guidelines for Multinational Enterprises’ in M.K.Addo, (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, (Kluwer: London, 1999) (edited collection hereinafter ‘Addo’) 89-106; C.Hägg, ‘The OECD Guidelines for Multinational Enterprises: A Critical Analysis’ 3 Journal of Business Ethics 71-76 (1984); D.J.Plaine, ‘The OECD Guidelines for Multinational Enterprises’ 11 Int’l L. 339 (1977).

one terminology over another.⁶ This dissertation posits the view that both approaches are wrong and that debating the finer meanings of language is both unhelpful and, more importantly, unnecessary. A broader approach is to be preferred, as encompassed by the treaty proposal of the UN Sub-Commission on the Protection of Human Rights in the form of the draft ‘Norms on Transnational Business Corporations and other business enterprises’⁷ and more recently by the mandate and work of UN Secretary-General’s Special Representative on Business and Human Rights, John Ruggie⁸ both of which specifically include TNCs as well as other business entities.

Historically, consistent language has never been used in this field. In the first edition of his classic work, *Multinational Enterprises and the Law*, Peter Muchlinski identified an assortment of different terminologies utilised when referring to commercial actors conducting business across national borders. He questioned whether there was an ‘agreed definition that is sufficiently sophisticated to encompass the various business forms that such firms might take.’⁹ Eight years later, in the second edition, Muchlinski is still describing ‘terminological confusion.’ He outlines the reasons for the development of different terminologies, identifying three key terms: Multinational Corporation, Multinational Enterprise and Transnational Corporation.

Firstly, in defining ‘Multinational Corporation’ he asserts that:

The first use of the term ‘multinational’ in relation to a corporation has been attributed to David E. Lilienthal, who, in April 1960 gave a paper to the Carnegie Institute of Technology on ‘Management and corporations 1985,’ which was later published under the title ‘The Multinational Corporation’ (MNC). Lilienthal defined MNCs as ‘corporations...which have their home in one country but which operate and live

⁶ See e.g. J.H.Dunning, *Multinational Enterprise and the Global Economy* (Addison-Wesley: Wokingham, 1993) (hereinafter ‘Dunning’) at 3; J.I.Charney, ‘Transnational Corporations and Developing Public International Law’ Duke L.J. 748-788 (1983) (hereinafter ‘Charney’) at 748 Note 1; F.Rigaux, ‘Transnational Corporations’ in M.Bedjaoui, *International Law: Achievements and Prospects* (UNESCO/Kluwer: Paris and Dordrecht, 1991) (hereinafter ‘Rigaux’) 121-132 at 121.

⁷ UN Norms on the Responsibility of Transnational Corporations and Other Business Entities with Regards to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26th August 2003. For a more detailed discussion of the Norms see *infra* Chapter 3, Section 3.2.1.2.

⁸ Human rights and transnational corporations and other business enterprises, Human Rights Council Resolution 2005/69, 20th April 2005. See also the Guiding Principles note 2.

⁹ P.T.Muchlinski, *Multinational Enterprises and the Law* (Blackwell: Oxford, 1999) at 12.

under the laws and customs of other countries as well.’ This definition sees the MNC as a uninational enterprise with foreign operations.¹⁰

He concludes that the use of ‘Multinational Corporation’ is rooted in the experiences of US business and therefore does not consider business enterprises of ‘multiple national origin.’¹¹ Nevertheless it is a term in regular use by academics in the spheres of economics, politics, management and business.¹²

The second term, ‘Multinational Enterprise,’ emerges from economic literature and is adopted by economists such as John Dunning who defines it as ‘an enterprise that engages in foreign direct investment (FDI) and owns or controls value-adding activities in more than one country.’¹³ Muchlinski describes it more bluntly:

...the MNE is a firm that engages in **direct investment outside its own country**.¹⁴

He believes that MNEs are a ‘distinct type of business enterprise’ which ought to be regulated in a manner specific to them.¹⁵

Multinational in this context still seems to exclude businesses of multiple national origin. This definition also clearly distinguishes between direct and indirect investment:

Economists have favoured a simple all-embracing formula, defining as a ‘multinational enterprise’ any corporation which ‘owns (in whole or in part), controls and manages income generating assets in more than one country.’¹⁶

For Muchlinski, the use of the term ‘enterprise’ is unproblematic and secondary to the lack of uniformity caused by the inconsistent employment of the terms ‘multinational’ and

¹⁰ Muchlinski (2007) note 4 at 5.

¹¹ Muchlinski, *ibid*. While the term ‘multinational corporation’ received most use in the 1970s, it is still in use today in a variety of disciplines although it appears to be gradually falling out of favour.

¹² See e.g. C.Dörrenbächer & M.Geppert, (eds), *Politics and Power in the Multinational Corporation: The Role of Institutions, Interests and Identities* (Cambridge University Press: Cambridge, 2011).

¹³ Dunning note 6 at 3.

¹⁴ Muchlinski (2007) note 4 at 5. Muchlinski’s emphasis.

¹⁵ Muchlinski (2007) note 4 at 8.

¹⁶ Muchlinski (2007) note 4 at 5.

‘transnational.’¹⁷ He views the definitions as ‘no more than conceptual guidelines’¹⁸ and explains his position in simple legal terms:

The term ‘enterprise’ is favoured over ‘corporation’ as it avoids restricting the object of study to incorporated business entities and to corporate groups based on parent-subsidiary relations alone. International production can take numerous legal forms. From an economic perspective the legal form is not crucial to the classification of an enterprise as ‘multinational.’¹⁹

Such an analysis is correct. Furthermore, it is contended that the *legal* model employed to describe the entity is irrelevant when assessing accountability or responsibility for violations of international human rights law. So the corporate entity itself, and possibly its officers, is liable or in non-corporate situations, the individuals engaging in the commercial activities are liable. The issue therefore becomes one of geography.

Finally, there is the Transnational Corporation.²⁰ Jonathan Charney, writing in 1984, embraces the term ‘Transnational Corporations’ and attempts to differentiate them from Multinational Enterprises. This is despite his assertion that ‘[t]he literature on multinational enterprises employs the terms Transnational Corporations (TNC) and Multinational Entities (MNE) interchangeably.’²¹ His definition of TNCs, however, is convoluted and complex and illustrates the difficulties of attempting to characterise such businesses:

The term TNC is used here because it conveys more clearly this article’s focus on business enterprises. There are numerous definitions of TNCs... For the purposes of this article the following definition will be used: [A] number of affiliated business establishments which function simultaneously in different countries, are joined together by ties of common ownership or control, and are responsible to a common management strategy. From the headquarters company (and country) flow direction and control, and from the affiliates (branches subsidiaries and joint enterprises) products, revenues, and information. Management may be organized in either monocentric or polycentric fashion. In the former case, top management is centred in one headquarters company; in the latter case, management has been divided into

¹⁷ Muchlinki (2007) note 4 at 7.

¹⁸ Ibid.

¹⁹ Muchlinksi (2007) note 4 at 5.

²⁰ Muchlinksi (2007) note 4 at 6.

²¹ Charney note 6 at 748 footnote 1.

geographic zones and a separate headquarters company has been established for each zone.²²

François Rigaux shares the view that the term *Transnational Corporation* is to be preferred.²³ He contends this on the basis that the commercial entities involved are almost always companies but weakens his argument for terminology based on corporate status by acknowledging that other private actors may be involved in transnational business.²⁴ He also claims, erroneously, that there is general agreement as to the language to be employed:

There now seems to be an accepted terminology in this field. We no longer speak of **multinational** corporations (or enterprises), as the use of this adjective gives the mistaken impression that the company or enterprise has national status in different countries. The term **transnational** more correctly refers to a form of autonomy which corporations with establishments scattered over the territories of several States have been able to acquire in their relations with each one of them.²⁵ [emphasis in original]

As has been demonstrated, there is no such ‘accepted terminology.’ Further evidence of this can be seen in two additional examples, one academic and one institutional.

Firstly, Michael Addo in the introduction to his 1999 edited collection *Human Rights Standards and the Responsibility of Transnational Corporations* acknowledges the uncertainty of the situation, noting that only ‘some of the essays in this book’ employ TNC terminology:

It is a form of reference used in this book not unaware of the other terms such as multinational corporation, international company, multinational enterprises, often used to represent large corporations which have a policy headquarters in one country (the home country) and operating in foreign jurisdictions (the host country) through wholly or partly owned subsidiaries, agencies and other forms of business representatives.²⁶

Interestingly, none of the works in the collection attempts to address ‘the doctrinal differences relating to the effect of one or the other title.’ This dissertation takes the view that such distinctions are therefore irrelevant for legal purposes. Rather they exercise

²² Ibid.

²³ Rigaux note 6 at 121.

²⁴ Rigaux note 6 at 122.

²⁵ Rigaux note 6 at 121. Rigaux’s emphasis.

²⁶ M.K.Addo, ‘Introduction’ in Addo note 5 at 3.

economists. Witness John Dunning drawing on a variety of sources in an attempt to help classify a particular entity as ‘multinational’ or ‘transnational.’ He identifies:

...several criteria for assessing the degree of an enterprise’s multi- or transnationality. These include:

- (1)The number and size of foreign subsidiaries or associate companies it owns or controls,
- (2)The number of countries in which it engages in value-adding activities such as mines, plantations, factories, selling outlets, banks, offices and hotels,
- (3)The proportion of its global assets, revenue, income or employment accounted for by its foreign affiliates,
- (4)The degree to which its management or stock ownership is internationalized,
- (5)The extent to which its higher value activities, for example, research and development, are internationalized; this measure is intended to capture the quality or depth of foreign production,
- (6)The extent and pattern of the systemic advantages arising from its governance of, and influence over, a network of economic activities located in different countries.²⁷

He does, however, acknowledge that such a classification is inevitably ‘arbitrary’ and that ‘the multi- or transnationality of an enterprise is best considered as a multi-dimensional, rather than a unidimensional concept.’²⁸ Muchlinski also believes that ‘[i]nvariably, a certain degree of arbitrariness is involved’ and cites the UN institutional experience as evidence, which leads to the second example.²⁹

The UN has muddied the waters with an inconsistent and shifting approach to terminology. In the early 1970s the UN employed the term ‘Multinational Corporation’³⁰ but by the middle of the decade, as a result of UNCTC debates, it had switched to ‘Transnational Corporation.’³¹ This shift came at the behest of several States who took the view that the term ‘transnational’ ‘better expressed the essential feature of operation across national

²⁷ Dunning note 6 at 3.

²⁸ Ibid.

²⁹ Muchlinski (2007) note 4 at 7.

³⁰ UN Group of Eminent Persons, ‘The Impact of Multinational Corporations on Development and on International Relations’ UN Doc. E/5500/Add.1 (Part 1), 24 May 1974; See Muchlinski (2007) note 4 at 4 and 7.

³¹ P.T.Muchlinski, ‘Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD’ in M.T.Kamminga & S.Zia-Zariffi, (eds), *Liability of Multinational Corporations Under International Law* (Kluwer: The Hague, 2000) 97-118.

borders than did the term multinational.³² There was also intense disagreement between the developed and developing nations about whether or not to include State corporations within the scope of the proposed UNCTC Code of Conduct.³³ Conversely the more recent UN projects such as the Global Compact, the draft Norms and the work of SGSR Ruggie adopt a broader approach, referring not only to TNCs but also to ‘business entities and other business organisations’ thus avoiding the debate about nomenclature to a certain extent.

The emergence of Corporate Social Responsibility (CSR) as an enduring term of art³⁴ in the 1990s merely led to further uncertainty (although the term is believed to have been in use since the 1960s³⁵). This lack of consistency in terminology impacts on the regulatory scope of the different business and human rights initiatives. A broad definition is self-evidently far-reaching and inclusive of *all* business entities. A narrower definition obviously limits and restricts regulatory reach. So, for example, after much debate, the Draft Code of Conduct of the UN Centre on Transnational Corporations was intended to apply only to *transnational corporations*.³⁶

The term ‘transnational corporation’ as used in this Code means an enterprise, whether of public, private or mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them [may be able to] exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.³⁷

³² Muchlinski (2007) note 4 at 6.

³³ M.Sornarajah, *The International Law on Foreign Investment*, (2nd ed.), (Cambridge University Press: Cambridge, 2004) (hereinafter Sornarajah) at 277.

³⁴ See C.A.Harwell Wells, ‘The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century’ 51 *Kansas Law Review* 77 – 140 (2002) (hereinafter ‘Harwell Wells’). The term continues to be used see e.g. Commission of the European Communities, Green Paper: Promoting a European framework for Corporate Social Responsibility, (Brussels 18.7.2001) COM(2001) 366 final.

³⁵ See generally D.Engel, ‘An Approach to Corporate Social Responsibility’ 32 *Stanford Law Review* 1 (1979–1980) (hereinafter ‘Engel’); C.Stone, *Where the Law Ends: The Social Control of Corporate Behaviour*, (Harper & Rowe: New York, 1975).

³⁶ UNCTC, Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990.

³⁷ Para.1(a), Development and International Economic Cooperation: Transnational Corporations, UN Doc. E/1990/94; see also Draft United Nations Code of Conduct on Transnational Corporations, May 1983, 23 ILM 626 (1984).

This was a response to Latin American objections, specifically Andean Pact nations which used the term ‘multinational’ to ‘refer to corporations jointly set up under Andean Group rule.’³⁸ The agreement to use the term did not stop ongoing disagreements as to the definition of TNC, so for example, many States expressed ongoing dissatisfaction at the proposed inclusion of State-owned enterprises within the scope of the draft Code.³⁹ At around the same time the OECD began drafting its Guidelines on Multinational Enterprises and chose to adopt an alternative vocabulary. The OECD Guidelines are addressed to *multinational enterprises*, thus applying, not only to corporate actors, but to a much wider group of business actors. Guideline I(4) states that:

A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.⁴⁰

As stated in the introduction to the chapter, the draft Norms produced by the UN’s Sub-Commission on the Promotion and Protection of Human Rights attempted to encompass all businesses within a proposed convention by adopting the term ‘Transnational Corporations and Other Business Enterprises.’⁴¹ This broader approach has also been embraced by SGSR Ruggie. In his 2007 Report he refers to the ‘challenges posed’ by ‘transnational and

³⁸ Muchlinski (2007) note 4 at 6.

³⁹ UNCTC: Report of the Secretariat on the Outstanding Issues in the Draft Code of Conduct on Transnational Corporations, UN Doc. E/CD. 10/1984/S/5 of May 29 1984 reproduced in 23 ILM 602 (1984) at 607 paras 9-15.

⁴⁰ OECD Guidelines 2011 note 5 at 17, Guideline I Concepts and Principles.

⁴¹ D.Weissbrodt & M.Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ 97 AJIL (2003) 901 at 907-909. See also Chapter 3 *infra*.

private enterprises'⁴² and the Guiding Principles published in 2011 use 'business' and 'business enterprise.'⁴³ David Weissbrodt, Chair of the UN Sub-Commission on the Promotion and Protection of Human Rights, which oversaw the creation of the draft Norms, has concluded that the use of the term TNC became entrenched historically due to intense 'media attention on the activities and misdeeds of major corporations.'⁴⁴ He further cites the 'mobility and power' of TNCs as reasons for the regulatory focus, pointing out that they can 'evade national laws and enforcement because they can relocate' and can 'use their political and economic clout to pressure governments to ignore corporate abuses.'⁴⁵ In his words, the draft Norms sought to 'level the playing field' by applying 'not only to TNCs but also to national companies and local businesses' so that each would 'be responsible according to their respective spheres of activity and influence'⁴⁶ In doing so, the Norms endeavoured to avoid the risk of 'sophisticated corporate lawyers' structuring commercial entities in such a way 'as to avoid the application of international standards designed only for TNCs.'⁴⁷

Attempting to categorise commercial entities as MNCs, MNEs or TNCs, or any variation thereof, is to miss the point. Such definitions are a red herring. Certainly, these commercial actors are doing business across national borders. Yes, their behaviour may be constrained by national regulation. As will be demonstrated, however, circumstances arise regularly whereby national regulation is impotent and business actors operate with impunity. There are certain minimum *international* standards of behaviour, particularly in relation to human rights which ought to be observed because they transcend national jurisdiction. Such standards operate irrespective of the multinationality or transnationality

⁴² Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Business and Human Rights: mapping international standards of responsibility and accountability for corporate acts UN Doc. A/HRC/4/35 2007 at para.3.

⁴³ Guiding Principles note 2. For a detailed analysis of the Guiding Principles see Chapter 3 of this dissertation.

⁴⁴ D.Weissbrodt, 'International Standard-Setting on the Human Rights Responsibilities of Businesses' 26 Berkeley J. Int'l L. 373-391 (2008) (hereinafter, 'Weissbrodt (2008)') at 380. The applicable human rights standards are addressed in Chapter 3.

⁴⁵ Ibid.

⁴⁶ Ibid at 381.

⁴⁷ Ibid.

of the actor. *All* business actors, whether operating in their home State or abroad, ought to adhere to them. Defining business actors by reference to business models and geographical configurations more often than not, as Weissbrodt concludes, enables rogue businesses to escape legal accountability and responsibility.⁴⁸ Corporate nationality notwithstanding, they elude accountability and redress in host States for reasons which will be elaborated upon later in this chapter. They also escape the territorial jurisdiction of their home State because domestic legal systems almost invariably regard them as foreign nationals and thus the responsibility of the State of incorporation. This dissertation is founded upon the premise that such definitions are unnecessary. An international regulatory architecture directed simply to every entity engaged in business activities and implemented at the national level is the key to achieving accountability, responsibility and individual redress for human rights violations.

1.1.2 Literature Review

As will be demonstrated, the modern conceptions of business and human rights and Corporate Social Responsibility (CSR) did not emerge until the latter part of the twentieth century, nevertheless, early corporate governance scholars did address issues of corporate accountability and responsibility. Most notably a debate between preeminent US corporate law scholars Professors Berle and Dodd took place in the Harvard Law Review in the early 1930s and is generally recognised as being the starting point for stakeholder theory.⁴⁹ The Berle-Dodd debate arose out of contemporary concerns about the fast growth of large corporations where the ‘control had passed from owners to managers’ and which gave rise to questions about the nature of the corporation.⁵⁰ In essence, this new stakeholder

⁴⁸ Ibid at 380.

⁴⁹ A.A. Berle, ‘Corporate Powers as Powers in Trust’ 44 Harv. L. Rev. 1049 (1931); E.Dodd, ‘For Whom Are Corporate Managers Trustees?’ Harvard L. Rev. 1049 (1931) (hereinafter ‘Dodd’); A.A.Berle, ‘For Whom Are Corporate Managers Trustees?’ Harvard L. Rev. 1365 (1932) (hereinafter ‘Berle (1932)’); A.A.Berle & G.C.Means, *The Modern Corporation and Private Property* (with a new introduction by M.Weidenbaum & M.Jensen), (Transaction Publishers: New Brunswick,1991) (originally published in 1932 by Harcourt, Brace and World Inc.) (hereinafter ‘Berle and Means’). For a detailed discussion of the Berle-Dodd debate see Harwell Wells note 34 at 82-99. See also e.g. J.L.Weiner, ‘The Berle-Dodd Dialogue on the Concept of the Corporation’ 64 Colum.L.Rev. 1458 (1964); E.George, ‘See No Evil? Revisiting Early Visions of the Social Responsibility of Business: Adolf A. Berle’s Contribution to Contemporary Conversations,’ 33 Seattle U. L. Rev. 965 (2010); O.Amao, *Corporate Social Responsibility, Human Rights and the Law* (Routledge, 2011) (hereinafter ‘Amao (2011)’)) at 56-59.

⁵⁰ See also Harwell Wells ibid at 84.

approach represented a challenge to the accepted position as elaborated clearly in *Dodge v. Ford Motor Co.*:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.⁵¹

Professor Dodd in particular challenged the traditional position that a company existed only for the benefit of the shareholders. Berle and Dodd disagreed initially that a corporate entity existed not solely for the benefits of its shareholders but also for the benefit of the wider community including its employees and those living in the vicinity of a company's activities.⁵² Nevertheless, two decades later, Berle acknowledged publicly that Dodd had been correct and that corporations ought to act for the public benefit.⁵³

Throughout the 1950s and 1960s the debate continued with mainstream corporate law scholars such as Manning rejecting the notion of 'corporate power' as vague and unhelpful.⁵⁴

The conclusion seems to me inescapable that in our present posture of knowledge, analysis and disagreement, we are far from ready to deal with anything so abstract as the asserted Problem of Corporate Power and Individual Freedom. We have none of the necessary elements under intellectual control. We cannot categorize the actors--cannot say what they do or do not do that is contrary to our desires--do not know who is affected--do not know in what respect they are affected--and have no common set of norms or criteria by which to judge whether we think particular results are good or bad--or how intensely we feel about it. Every link in this chain vies to be the weakest. When we do not know what the problems are, we are hardly in a position to Constitutionalize about it.⁵⁵

⁵¹ *Dodge v. Ford Motor Company* 204 Mich. 459, 170 N.W. 668 (Mich.1919) at 684.

⁵² Berle (1932) note 49 at 1372; Berle and Means note 49 at 312; Dodd note 49 at 1148; Harwell Wells note 34 at 95.

⁵³ See e.g. A.A.Berle, *The Twentieth Century Capitalist Revolution* (Harcourt Brace: New York, 1954) at 169. See also Harwell Wells *ibid* at 101-102.

⁵⁴ B.Manning, 'Corporate Power and Individual Freedom: Some General Analysis and Particular Observations' 55 *Nw U.L.Rev* 38 (1960)

⁵⁵ *Ibid* at 51.

Likewise, Rostow criticised the proposals put forward by Berle and others to change the status quo as ‘bewildering balderdash’ and argued that the ‘quest for maximum revenue’ by companies resulted in competition in the market which in turn was ‘superior to any alternative, in its contribution to the economic welfare of the community as a whole.’⁵⁶ Harwell Wells, however, argues that the social responsibility of corporations was an accepted fact by the mid-1960s⁵⁷ but it is difficult to agree with this assertion as having any meaningful effect. As Blumberg noted in 1970: ‘responsibility to the community has not replaced responsibility to shareholders as the legal standard for determining the validity of corporate conduct.’⁵⁸ Certainly there was no change to the existing normative framework governing corporations. Even if CSR were recognised as a principle of business, the leading text of the time, Walton’s *Corporate Social Responsibilities*, defined it as a purely voluntary principle:⁵⁹

In short, the new concept of social responsibility recognizes the intimacy of the relationships between the corporation and society and realizes that such relationships must be *kept in mind* by top managers as the corporation and the related groups pursue their respective goals.⁶⁰ [emphasis added]

Walton’s influential work no doubt helped to establish the voluntarism versus regulation narrative that came to dominate the CSR paradigm.⁶¹ Given the emphasis on the voluntary nature of CSR, it was not at all clear that corporate social responsibility had become a generally accepted principle of either business or law.

Post-colonial issues subsequently affected much of the pro-regulation academic literature during the 1960s and 1970s arising in part from debates surrounding the UN Declaration on Permanent Sovereignty over Natural Resources and the Charter on the Economic Rights

⁵⁶ E.V.Rostow, ‘To Whom and for What Ends Is Corporate Management Responsible?’ in E.S.Mason, (ed.), *The Corporation in Modern Society* (Harvard University Press: Cambridge MA, 1959) 39 at 63.

⁵⁷ Harwell Wells note 34 at 111.

⁵⁸ P.I.Blumberg, ‘Corporate Responsibility and the Social Crisis,’ 50 B.U. L. REV. 157 (1970) at 205.

⁵⁹ C.C.Walton, *Corporate Social Responsibilities* (Wadsworth: Belmont CA, 1967) at 18.

⁶⁰ Ibid.

⁶¹ A.B.Carroll, ‘Corporate Social Responsibility: Evolution of a Definitional Construct’ 38 Business Society (1999) 268-295 at 272.

and Duties of States.⁶² Particular concerns over the activities and power of what came to be known as transnational corporations were expressed by developing States. So, for example, it became a key point for discussion at the UN Commission on Transnational Corporations (UNCTC), and thus shifted the spotlight, from what had been a predominantly domestic legal issue in the US, onto CSR at an international level.⁶³ The activities of the United Fruit Company and International Telephone and Telegraph in Latin America stretching back to the 1950s⁶⁴ and the controversial involvement of international business in apartheid South Africa throughout the 1970s and 1980s⁶⁵ clearly influenced States drafting the UNCTC Code of Conduct as they sought to limit what was perceived as the expanding power of TNCs.⁶⁶

Two important works published around this time, Stone's *Where the Law Ends: The Social Control of Corporate Behaviour*⁶⁷ and Nader, Green, and Seligman's *Taming the Giant Corporation*⁶⁸ addressed what was perceived to be the increasing abuse of corporate power and advocated legislative regulatory solutions. In what seems to be a clear nod to the Berle-Dodd stakeholder theory, Nader, Green, and Seligman argued quite simply that

⁶² For a discussion see S.Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' 111 Yale. L. J. 443-545 (2001) at 454-457.

⁶³ See e.g. discussion on the UN Commission on Transnational Corporations and its Code of Conduct at Chapter 3 Section 3.2.1.1; J.H.Dunning, *The Theory of Transnational Corporations Vol.1* (Taylor & Francis, 1993).

⁶⁴ On the power and influence of United Fruit Company, see e.g. P.Chapman, P., *Bananas: How the United Fruit Company Shaped the World*, (Canongate, 2004); S.May & G.Plaza, *The United Fruit Company in Latin America*, (Washington: National Planning Association, 1958); L.Turner, 'Multinational Companies and the Third World' 30 *The World Today* No.9 394-402 (Sep.,1974) at 394. On International Telephone and Telegraph, see Ratner note 62 at 457.

⁶⁵ For background see e.g. D.Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (The Brookings Institution: Washington D.C., 2005) (hereinafter 'Vogel'); C.McCrudden, 'Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?' 19 *Oxford J. Leg. Stud.* 167-201 (1999).

⁶⁶ O.De Schutter, *International Human Rights Law* (Cambridge University Press: Cambridge, 2010) at 396. See also W.Spröte 'Negotiations on a United Nations Code of Conduct on Transnational Corporations' 33 *German Yearbook of Int'l L.* 331 (1990); Muchlinski, P.T., 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD' in M.T. Kamminga & S.Zia-Zariffi, (eds), *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer, 2000) 97-117; N.Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Oxford: Hart, 2002) at 119-24. For a discussion of the UNCTC Code see infra at section 3.2.1.1.

⁶⁷ C.Stone, *Where the Law Ends: The Social Control of Corporate Behaviour*, (Harper & Rowe: New York, 1975).

⁶⁸ R.Nader, M.Green & J.Seligman, *Taming the Giant Corporation* (Norton: New York, 1976).

corporate actors ought to ‘avoid exploiting consumers or communities.’⁶⁹ A subsequent article by David Engel is intensely critical of both texts for their focus on regulation:⁷⁰

the basic question of corporate social responsibility is not whether we wish to compel or forbid certain kinds of corporate conduct by legislative command, for example, but rather whether it is socially desirable for corporations organized for profit voluntarily to identify and pursue social ends where this pursuit conflicts with the presumptive shareholder desire to maximize profit.⁷¹

Nevertheless, Engel also recognised that corporate social responsibility could not be considered in isolation and had to be ‘debated...against the background of a general political theory.’⁷²

The pro-regulation movement was not unchallenged. For example, Detlev Vagts asserted that TNCs wielded little real power.⁷³ Most famously a vehemently neoliberal economic approach to corporate governance was expounded by Milton Friedman in an article in the New York Times Magazine in 1970 where he pronounced: ‘the key point is that, in his capacity as a corporate executive, the manager is the agent of the individuals who own the corporation or establish the eleemosynary institution, and his primary responsibility is to them.’⁷⁴ This, of course, was a point that Friedman had elaborated upon some eight years previously in his monograph *Capitalism and Freedom* where he railed against any acceptance of corporate social responsibility writing that:

few trends would so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make

⁶⁹ Ibid at 122.

⁷⁰ Engel note 35. For a general discussion of CSR developments see Vogel note 65 at Chapter 1; H.Goldschmid, ‘The Greening of the Boardroom: Reflections on Corporate Social Responsibility’ 10 Columbia Journal of Law and Social Problems 17 (1973). For a discussion of the economic debate see e.g. D.Birch, ‘Corporate social responsibility, some key theoretical issues and concepts for new ways of doing business’ in S.Reddy (ed.) *Corporate social responsibility contemporary insights*, (Icfai University Press Hyderabad, India, 2004) 24-53. See also Harwell Wells note 34.

⁷¹ Engel ibid at 3.

⁷² Engel ibid at 1.

⁷³ D.Vagts, ‘The Multinational Enterprise: A new Challenge for Transnational Law’ 83 Harv. L. Rev. 739-792 (1970).

⁷⁴ M.Friedman, ‘The Social Responsibility Of Business is To Increase Its Profits,’ New York Times Magazine, 11 September 1970 (hereinafter ‘Friedman (1970)’ at 32.

as much for their shareholders as possible. This is a fundamentally subversive doctrine.⁷⁵

Friedman's neoliberal economic approach to corporate governance was resisted by many scholars at the time and the literature, at least in the US, focused on the role of the corporation in society. So, for example, economist David Linowes was a vociferous supporter of socially responsible business arguing that 'the corporation cannot realistically or rationally divorce itself from society.' He concluded that 'socially constructive corporate action will in the long run benefit all of society' while '[i]rresponsible action - or inaction - will boomerang to harm business as well as the non business sector.'⁷⁶

As the work of the UNCTC faltered⁷⁷ it was clear that neo-liberalism had emerged as the predominant driving force of globalisation and academic focus turned to the effects of increasing transnational commercial activity within a globalised context. Professor Steven Ratner's substantial and impressively wide-ranging article in the Yale Law Journal in 2001 is probably the first modern attempt to establish a theoretical framework for business and human rights within an international law paradigm.⁷⁸ He argues that there has been an 'erosion' of the *domain réservé* and that this presents a challenge to the traditional prerogative of States to regulate companies within their jurisdiction.⁷⁹ Ratner claims that '[t]he question is not whether nonstate actors have rights and duties but what those rights and duties are'⁸⁰ although he recognises that States are ambivalent about 'accepting corporate duties' especially in relation to human rights duties.⁸¹ He takes the view that such 'duties of a company are a direct function of its capacity to harm human dignity.'⁸² This position is reflected in the work of several other subsequent scholars.

⁷⁵ M.Friedman, *Capitalism and Freedom*, (University of Chicago Press: Chicago, 1962) at 133.

⁷⁶ D.F.Linowes, *The Corporate Conscience*, (Hawthorn Books: New York, 1974) at 4.

⁷⁷ See infra Section 3.2.1.1.

⁷⁸ Ratner note 62.

⁷⁹ Ratner *ibid* at 524. See also L.Henkin note 1.

⁸⁰ Ratner *ibid* at 476.

⁸¹ Ratner *ibid* at 487.

⁸² Ratner *ibid* at 524.

Much of the modern business and human rights literature therefore focuses on *how* to regulate business actors in relation to human rights and thus a key element of scholarly work became the discussion about instrumentality versus normative framework (or hard law versus soft law).⁸³ Some scholars such as Glinksi, Williams and Blanpain focus on the positive regulatory value of voluntary corporate codes of conduct.⁸⁴ More recently there has also been an increase in literature focusing on institutional analysis.⁸⁵ Thus we see

⁸³ See e.g. J.Zerk, *Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) (hereinafter 'Zerk'); B.Stephens, 'Corporate Liability: Enforcing Human Rights Through Domestic Litigation' 24 *Hastings Int'l & Comp. L. Rev.* 401-414 (2001); R.A.Anderson, 'Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations' 88 *Denver Univ.L.Rev.* 183 (2010) (hereinafter 'Anderson'); K.Basu, 'Compacts, Conventions, and Codes: Initiatives for Higher International Labor Standards' 34 *Cornell Int'l L.J.* 487 (2001); G.C. Shaffer & M.A.Pollack, 'Hard Law vs Soft Law: Alternatives, Complements and Antagonists in International Governance,' 94 *Minn. L. Rev.* 706 (2010); D.Shelton, 'Protecting Human Rights in a Globalized World' 25 *Boston College Int'l & Comp. L. Rev.* 273-322 (2002) (hereinafter Shelton (2002)').

⁸⁴ See C.Glinksi, 'Bridging the Gap: The Legal Potential of Private Regulation,' in O.Dilling, M.Herberg & G.Winter, (eds), *Responsible Business: Self-governance and law in transnational economic transactions* (Oxford: Hart, 2008) 41-66; C.Glinksi, 'Self-Regulation of Transnational Corporations: Neither Meaningless in Law Nor Voluntary' in S.MacLeod, (ed.), *Global Governance and the Quest for Justice: Volume 2 Corporate Governance*, (Oxford: Hart, 2006) 197-220. See also e.g. S.D.Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level,' 43 *Columbia Journal of Transnational Law* 388-433 (2005); C.Williams, 'Text of Remarks on Panel: "Codes of Conduct and Transparency"' 24 *Hastings Int'l & Comp. L. Rev.* 415-422 (2001); R.Blanpain, (ed.), *Multinational Enterprises and the Social Challenges of the XXIst Century (The ILO Declaration on Fundamental Principles at Work. Public and Private Corporate Codes of Conduct.)* 37 *Bulletin of Comparative Labour Relations* 2000, (London: Kluwer Law International, 2000) (hereinafter 'Blanpain'); R.Shamir, 'Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility' 38 *Law & Soc. Rev.* 635-664 (2004) (hereinafter 'Shamir').

⁸⁵ See e.g. Zerk note 83; S.Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2012) (hereinafter 'Deva (2012)'); J.L.Černič, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights* (Europa Law Publishing, 2011) (hereinafter Černič (2011)); Amao (2011) note 49.

Weissbrodt, Kinley, Deva and other scholars positively evaluating the approach of the UN Norms⁸⁶ to business regulation, in contrast to Ruggie and Baxi.⁸⁷

Domestic approaches to the problem, particularly under the US Alien Tort Claims Act, have received scholarly attention but the absence of concrete outcomes in the US courts meant that there has been little jurisprudence to analyse.⁸⁸ The problem of business actors and human rights has received little legislative attention elsewhere and so there is limited scope for scholarly literature to address national CSR approaches. This is despite the fact that many claim that ‘national courts and national legal regimes are crucial.’⁸⁹

⁸⁶ Weissbrodt, of course, was a member and then chair of the United Nations Sub-Commission on the Promotion and Protection of Human Rights which drafted the Norms. See: D. Weissbrodt, ‘Business and Human Rights’ 74 *Univ. of Cincinnati L. Rev.* 55-73 (2005) (hereinafter ‘Weissbrodt (2005)’); D. Weissbrodt, ‘International Standard-Setting on the Human Rights Responsibilities of Businesses’ 26 *Berkeley J. Int’l L.* 373-391 (2008) (hereinafter ‘Weissbrodt (2008)’); D. Weissbrodt & M. Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ 97 *AJIL* 901 (2002) (hereinafter (Weissbrodt & Kruger’); S. Deva, ‘UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in Right Direction?’ *Beppress Legal Series*, Working Paper no. 112 (2004) <http://law.bepress.com/cgi/viewcontent.cgi?article=1270&context=expresso&sei-redir=1#search=%22norms%20business%20human%20rights%22> [last accessed 15.7.11] (hereinafter ‘Deva (2004)’); J. Campagna, ‘United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers’ 37 *J. Marshall L. Rev.* 1205 (2003-204) (hereinafter ‘Campagna’). D. Kinley, J. Nolan & N. Zerial, ‘The Norms are dead! Long live the Norms! The politics behind the UN Human Rights Norms for Corporations’ in D. McBarnet, A. Voiculescu & T. Campbell, (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 459-475 (hereinafter ‘McBarnet, Voiculescu & Campbell’ and ‘Kinley, Nolan & Zerial (2007a)’); D. Kinley, J. Nolan & N. Zerial, ‘The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations’ (2007) 25 *Companies and Securities Law Journal* 30 (hereinafter ‘Kinley, Nolan & Zerial (2007b)’).

⁸⁷ J. Ruggie, ‘Protect, Respect and Remedy A Framework for Business and Human Rights’ 3 *Innovations: Technology Governance Globalization* 189-212 (2008) at 198; U. Baxi, ‘Market Fundamentalisms: Business Ethics at the Altar of Human Rights’ 5 *Human Rights Law Review* 1-26 (2005) at 5.

⁸⁸ Alien Tort Claims Act 28 USC 1350. See discussion *infra* Section 1.6.1, Section 1.5.1 and Section 3.5.1. For literature see e.g. W.S. Dodge, ‘Which Torts in Violation of the Law of Nations?’ 24 *Hastings Int’l & Comp. L. Rev.* 351-380 (2001); M.D. Ramsey, ‘Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns’ 24 *Hastings Int’l & Comp. L. Rev.* 362-380 (2001) (hereinafter ‘Ramsey’); Shamir note 84; S. MacLeod, ‘Maria Aguinda v. Texaco Inc.: Defining the Limits of Liability for Human Rights Violations Resulting from Environmental Degradation,’ 4(2) *Contemporary Issues in Law* 189-209 (1999) (hereinafter ‘MacLeod (1999)’); S. Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart, 2004).

⁸⁹ International Council on Human Rights Policy, ‘Beyond Voluntarism: Human rights and the developing international legal obligations of companies’ February 2002, http://www.ichrp.org/files/reports/7/107_report_en.pdf [last accessed 28.8.12] at 160.

Numerous scholars, both eminent and emerging support the case for some form of binding international regulation, albeit to different degrees and in different ways.⁹⁰ Ratner has concluded that the creation of binding rules for business actors is a logical development of international law:

Proposing international norms of corporate responsibility for violations of human dignity continues the trajectory that the law has taken, but it also represents new challenges for the enterprise. It challenges the state's exclusive prerogative (what some might call sovereignty) to regulate business enterprises by making them a subject of international scrutiny; it makes them entities that have their own duties to respect human rights.⁹¹

The calls for binding international regulation have been vociferously and frequently opposed by Ruggie⁹² and scholars outside the discipline of law also tend to support a non-binding approach to CSR⁹³ although Philip Alston has queried the implications of imposing human rights obligations on business actors.⁹⁴ Opposition to legally binding international regulation of business actors in the human rights sphere has come predominantly from

⁹⁰ Ratner note 62 at 538-540. See: Shelton (2002) note 83 at 322; O.De Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in O.De Schutter, (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart, 2006) 1-40; H.H.Koh, 'Separating Myth from Reality About Corporate Responsibility Litigation' 7 J. of Int'l Economic L. 263-274 (2004) (hereinafter 'Koh (2004)') who argues for a multilateral treaty; Zerk note 83 at 298; J.Wouters & L.Chanet, 'Corporate Human Rights Responsibilities: A European Perspective,' 6 Nw U.J. Int'l Hum. Rts 262 (2008) (hereinafter 'Wouters & Chanet') at para.20; Amao (2011) note 49 who advocates the creation of global company law; Weissbrodt (2005) note 86; Weissbrodt (2008) note 86; Weissbrodt & Kruger note 86; Deva (2004) note 86 at 40; Campagna note 86; Anderson note 83; P.Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' 3 Journal of Human Rights and Environment (2012); Černič (2011) note 85 at 253 who advocates an international normative framework in order to create a 'harmonic society' although the myriad of options proposed renders the precise framework unclear. See also: UK House of Lords/House of Commons Joint Committee on Human Rights, 'Any of our business? Human Rights and the UK private sector,' First Report of Session 2009-10, Vol.1, HL Paper 5-I, HC 64-I, 16th December 2009 at 96 para.17.

⁹¹ Ratner note 62 at 540.

⁹² See e.g.: Ethical Corp., By Invitation: John Ruggie: Business and Human Rights—Treaty Road not Travelled (6 May 2008), available at http://www.hks.harvard.edu/m-rcbg/news/ruggie/Pages/%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf [last accessed 25.8.12] (hereinafter 'Ruggie (2008a)'); Professor John G Ruggie, 'Presentation of Report to United Nations Human Rights Council' (30 May 2011) http://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf [last accessed 25.8.12]; JG Ruggie, 'Response by John Ruggie to Misereor/Global Policy Forum, "Problematic Pragmatism – The Ruggie Report 2008: Background, Analysis and Perspectives"' (2008) <http://198.170.85.29/Ruggie-response-to-Misereor-GPF-2-Jun-2008.pdf> [last accessed 25.8.12]; J.G. Ruggie, 'Business and Human Rights: The Evolving International Agenda' 101 Am.J.Int'l L. 819 (2007) (hereinafter 'Ruggie (2007)').

⁹³ See e.g. J.J.A.Shaw, 'The European Constitution and CSR: Consensus or Conflict,' 2 Social Responsibility Journal 186 - 193 (2006); A.G.Scherer & G.Palazzo, 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy,' 48:4 Journal of Management Studies 899-931 (2011).

⁹⁴ P.Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P.Alston, (ed.), *Non-State Actors and Human Rights*, (Oxford: OUP, 2005) 3 at 13-14.

business actors, trade organisations and States.⁹⁵ Legal scholars as a general rule do not reject international regulation but many conclude that it is an ‘unlikely’ outcome.⁹⁶

Another important theme which emerges in the literature and which underpins this dissertation is what Koh describes as a culture of ‘norm-internalization’⁹⁷ through socialisation whereby one moves from ‘grudgingly accepting a rule one time only to habitually obeying it’ as ‘the rule transforms from being some kind of external sanction to becoming an internal imperative.’⁹⁸ This analysis links with Slaughter’s ‘liberal theory’ of international law which advocates a ‘bottom up’ approach to creating international law norms and thus:

‘identifies multiple bodies of rules, norms and processes that contribute to international order, beginning with voluntary codes of conduct adopted by individual and corporate actors operating in transnational society and working up through transnational and transgovernmental law to traditional public international law.’⁹⁹

Zerk supports Slaughter’s approach arguing that what she describes as the ‘socialisation’ of business and human rights norms at the domestic level is ‘well underway’.¹⁰⁰ She concludes that despite the State-centric nature of international law, this in itself is not a

⁹⁵ See discussions *infra* at Section 1.6.2 and Chapter 6.

⁹⁶ Zerk note 83 at 297.

⁹⁷ H.H.Koh, ‘How is International Human Rights Law Enforced?’ 74 Ind. L. J. 1397-1417 (1999) (hereinafter ‘Koh 1999’) at 1400; H.H.Koh, ‘Bringing International Law Home’ 35 Hous. L. Rev. 623-681 (1998) (hereinafter ‘Koh (1998)’); H.H.Koh, ‘Internalization through Socialization’ 54 Duke L.J. 975-982 (2005) (hereinafter ‘Koh (1995)’). See also generally R.Goodman & D.Jinks, ‘Toward an Institutional Theory of Sovereignty’ 55 Stan.L.Rev. 1749 (2003) (hereinafter ‘Goodman & Jinks’).

⁹⁸ Koh (1999) *ibid* at 1400. For a riposte to Koh’s theory of norm internalization see e.g. T.M.Franck, ‘Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh’s Optimism: Commentary’ 35 Hous. L. Rev. 683 (1998-1999).

⁹⁹ A. Slaughter, ‘A Liberal Theory of International Law’ (2000) 94 ASIL Proceedings 240 at 242; A.Slaughter, ‘International Law in a World of Liberal States’ 6 EJIL 503 (1995). See also International Council on Human Rights Policy, ‘Beyond Voluntarism: Human rights and the developing international legal obligations of companies’ February 2002, http://www.ichrp.org/files/reports/7/107_report_en.pdf [last accessed 28.8.12]. See also: International Council on Human Rights Policy, ‘Beyond Voluntarism: Human rights and the developing international legal obligations of companies’ February 2002, http://www.ichrp.org/files/reports/7/107_report_en.pdf [last accessed 28.8.12] at 160.

¹⁰⁰ Zerk note 83 at 309. For more on Zerk’s theory of socialisation see Zerk at 94-95 (on the role of NGOs in the socialisation process), 98, 101 and 309. See also T.Risse & K.Sikkink, ‘The Socialization of International Human Rights Norms into Domestic Practices: Introduction’ in T.Risse, S.Ropp & K.Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

barrier to a positive role for international law in addressing human rights violations by business, rather it offers ‘regulatory opportunities’ which are under-utilised currently.¹⁰¹

In terms of institutional analysis of CSR activities, the academic community has been slow to address the ways in which international and regional bodies were tackling the problem of human rights abuses by business actors. There are, however, recent institutional analyses which have been critiquing institutional frameworks.¹⁰² Thus we see scholarly examinations of the burgeoning CSR regulatory approaches at the UN (the UN Norms,¹⁰³

¹⁰¹ Zerk note 83 at 310.

¹⁰² See e.g. Zerk *ibid*; Černič (2011) note 85; Amao (2011) note 49.

¹⁰³ Weissbrodt (2002) note 86; Weissbrodt (2005) note 86; Weissbrodt (2008) note 86; Weissbrodt & Kruger note 86; S.MacLeod, ‘The United Nations, Human Rights and Transnational Corporations: challenging the international legal order,’ in N.Boeger, C.Villiers & R.Murray, (eds), *Perspectives on Corporate Social Responsibility*, (Cheltenham: Edward Elgar Publishing, 2008) at 64-84; S.MacLeod, ‘Reconciling Regulatory Approaches to Corporate Social Responsibility: The European Union, OECD and United Nations Compared’ 13 *European Public Law* 671-702 (2007) (hereinafter ‘MacLeod (2007)’); Černič (2011) note 85 at 221-224; L.C.Backer, ‘Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law,’ 37 *Colum.Hum.Rts.L.Rev.* (2006) 287; Deva (2004) note 86; D.Kinley, ‘The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations’ 25 *Company & Sec. L.J.* 30 (2007) (also published as Sydney Law School/ Kinley, Nolan & Zerial (2007b) note 86); D.Kinley. & R.Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ 6 *Hum. Rts. L. Rev.* 447-497 (2006); C.F.Hillemanns, ‘UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights,’ 4 *German Law Journal* No.10 1065-0180 (2003) http://www.germanlawjournal.com/pdfs/Vol04No10/PDF_Vol_04_No_10_1065-1080_European_Hillemanns.pdf [last accessed 13.7.11]

Global Compact¹⁰⁴ and Guiding Principles¹⁰⁵) and at the OECD¹⁰⁶ and the European Union.¹⁰⁷

¹⁰⁴ MacLeod (2007) note 103; S.MacLeod, 'Corporate Social Responsibility within the European Union Framework', 23 Wisconsin International Law Journal 541 (2005) (hereinafter 'MacLeod (2005)'); Černič (2011) note 85 at 228-229; D.Cetindamar, 'Corporate Social Responsibility Practices and Environmentally Responsible Behaviour: The Case of the United Nations Global Compact' 76 J. of Business Ethics 163-176 (2007); S.Deva, 'Global Compact: A Critique of the UN's "Public-Private" Partnership for Promoting Corporate Citizenship' 34 Syracuse J. Int'l L. & Com. 107-151 (2006); King, B., 'UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations' 34 Cornell Int'l L.J. 481 (2001); W.Meyer & B.Stefanova, 'Human Rights, the UN Global Compact and Global Governance' 34 Cornell Int'l L.J. 501 (2001); J.Nolan, 'The United Nation's Compact with Business: Hindering or Helping the Protection of Human Rights?' 24 U. of Queensland L.J. 445 (2005); A.Rasche, 'Toward a Model to Compare and Analyze Accountability Standards – The Case of the UN Global Compact' 16 Corp. Soc. Responsib. Environ. Mgmt. 192–205 (2009); A.Rasche, "A Necessary Supplement": What the United Nations Global Compact Is and Is Not, 48 Business & Society December 511-537 (2009); E.Oshionebo, 'The UN Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities' 19 Fla. J. Int'l L. 1-38 (2007); J.G.Ruggie, 'Global_governance.net: The Global Compact as Learning Network' 7 Global Governance 371-378 (2001).

¹⁰⁵ S.Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' 9(2) European Company Law 101-109 (2012); N.Jägers & W.van Genugten, 'Corporations and Human Rights: Moving Beyond 'Principled Pragmatism' to 'Ruggie-Plus'' 1 March 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1844203 [last accessed 16.7.11]; S.Jerbi, 'UN Adopts Guiding Principles on Business and Human Rights - What Comes Next?' Institute for Human Rights and Business, 17 June 2011 http://www.ihrb.org/commentary/staff/un_adopts_guiding_principles_on_business_and_human_rights.html [last accessed 8.7.11]; J.H.Knox, 'The Human Rights Council Endorses "Guiding Principles" for Corporations,' 15 ASIL Insights 1 August 2011, <http://www.asil.org/pdfs/insights/insight110801.pdf> [last accessed 23.10.11].

¹⁰⁶ Černič (2011) note 85 at 184-206; L. C.Backer, 'Rights and Accountability in Development (RAID) v. DAS Air and Global Witness v. Afrimex: Small Steps to an Autonomous Transnational Legal System for the Regulation of Multinational Corporations,' 10(1) Melb.J.Int'l Law 258 (2009); J.L.Černič, 'Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' 3 Hanse Law Review 71-101 (2008); C.Hägg, 'The OECD Guidelines for Multinational Enterprises: A Critical Analysis' 3 Journal of Business Ethics 71-76 (1984); D.J.Plaine, 'The OECD Guidelines for Multinational Enterprises' 11 Int'l L. 339 (1977); S.Tully, 'The 2000 Review of the OECD Guidelines for Multinational Enterprises,' 50 ICLQ 394-404 (2001); B.H. Melgar, K.Nowrot & W.Yuan, 'The 2011 Update of the OECD Guidelines for Multinational Enterprises: Balanced Outcome or an Opportunity Missed?' Institute of Economic Law Transnational Economic Law Research Center (TELC), School of Law Martin Luther University Halle-Wittenberg, June 2011, http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft112_0.pdf [last accessed 4.11.11].

¹⁰⁷ See e.g. MacLeod (2007) note 103; MacLeod (2005) note 104; O.C.De Schutter, 'Corporate Social Responsibility European Style,' 14 European Law Journal, 203–236 (2008); G.Roth & H.Fitz, 'Corporate Social Responsibility: European Models,' 30 Hastings Law Journal 1433 (1978–1979); J.Wouters & N.Hachez, European Parliament Study, 'Business and Human Rights in EU External Relations: Making the EU a Leader at Home and Internationally' EXPO/B/DROI/2009/2 PE407.014, April 2009 http://ghumweb2.ghum.kuleuven.ac.be/ggs/publications/study_ep.pdf [last accessed 23.8.10]; Wouters & Chanet note 90; Wouters, J. & Hachez, N., 'The EU's international corporate social responsibility strategy: a business-driven, voluntary and process-oriented policy, (JESP Symposium: The European Union's global social role)' 19 Journal of European Social Policy 2009 110-113 at 110; A.Voiculescu, 'The Other European Framework for Corporate Social Responsibility: From the 'Green Paper to New Uses of Human Rights Instruments,' in McBarnet, D. Voiculescu, A. & Campbell, T., (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007) 365-396. On the more specific issue of EU external trade relations see O.Amao, 'Trade Sanctions, Human Rights and Multinational Corporations: The EU-ACP Context' 32 Hastings Int'l & Comp. L. Rev. 379 (2009); K.K.Hermann, 'Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study,' 11 Ind. J. Global Legal Stud. 205 (2004) (Student author).

The literature is predominantly critical of the institutional frameworks and does not locate the debate within an explicitly new governance paradigm which recognises that effective regulation can encompass both hard and soft law.¹⁰⁸ Although there are some scholars who advocate a joined-up approach to regulation. So, for example, Černič advocates a ‘harmonic society,’ Amao a ‘global company law’ and Deva ‘an integrated theory of regulation.’¹⁰⁹

This dissertation primarily involves an institutional analysis of the responses of the UN, OECD and EU to the issue of human rights violations by business actors. It does not claim to be an exhaustive analysis of all possible international mechanisms for dealing with the problem, rather it focuses on initiatives which have been specifically established at the international and regional level to prevent further human rights abuses by business actors and to provide a measure of accountability. The dissertation recognises many positive elements of these institutional responses, along with the negative, in contrast to earlier approaches, and argues that a hybrid approach to CSR regulation which incorporates hard and soft elements is the solution. Thus the dissertation is rooted in new governance approaches to regulation. It does not advocate an ‘either/or’ approach which is reflected in much of the literature, neither advocating a purely hard law regulatory response nor voluntarism.

As is shown throughout this dissertation, business actors violate many different types of human rights in a wide variety of contexts and geographical locations. There is little disagreement that this is the case or indeed that business actors ought not to be socially responsible. The disagreements arises in relation to the form of regulation that ought to be implemented. In an ideal world, States would would have attempted to regulate this wrongful behaviour from the top-down through domestic regulation. State regulators in general are not, however, regulating the business and human rights sphere in any meaningful or consistent fashion. Grassroots, bottom-up attempts to encourage observance of human rights standards as part of a socialisation process are progressing positively but at a glacial pace. Waiting for corporate social responsibility to become an ‘internal

¹⁰⁸ See generally Trubek & Trubek note 3; Conley & Williams note 3; Scott & Trubek note 3.

¹⁰⁹ Černič (2011) note 85; Amao (2011) note 49; Deva (2012) note 85.

imperative' will be a slow process and in the meantime business actors continue to violate human rights.

This is why a hybrid approach to regulation is necessary. It implies both softer, bottom-up attempts at regulation and harder command-based legislation. The hybrid approach advocated in this dissertation recognises that norm-internalisation is a desirable goal and actively supports many of the softer CSR initiatives, but it also recognises that in order to deal with rogue business actors, law backed by strong enforcement mechanisms are also essential. There are many positive elements to the institutional responses analysed in this dissertation but it is clear that a stronger, more enforceable regulatory response is required and thus the hybrid approach is appropriate.

1.2 Creating a Better World for Merrill Lynch: The Rise and Rise of Transnational Business

*Compliance with host country law has been enough - indeed, often more than enough - to ask of the foreign investor. For the corporation, the relationship with the citizenry became a matter of getting the best terms out of the employment contract. The citizenry's human rights were the government's responsibility, not theirs. In short, the race to the bottom was on.*¹¹⁰

As stated in the previous section, corporate social responsibility discourse can be traced back to the early 1930s debate between Professors Berle¹¹¹ and Dodd¹¹² originating in the Harvard Law Review and which resulted ultimately in the concession that corporations were required to 'serve not alone the owners or the control, but all society'¹¹³ and that they performed a 'social service as well as a profit-making function.'¹¹⁴ The debate is widely

¹¹⁰ Ratner note 62 at 460.

¹¹¹ Berle (1931) note 49; Berle (1932) note 49. See also generally: J. Weiner, 'The Berle-Dodd Dialogue on the Concept of the Corporation' 64 Columbia L. Rev. 1458 (1964); K. Wedderburn, 'The Social Responsibility of Companies' 15 Melbourne University Law Review 4-30 (1985) at 6. For an overview of the background to and history of the debate see generally Harwell Wells note 34.

¹¹² Dodd note 49.

¹¹³ Berle & Means note 49 at 312.

¹¹⁴ Dodd note 49 at 1148.

viewed as having given rise to stakeholder theory¹¹⁵ with Berle expressing his rather idealistic position thus:

Most students of corporate finance dream of a time when corporate administration will be held to a high degree of required responsibility – a responsibility conceived not only in terms of stockholders' rights, but in terms of economic government satisfying the respective needs of investors, workers, customers, and the aggregated community.¹¹⁶

Dodd goes further stating that 'the law has already reached the point...where it compels business enterprises to recognize to some extent the interests of other persons besides their owners' and he concluded that 'a sense of social responsibility toward employees, consumers, and the general public may thus come to be regarded as the appropriate attitude to be adopted by those who are engaged in business.'¹¹⁷ Thus we see the emergence of a corporate social responsibility paradigm and the identification of issues, such as the credibility of self-regulation, which are still being debated today:

It may well be that any substantial assumption of social responsibility by incorporated business through voluntary action on the part of its managers can not reasonably be expected. Experience may indicate that corporate managers are so closely identified with profit-seeking capital that we must look to other agencies to safeguard the other interests involved, or that the competition of the socially irresponsible makes it impracticable for the more public-spirited managers to act as they would like to do, or that to expect managers to conduct an institution for the combined benefit of classes whose interests are largely conflicting is to impose upon them an impossible task and to endow them with dangerous powers.¹¹⁸

Berle and Dodd could little have imagined that the CSR debate would remain largely static and unresolved for the best part of a century.

¹¹⁵ See e.g. Harwell Wells note 34; C.Budzynski, 'Can a Feminist Approach to Corporate Social Responsibility Break Down the Barriers of the Shareholder Primacy Doctrine?' 38 Univ. of Toledo Law Rev. 435 (2006). See also: E.George, 'See No Evil? Revisiting Early Visions of the Social Responsibility of Business: Adolf A. Berle's Contribution to Contemporary Conversations,' 33 Seattle U. L. Rev. 965 (2010); Amao (2011) note 49 at 56-59.

¹¹⁶ Berle (1932) note 49 at 1372.

¹¹⁷ Dodd note 49 at 1160.

¹¹⁸ Dodd *ibid* at 1161-1162.

While not as prolonged as the more general, conceptual debates around CSR issues, the specific problematic relationship between business and human rights has been on the international radar for decades. Steven Ratner writes that:

Claims that various kinds of corporate activity have a detrimental impact on human welfare are at least as old as Marxism, and have always been a mantra of the political left worldwide.¹¹⁹

Arguably it was the Nuremberg Military Tribunal cases against the directors and other officers of IG Farben,¹²⁰ Krupp¹²¹ and Flick¹²² (and the prosecution of various Nazi industrialists for war crimes and crimes against peace in the Roehling Case¹²³) which first brought the correlation between business actors and human rights violations to public attention, although ultimately, international law was enforced against numerous officers of the companies rather than the businesses.¹²⁴ Individual members of the *Vorstand* or managing board ranging from Chief Executive Officers, to accountants, legal counsel and others were accused in the *IG Farben*, *Krupp* and *Flick* cases of ‘acting through the instrumentality’ of the companies in order to commit variously, crimes of aggression, crimes against peace, spoilation and using forced labour.¹²⁵ In other words, these individuals directly assisted the Nazis in the war effort, through the auspices of the companies.¹²⁶ While some of the defendants had been members of the SS or held military offices, the key factor was that ‘all of the defendants held high positions in the financial,

¹¹⁹ Ratner note 62 at 446. See also e.g. P.Ireland, I.Grigg-Spall & D.Kelly, ‘The Conceptual Foundations of Modern Company Law’ in P.Fitzpatrick & A.Hunt, (eds), *Critical Legal Studies* (Blackwell: Oxford, 1987) 149-165 at 162.

¹²⁰ *IG Farben Case* (USA v. Carl Krauch et al. 1947-48) NMT Vol.7; *In re Krauch and Others* 15 Ann. Dig. 668 (Case No.218) (1948) (United States Military Tribunal, Nuremberg) (hereinafter ‘*IG Farben Case*’). Twenty-four individuals were prosecuted. See J.Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said* 109 Columbia L. Rev. 1094 (2009).

¹²¹ *Krupp Case* (USA v. Alfred Krupp et al. 1947-48) NMT Vol.10; *In re Krupp* 15 Ann. Dig. 620 (Case No.) (1948) (United States Military Tribunal, Nuremberg). Twelve individuals were prosecuted.

¹²² *Flick Case* (USA v. Friedrich Flick et al. 1947) NMT Vol.5; *In re Flick* 14 Ann. Dig. 266 (Case No. 122) (1947), (United States Military Tribunal, Nuremberg).

¹²³ *The Case Against Hermann Roehling and Others*, General Military Tribunal of the Military Government of the French Zone of Occupation in Germany, June 30, 1948; *In re Roehling* 15 Ann. Dig. 398 (Case No.) (1948) For a digest of the case see W.W.Bishop Jr, ‘The Case Against Hermann Roehling and Others’ 43 AJIL 191-193 (1949).

¹²⁴ For overviews of the cases see e.g. R.Sasuly, *IG Farben*, (Boni and Gaer: New York, 1947); J.Barkin, *The Crime and Punishment of IG Farben* (Deutch: London, 1979).

¹²⁵ *IG Farben Case* note 120 at 14.

¹²⁶ Koh (2004) note 90 at 266 and Note 14.

industrial and economic life of Germany.’¹²⁷ In *IG Farben*, *Krupp* and *Flick* the charges of crimes of aggression and crimes against peace were unsuccessful and the defendants found not guilty, however, many of the charges of spoilation and forced labour resulted in convictions. Roechling was found guilty of war crimes and crimes against peace both in his capacity as *Generalbeauftragter* (Plenipotentiary General) and as President of the *Reichsvereinigung Eisen* (Reich Iron Association) and because of his seizure and ‘rigorous’ control of the French steel industry.¹²⁸

Taking the inevitable criticisms of the Nuremberg Tribunals as retroactive justice and victors’ justice into account,¹²⁹ these Nuremberg judgments ought not to be ignored. At the very least, they point to an alternative approach to the issue given the subsequent inability of the international community to reach a consistent and coherent regulatory approach to human rights violations by business actors. Individual responsibility for human rights violations committed by business actors will be revisited in the final chapter of this dissertation as a possible solution to the ongoing problems of regulatory capture highlighted in Chapters 3 to 6.

Post-Nuremberg, however, it was not until the final decade of the twentieth century that the international community started to take the problems of human rights violations by business actors seriously. During the 1970s, in the wake of the scandal of International Telephone and Telegraph’s involvement in Pinochet’s coup in Chile, both the UNCTC and the ILO became engaged in creating human standards for business via the draft Code of Conduct on TNCs¹³⁰ and the Tripartite Declaration of Principles concerning Multinational

¹²⁷ *IG Farben Case* note 120 at 14.

¹²⁸ *In re Roechling* note 123.

¹²⁹ See e.g. H.Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’ 1 Int’l L. Q. 153 (1947); H.Weschler, ‘The Issues of the Nuremberg Trial’ 62 Poli. Sci. Q. 11 (1943); T.Rosenbaum, ‘The Romance of Nuremberg and the Tease of Moral Justice’ 27 Cardozo L. Rev. 1731 (2006).

¹³⁰ ECOSOC Res. 1913 sets out the UNCTC’s Terms of Reference: E/Res/1913/LVII, 5 December 1974, UNCTC, CTC Reporter 1, No.1 (December 1976) 3-4; UNCTC, Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990; see Sagafi-nejad & Dunning *ibid* note 4 at 92.

Enterprises and Social Policy, respectively.¹³¹ Likewise ‘economic development agreements’ clearly defined the rights *and* duties of transnational business enterprises.¹³² Nevertheless, as globalisation escalated apace throughout the 1980s and 1990s, businesses headquartered in the industrialised nations looked ever more to new markets for sales and cheaper production costs (so-called ‘bottom feeding’) as well as new territory to explore and exploit for natural resources.¹³³ Consequently fewer legal duties were imposed on them by States anxious to attract inward investment.

Developing nations became ‘host’ States, required to accept foreign direct investment (FDI) under the banner of ostensibly neutral concepts such as ‘structural adjustment’ and ‘conditionality’ which were imposed by international financial institutions, for instance the International Monetary Fund and the World Bank, in order to reassure and ‘serve the interests of TNCs, banks and investors.’¹³⁴ This economic liberalisation programme was propounded by the so-called Washington Consensus, a set of policies developed by economist John Williamson¹³⁵ and advocated by the US, the IMF and World Bank, which regarded free-market capitalism as the only globally workable economic model and sought subsequently to implement, or arguably, impose it on the debt-laden developing world

¹³¹ International Labour Organization, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th Session (Geneva, November 2000), Official Bulletin, Vol. LXXXIII, 2000; Series A, No. 3; G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2.9.1990; <http://www.ilo.org/public/english/employment/multi/download/english.pdf>; 17 ILM 422 (1978)

¹³² Ratner note 62 at 456.

¹³³ For an overview see e.g. N.Chomsky, *World Orders, Old and New*, (London: Pluto Press, 1994) at 113-129 (hereinafter ‘Chomsky (1994)’); B. de Sousa Santos, ‘Globalizations,’ 23 *Theory, Culture & Society* 393-399 (2006); N.Hertz, *Silent Takeover: Global Capitalism and the Death of Democracy*, (London: Heineman, 2001); G.Soros, *The Crisis of Global Capitalism: Open Society Endangered* (London: Little, Brown and Company, 1998) in particular 106-108; N.D.Lewis, ‘Law and Globalisation: an Opportunity for Europe, its Partners and for Legal Scholars’ 8(2) *European Public Law* 219-39 (2002); Ratner note 62 at 458-460. See also Shelton (2002) note 83 at 275-280; C.A.Williams, ‘Corporate Social Responsibility in an Era of Economic Globalization’ 35 *UC Davis L. Rev.* 705 (2002).

¹³⁴ Chomsky (1994) *ibid* at 178. See also e.g. S.Tugelbayev, ‘Come and Exploit Us’ *Far E. Econ. Rev.* 25 (1998); J.Bendall, ‘Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement’ UNRISD Technology, Business and Society Programme Paper Number 13, June 2004 (hereinafter ‘Bendall’) at 10; C.Villiers, ‘Corporate Law, Corporate Power and Corporate Social Responsibility,’ in N.Boeger, C.Villiers & R.Murray, *Perspectives on Corporate Social Responsibility* (Cheltenham: Edward Elgar, 2008) 85-112 at 88. See also ‘What is the IMF?’ 1 June 2011 <http://www.imf.org/external/pubs/ft/exrp/what.htm> [last accessed 28.8.11].

¹³⁵ J.Williamson, ‘What Washington Means by Policy Reform,’ in J.Williamson, (ed.), *Latin American Adjustment: How Much Has Happened?*, Chapter 2 (Washington, D.C.: Institute for International Economics, 1990), <http://www.iie.com/publications/papers/paper.cfm?researchid=486> [last accessed 20.8.11].

purportedly to enable States to ease their debt burden.¹³⁶ In so doing, the Washington Consensus handed great power directly to private business actors. As Chomsky puts it, the Consensus represented ‘an array of market oriented principles designed by the government of the US and the international institutions that it largely dominates’ whose ‘principal architects...are the masters of the private economy, mainly huge corporations,’¹³⁷ which drove developing countries into embracing the traditional capitalist economic dogma of low inflation, privatisation and trade liberalisation. The policies are often summed up in the maxim ‘stabilize, privatize and liberalize.’¹³⁸ Commonly these were attained (or at least attempted) through the infamous structural adjustment programmes whereby, in exchange for loans serviced by the IMF and World Bank, developing countries were structurally adjusted in a manner compatible with ‘laissez-faire capitalism.’¹³⁹ Consequently host States:

adjusted domestic laws to make them more attractive to corporations, handed over tracts of land to de facto control by corporations, or simply turned a blind eye to violations of domestic law.¹⁴⁰

Furthermore the Washington Consensus:

... privileged market forces, and the [World] Bank followed by promoting privatization programs that took the state out of health, education, and housing. Reduced social spending transferred resources to the private sector and, in some cases, the military.¹⁴¹

As the rights of transnational corporations and other business enterprises expanded thanks to self-styled free trade agreements such as GATT and NAFTA so too did their power and their ability to influence policy but many scholars have argued that ‘no corresponding

¹³⁶ See J.Stiglitz., *Globalization and Its Discontents* (London: Penguin,2002); N.Chomsky, *Profit Over People: Neoliberalism and Global Order* (New York: Seven Seas Press, 1999) (hereinafter ‘Chomsky (1999)’) 19-40; Sornarajah note 33 at 25-30 and at 52.

¹³⁷ Chomsky (1999) *ibid* at 20.

¹³⁸ See e.g. D.Rodrik, ‘Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank’s Economic Growth in the 1990s: Learning from a Decade of Reform’ Vol. XLIV *Journal of Economic Literature* 973-987 (2006) at 973.

¹³⁹ J.Pilger, *Hidden Agendas*, (London: Vintage, 1998) at 63.

¹⁴⁰ Ratner note 62 at 460.

¹⁴¹ Shelton (2002) note 83 at 290.

obligations' were imposed upon them.¹⁴² This was despite a shift on the part of the World Bank (but not the IMF) towards 'social safety nets, human rights and the notion of good governance.'¹⁴³ As Richard Falk puts it:

Neoliberalism, without the challenge of socialism, dispensed with pretensions that economic policy should take explicit account of the needs of people to the extent politically possible, and world capitalism showed its cruel face.¹⁴⁴

Indeed in a bizarre twist, some business entities have *themselves* been able to claim the protection of human rights instruments.¹⁴⁵ Examples of rights granted to legal persons, specifically companies, can be found in relation to claims brought under the Article 1 of Protocol 1 'right to property' provision of the European Convention on Human Rights and Fundamental Freedoms¹⁴⁶ which specifically provides that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.' This has been interpreted as protecting both a company as a legal entity, as well as its shareholders, thus:

today the European Convention on Human Rights is seen more as an instrument that provides *rights* for corporations rather than one that lays down obligations for them, unless they are vested with state powers and/or are controlled by the state.¹⁴⁷

The Parliamentary Assembly of the Council of Europe has recently expressed concern about the 'existing imbalance in the scope of human rights protection between individuals and businesses' noting that:

While a company may bring a case before the Court claiming a violation by a state authority of its rights protected under the European Convention on Human Rights...an

¹⁴² Chomsky (1994) note 133 at 180-181 and Chomsky (1999) note 136 at 21. See also M.W.Gordon, 'Of Aspirations and Operations: The Governance of Multinational Enterprises by Third World Nations' 16 U. Miami Inter-Am. L. Rev. 301 (1984) at 325 et seq; A.Orford, 'Contesting Globalization: A Feminist Perspective on the Future of Human Rights' 8 Transnational Law and Contemporary Problems 171 (1998), reprinted in B.H.Weston & S.P.Marks, (eds), *The Future of International Human Rights* (Ardsley, New York: Transnational Publishers, 1999) 157.

¹⁴³ Shelton (2002) note 83 at 290-291.

¹⁴⁴ R.Falk, *Achieving Human Rights*, (New York: Routledge, 2009) (hereinafter 'Falk') at 6.

¹⁴⁵ See generally Addo note 26.

¹⁴⁶ 87 UNTS 103. See e.g. *X. v. Austria* No. 1706/62, 21 CD 34 (1966).

¹⁴⁷ Wouters & Chanet note 90 at 263 para.3. In *Sunday Times v. UK* (No.2) 13166/87 Judgment (1991) the newspaper's right to freedom of expression under Article 10 ECHR was upheld.

individual alleging a violation of his or her rights by a private company cannot effectively raise his or her claims before this jurisdiction.¹⁴⁸

While the Parliamentary Assembly is keen to rectify this situation by putting in place regulatory mechanisms,¹⁴⁹ nevertheless, such a quirk has one important and positive aspect, as Harold Koh points out, ‘[i]f corporations have rights under international law, by parity of reasoning, they must have duties as well.’¹⁵⁰

Notwithstanding this peculiarity of human rights law, as SGSR John Ruggie explains, business rights expanded in other arenas:

In recent decades, especially the 1990s, global markets expanded significantly as a result of trade agreements, bilateral investment treaties, and domestic liberalization and privatization. The rights of transnational corporations became more securely anchored in national laws and increasingly defended through compulsory arbitration before international tribunals. Globalization has contributed to impressive poverty reduction in major emerging market countries and overall welfare on the industrialized world. But it also imposes costs on people and communities – including corporate-related human rights abuses...¹⁵¹

In a 2008 report ‘On the Margins of Profit,’ the Center for Human Rights and Global Justice (CHRGJ) and Human Rights Watch (HRW) also recognise the positive impact of what they describe as the ‘widespread growth of commerce and the reach of business.’¹⁵² The report, however, laments the fact that ‘human rights protections have lagged behind’ to the extent that ‘[t]here are no clear, common rules to prevent business-related human rights

¹⁴⁸ Council of Europe, Parliamentary Assembly Resolution 1757 (2010) on Human Rights and Business, 6 October 2010 <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1757.htm> [last accessed 29.8.11]. See also Council of Europe, Report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Holger Haibach Doc. 12361, 27 September 2010 Human rights and business <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12361.pdf> [last accessed 28.8.11].

¹⁴⁹ See Council of Europe, Parliamentary Assembly Recommendation 1936 (2010) on Human rights and business, 6 October 2010 <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1936.htm> [last accessed 29.8.11].

¹⁵⁰ Koh (2004) note 90 at 265; see also P.Sands, *Lawless World: America and the Making and Breaking Global Rules* (London: Penguin, 2005) at 19.

¹⁵¹ Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Business and Human Rights: mapping international standards of responsibility and accountability for corporate acts UN Doc. A/HRC/4/35 2007 at para.2.

¹⁵² Center for Human Rights and Global Justice/Human Rights Watch, ‘On the Margins of Profit: Rights at Risk in the Global Economy,’ Volume 20, No.3(G), February 2008 <http://www.chrgj.org/publications/docs/bhr.pdf> [last accessed 21.8.11] (hereinafter ‘On the Margins of Profit’) at 50.

abuses and provide adequate remedies and reparation when they occur.’¹⁵³ The burden of this dissertation lies in proving that there ought to be such ‘common rules’ in both hard, soft and hybrid forms. At present, no hard law exists and the soft rules have a limited effect.

The right of access to global markets alluded to by Ruggie, CHRGJ and HRW, corresponded with some astonishing developments.¹⁵⁴ For example, the Institute of Policy Studies determined that by the beginning of the twenty-first century, fifty-one ‘of the 100 largest economies in the world’ were corporations and ‘only’ forty-nine were countries¹⁵⁵ and the situation could be summarised thus:

General Motors is now bigger than Denmark; DaimlerChrysler is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela; IBM is bigger than Singapore; and Sony is bigger than Pakistan.¹⁵⁶

In addition, the number of TNCs increased exponentially. Approximately 7,000 TNCs could be identified in 1970,¹⁵⁷ rising to 35,000 by 1990¹⁵⁸ and 60,000 by 1999.¹⁵⁹

UNCTAD’s World Investment Report 2009 identifies ‘82,000 TNCs worldwide, with 810,000 foreign affiliates in the world.’¹⁶⁰ The foreign affiliates employ approximately 77

¹⁵³ On the Margins of Profit *ibid* at 50.

¹⁵⁴ See e.g. Muchlinski (2007) note 4 at 8-44.

¹⁵⁵ Institute of Policy Studies/S.Anderson/J.Cavanagh, ‘The Top 200: The Rise of Corporate Global Power’ (4 December 2000) http://www.ips-dc.org/reports/top_200_the_rise_of_corporate_global_power [last accessed 21.8.11] at 3 (hereinafter ‘The Top 200’). The figures are based on a comparison of corporate sales and the GDP of States.

¹⁵⁶ The Top 200 *ibid* at 3. The irony of these statistics is not lost looking through a post-2007 global economic crisis lens when General Motors, DaimlerChrysler or Ford Motors no longer even appear in the Forbes Global 2000 top 100 companies. Ford Motors shows up at number 549 while General Motors lingers on at number 844. http://www.forbes.com/lists/2009/18/global-09_The-Global-2000_Rank.html (as of April 2009) [last accessed 23.7.09]

¹⁵⁷ UNCTAD World Investment Report 1993: Transnational Corporations and Integrated International Production, ST/CTC/156 (UN: New York 1993) http://www.unctad.org/en/docs/wir1993_en.pdf [last accessed 21.8.11] at 1 and 19.

¹⁵⁸ Plus 150,000 foreign affiliates. UNCTAD World Investment Report 1992: TNCs as Engines of Growth, ST/CTC/143 (UN: New York, 1992) <http://www.unctad.org/en/docs/wir92ove.en.pdf> [last accessed 21.8.11] at 1 (Rising Importance of Transnational Corporations).

¹⁵⁹ UNCTAD World Investment Report 1999: Foreign Direct Investment and the Challenge of Development, (UN: New York, 1999) http://www.unctad.org/en/docs/wir1999_en.pdf [last accessed 21.8.11] at 84.

¹⁶⁰ UNCTAD World Investment Report 2009: Transnational Corporations, Agricultural Production and Development, (UN: New York, 2009) (hereinafter ‘World Investment Report 2009’) http://www.unctad.org/en/docs/wir2009_en.pdf [last accessed 21.8.11] at 17.

million people, a ‘fourfold’ increase ‘since 1982.’¹⁶¹ There has been a growth in internationalisation by the Top 100 TNCs (although this has slowed in light of the global economic crisis beginning in 2007) and this is also evident among the non-listed TNCs, the non-financial TNCs from developing nations and also those that are State-owned and family-owned.¹⁶² Increasing numbers of TNCs are headquartered in developing States¹⁶³ and there has been a steady increase in the number of State-owned TNCs.¹⁶⁴

Alongside economic expansion and escalating commercial internationalisation came the recognition that globalisation was challenging the traditional Westphalian conception of the world. While States continued to be key actors in the new world order they were no longer the sole actors. Richard Falk acknowledges the continuing primacy of States but observes that ‘a sustainable world order in the future depends on some major structural and ideational innovations to protect an otherwise severely endangered global public interest in the years ahead.’¹⁶⁵ Henkin notes, while recognising that ‘as a matter of law and as a matter of politics, states continue to remain responsible’ for transnational business activities, nevertheless, because ‘globalization occurs within and across the state system’ businesses operating across international borders are subject to international law and specifically international human rights law.¹⁶⁶ What appears to be a self-evident statement, is, in reality, incredibly contentious and gives rise to complex arguments about the nature and application of human rights obligations.

¹⁶¹ World Investment Report 2009 *ibid* at 17.

¹⁶² World Investment Report 2009 *ibid* at 18-19.

¹⁶³ UNCTAD World Investment Report 2010: Investing in a Low Carbon Economy (UN: New York, 2010), http://www.unctad.org/en/docs/wir2010_en.pdf [last accessed 21.8.11] at 17.

¹⁶⁴ UNCTAD World Investment Report 2011: Non-Equity Modes of International Production and Development (UN: New York, 2011) <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf> [last accessed 21.8.11] at 28: ‘In 2010 there were at least 650 State-owned TNCs, with more than 8,500 foreign affiliates, operating around the globe. While this makes them a minority in the universe of all TNCs...they nevertheless constituted a significant number (19 companies) of the world’s 100 largest TNCs of 2010 (also in 2009), and, more especially, of the top 100 TNCs from developing and transition economies of 2009 (28 companies).’

¹⁶⁵ Falk note 144 at 58.

¹⁶⁶ Henkin note 1 at 22.

1.3 The Rise of the Corporate Social Responsibility Agenda

*Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?*¹⁶⁷

*An increasingly globalized civil society is likely to respond to economic globalization by opposing liberalized trade and investment regimes that are not accompanied by accountability, transparency, public participation and respect for fundamental rights.*¹⁶⁸

Mounting dissatisfaction rooted in a ‘strong public distrust of the economic and political power of corporations’¹⁶⁹ and in the prevalence of an economic system which appeared to be making ‘the world a better place for Merrill Lynch’¹⁷⁰ together with increasing awareness of actual and potential human rights violations via ‘transnational issue networks,’¹⁷¹ led directly in the late 1980s and early 1990s¹⁷² to allegations, complaints, claims and counterclaims against business enterprises operating across a variety of sectors.¹⁷³ Textile and clothing manufacturers faced a barrage of accusations regarding the use of sweatshops and child labour, while indigenous populations sought to challenge the unbounded influence of natural resource companies and their exploration and

¹⁶⁷ Remark attributed to Edward, First Baron Thurlow 1731-1806, *The Penguin Dictionary of Quotations* (Penguin: London, 1960) at 397. It is also occasionally expressed as: ‘Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like.’

¹⁶⁸ Shelton (2002) note 83 at 279.

¹⁶⁹ The Top 200 note 155 at 1.

¹⁷⁰ W.Keegan, ‘Cheers and jeers at Summers’ lease,’ *The Guardian* 15 May 1999 <http://www.guardian.co.uk/business/1999/may/16/observerbusiness.theobserver9?INTCMP=SRCH> [last accessed 21.8.11].

¹⁷¹ Koh (1998) note 97 at 649.

¹⁷² Vogel note 65 at 6 asserts that the trend began in the 1960s and 1970s citing the anti-apartheid campaigns ‘pressuring firms to divest from South Africa’ as an example although he acknowledges that CSR has grown in considerable importance and scope since the 1990s.

¹⁷³ See generally: On the Margins of Profit note 152; D.Korten, *When Corporations Rule the World*, (2nd ed.), (San Francisco: Berrett-Koehler Publishers and Kimarian Press, 2001); Bendall note 134 at 13-15.

exploitation activities as inimical to their traditional ways of life.¹⁷⁴ Still others were accused of wreaking environmental havoc, killing, maiming and inducing life-threatening illness in urban and rural settings alike.¹⁷⁵ From the Bhopal disaster to Shell's fraught relationship with the Ogoni people of Nigeria, abuses and causes were highlighted and supported by non-governmental organisations and became increasingly fuelled by popular campaigns and boycotts.¹⁷⁶ These early, high-profile and popular crusades targeted, in particular, the extractive, textile and sportswear industries and provided the initial impetus for change.¹⁷⁷ As Sir Geoffrey Chandler, founder-chair of the Amnesty International UK Business Group and a former Director of Shell International describes it:

It was the damaging experience of Shell and BP in Nigeria and Colombia respectively which proved the catalyst for a change of attitudes and provided a lesson about corporate responsibility which was reinforced by the experience of Nike and other major international brands with reputations to protect.¹⁷⁸

Whereas the focus and preoccupation of the international community had always been on the failure of States to adhere to their human rights obligations, accelerating globalisation brought business activities into sharp relief. Companies which had been able to operate in a multitude of overseas territories subject to little scrutiny, free from much regulatory constraint and with impunity, found themselves and their activities to be the focus of

¹⁷⁴ See for example Shell: Friends of the Earth, 'Behind the Shine: The other Shell Report 2003', June 2004 http://www.foe.co.uk/resource/reports/behind_shine.pdf [last accessed 20.8.11]; Friends of the Earth press release http://www.foe.co.uk/resource/press_releases/shell_ordered_to_appear_by_11042006.html, [last accessed 11.4.2006]; Essential Action <http://www.essentialaction.org/shell/issues.html> [last accessed 20.8.11]; Burma: Burma Project <http://www.earthrights.org/burma/> [last accessed 20.8.11]. See also the ongoing debate about sweatshops: NikeWatch <http://www.oxfam.org.au/campaigns/labour/index.html> [last accessed 11.4.2006]; Donna Karan: Lawsuit Accuses New York's Donna Karan of Running Sweatshops, New York Times 8 June 2000; See generally <http://www.business-humanrights.org/Categories/Individualcompanies> [last accessed 20.8.11]; <http://www.nosweat.org.uk/> [last accessed 20.8.11] and <http://www.cleanclothes.org> [last accessed 20.8.11]. See also, N. Klein, *No Logo*, (London: Flamingo, 2001),

¹⁷⁵ See for example allegations made against Texaco and Chevron in Ecuador: <http://www.texaco.com/sitelets/ecuador/en/default.aspx> [last accessed 20.8.11]; BP in Colombia: R.Verkaik, 'BP pays out millions to Colombian farmers,' The Independent on Sunday, 22 July 2006 <http://www.independent.co.uk/news/world/americas/bp-pays-out-millions-to-colombian-farmers-408816.html> [last accessed 20.8.11].

¹⁷⁶ On the Bhopal campaign see <http://bhopal.net> [last accessed 20.8.11]; For Union Carbide's response see: <http://www.bhopal.com/> [last accessed 20.8.11]. For campaigns and boycotts relating to Shell's activities in Nigeria see: <http://www.essentialaction.org/shell/issues.html> [last accessed 20.8.11]. For Shell's response see: <http://www.shell.com/home/content/nigeria> [last accessed 20.8.11]. Stop Esso Campaign: <http://www.greenpeace.org.uk/blog/climate/stop-esso-campaign-history> [last accessed 20.8.11].

¹⁷⁷ For a useful history of the development of the CSR movement throughout the latter part of the twentieth century see Vogel note 65 chapter 1.

¹⁷⁸ G.Chandler, Keynote Speech, JUSTICE/Sweet & Maxwell conference, 'Corporate Liability: Human Rights and the Modern Business,' 12th June 2006, (hereinafter 'Chandler') <http://www.business-humanrights.org/Links/Repository/791944> [last accessed 20.8.11] at 2.

inspection and analysis at a global level almost overnight.¹⁷⁹ Or to put it another way, they became vulnerable to ‘brand tarnishing, to investor resistance, to shareholder resistance.’¹⁸⁰ This was not as a result of ‘corporate initiative’ rather it was ‘the result of reputational disaster.’¹⁸¹ NGOs and other ‘norm entrepreneurs’¹⁸² disseminated evidence of their wrongdoings, galvanising public opinion and stimulating media interest.¹⁸³

Each day, allegations of human rights abuses make their way to the public through various channels. Increasingly, companies are the subjects of these allegations. Whether through official reports or more informal means, various parties - NGOs, trade unions, States, media outlets, communities, shareholders and individuals - express concern over corporate-related human rights abuses.¹⁸⁴

Nevertheless this process is what Harold Koh and others regard as an important aspect of human rights enforcement in general and the first step in ‘norm-internalization’ or ‘socialization.’¹⁸⁵ By publicly and vocally drawing attention to human rights violations by business actors, civil society began the push towards ‘socialization’ ensuring compliance with an embryonic normative framework rooted in social responsibility.¹⁸⁶

¹⁷⁹ J.Parkinson, ‘The Socially Responsible Company’ in Addo note 5, 49-62 (Hereinafter ‘Parkinson’) at 49.

¹⁸⁰ Henkin note 1 at 24.

¹⁸¹ Chandler note 178 at 2.

¹⁸² Koh (1999) note 97 at 1409; Koh (1998) note 97 at 646.

¹⁸³ See generally, for example, On the Margins of Profit note 152. See also the work of e.g. No Sweat <http://www.nosweat.org.uk/> [last accessed 22.8.11]; OXFAM Australia Nikewatch <http://www.oxfam.org.au/explore/workers-rights/nike> [last accessed 22.8.11]; CorpWatch <http://www.corpwatch.org/> [last accessed 22.8.11]; <http://www.globalwitness.org/> [last accessed 22.8.11].

¹⁸⁴ Report of the Special-Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum 2, Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse, A/HRC/8/5/ADD.2, 23 May 2008 <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> [last accessed 20.8.11] (hereinafter ‘Ruggie survey’) at 8.

¹⁸⁵ Koh (1999) note 97 at 1400. See discussion *infra* at Section 1.1.2. See also Goodman & Jinks note 97: Koh (2005) note 97. See also Slaughter (2000) note 99 at 242; Zerk note 83 at 94.

¹⁸⁶ Zerk note 83 at 94.

As will be demonstrated in the next section, despite some arguably notable exceptions such as Body Shop International¹⁸⁷ which trades on its ethical reputation and the Cooperative Bank¹⁸⁸ which has ‘made a conscious decision to project...an ‘ethical identity,’¹⁸⁹ the business community has tended to *react* to these claims, rather than being proactive,¹⁹⁰ regardless of the fact that the accusations cut across every sector and region.

1.3.1 Typologies of How Business Actors Violate Human Rights

In 2008 SGS Ruggie published ‘A Survey of the scope and patterns of alleged corporate-related human rights abuses’ focusing on allegations ‘reported in the public domain between February 2005 and December 2007.’¹⁹¹ The survey ‘reviews 320 cases of alleged corporate-related human rights abuse’¹⁹² without ‘drawing any conclusions about the merits of the allegations’¹⁹³ and categorises the rights impacted by business actors as either ‘labour rights’ or ‘non-labour rights.’ Drawing only on the International Bill of Rights and the core ILO conventions¹⁹⁴ the survey sets out a rather narrow and specific set of rights impacted:

¹⁸⁷ H.Fabig, ‘The Body Shop and the Ogoni’ in Addo note 5, 309-321. See e.g. http://www.thebodyshop.com/en/ww/services/aboutus_values.aspx [last accessed 20.8.11] There has been an ongoing debate about the CSR credentials of Body Shop with the usual accusations of greenwashing by civil society. The company, however, consistently and publicly stated its social values long before CSR became fashionable. Some commentators have argued that it is impossible to determine whether it is in fact socially responsible. See e.g. B.Dennis, C.P.Neck, & M.Goldsby, ‘Body Shop International: an exploration of corporate social responsibility’ 36 Management Decision 649 - 653 (1998).

¹⁸⁸ S.Williams, ‘How Principles Benefit the Bottom Line: The Experience of the Cooperative Bank’ in Addo note 5, 63-68. The Cooperative Bank has its roots in the 19th century UK cooperative movement whereby as a mutual society it operates for the benefit of members as opposed to shareholders.

¹⁸⁹ J.M.T.Balmer, K.Fukukawa & E.R.Gray, ‘The Nature and Management of Ethical Corporate Identity: A Commentary on Corporate Identity, Corporate Social Responsibility and Ethics’ 76 Journal of Business Ethics 7-15(2007) at 7.

¹⁹⁰ Parkinson, note 179 at 50.

¹⁹¹ Ruggie survey note 184 at 8.

¹⁹² Ibid at p.7 para.2.

¹⁹³ Ibid at p.8 para.4.

¹⁹⁴ Ibid at p.10 para.11: Universal Declaration on Human Rights, UNGA res. 217A (III), UN Doc.A/811 10th December 1948; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

Table 1 - SGSR Ruggie Survey

Labour rights impacted	Non-labour rights impacted	Non-labour rights impacted (cont.)
Freedom of association	Right to life, liberty and security of the person	Right to self-determination
Right to equal pay for equal work	Right of peaceful assembly	Right to political life
Right to organize and participate in collective bargaining	Right to an adequate standard of living (including food, clothing, and housing)	Right to social security
Right to equality at work	Freedom from torture or cruel, inhuman or degrading treatment	Freedom of movement
Right to non-discrimination	Right to marry and form a family	Right to privacy
Right to just and favourable remuneration	Right to physical and mental health; access to medical services	
Abolition of slavery and forced labour	Equal recognition and protection under the law	
Right to a safe work environment	Freedom of thought, conscience and religion	
Abolition of child labour	Right to education	
Right to rest and leisure	Right to a fair trial	
Right to work	Right to hold opinions, freedom of information and expression	
Right to family life	Right to participate in cultural life, the benefits of scientific progress, and protection of authorial interests	

Despite its restrictions, the survey does acknowledge that a great many overlaps of impacts occurred, so frequently an alleged abuse was ‘not discrete’ and ‘often generated impact on multiple human rights.’¹⁹⁵

The survey differentiated between ‘direct’ and ‘indirect’ abuses and concluded that 59% of allegations related to direct abuse,¹⁹⁶ that is where ‘the company’s own actions or omissions were alleged to cause the abuse’ and ‘there was either no degree or a very minimal degree of separation between company actions and alleged abuses.’¹⁹⁷ Indirect abuse arose in situations where ‘the company was perceived to contribute to or benefit from the violations of third parties, including suppliers, States or arms of a State, and other business.’ These findings are significant given the subsequent emphasis on managing the supply chain in the UN Guiding Principles.¹⁹⁸

¹⁹⁵ Ibid at p.3.

¹⁹⁶ Ibid at p.16 fig.6.

¹⁹⁷ Ibid at p.11 para.13.

¹⁹⁸ Note 2. See discussion at section 1.6.2 and sections 3.3-3.7.

Also in 2008, Human Rights Watch published its assessment of the impacts of business actors on human rights taking a different approach with seven categories of rights impacted drawn from a significantly broader list of ‘core international human rights instruments.’¹⁹⁹

Table 2 Center for Human Rights and Global Justice/Human Rights Watch

Rights impacted	Examples of how human rights are impacted by business actors
Right to security of the person	Ill-treatment of prisoners by US private contractors in detention facilities in Iraq; sexual abuse of workers in Saudi Arabia; beating of child workers in Egypt (p.10)
Economic and social rights	Dumping of toxic waste affecting environment, health and livelihood in Cambodia; child workers having limited access to education El Salvador, Ecuador, US (p.18)
Civil and political rights	Confiscation of identity papers in Malaysia, Saudi Arabia, Singapore, the United Arab Emirates, and the US; destruction and theft of property in South Africa; use of intimidation and force against local residents in Namibia, South Africa, Guatemala, Nigeria; harassment on the basis of sexual orientation; mandatory medical examinations (including HIV tests) (pp22-23)

¹⁹⁹ On the Margins of Profit note 152 at 7. This survey refers to rights categorised as core by the UN Office of the High Commissioner for Human Rights (OHCHR), ‘International Law – The Core International Human Rights Instruments, undated, <http://www2.ohchr.org/english/law/index.htm#core> [last accessed 24.8.12]. They are: Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969; International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976; International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted December 10, 1984, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987; Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), adopted December 18, 1990, G.A. Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force July 1, 2003; Convention on the Rights of Persons with Disabilities (CPD), adopted December 13, 2006, G.A. Res. 61/611, U.N. Doc. A/61/611 (2006), entered into force 3 May 2008; International Convention for the Protection of All Persons from Enforced Disappearance (CED), adopted December 20, 2006, G.A. Res. 61/177, U.N. Doc. A/61/488 (2006), entered into force 23 December 2010.

Rights impacted	Examples of how human rights are impacted by business actors
Non-discrimination	Favouring of one ethnic groups by employers in DRC; mistreatment of migrant workers; gender discrimination; HIV-status discrimination; sexual orientation discrimination (p.28)
Labor rights	Children used to carry out dangerous agricultural work in Ecuador, Egypt, El Salvador, India, and South Africa in violation of international standards; forced labour and debt bondage; human trafficking; wage exploitation (p.34)
Rights of communities or groups, including indigenous peoples	Profiting from relocation of indigenous groups in Indonesia and Tibet; forcible evictions (pp39-40)
Right to an effective remedy and accountability	Bribery in Cambodia; failure to prosecute sex-traffickers in Bosnia-Herzegovina; in Guatemala, regulations governing the actions of private security forces have not been enforced, allowing abuses to be carried out with impunity (pp46-47)

The authors make clear that the list was not intended to create a hierarchy or ‘rigid division’ between the rights nor does it preclude overlap, rather ‘the clustering of rights under these categories is intended to facilitate an overview of the broad range of rights that are impacted by business activity.’²⁰⁰ Interestingly, the right to an effective remedy and accountability is omitted from SGSR Ruggie’s survey which is curious given his Protect, Respect, Remedy agenda. Moreover, in general, these two surveys illustrate that there is a clear difference in typology which has obvious repercussions for establishing a regulatory framework.²⁰¹

In terms of sector, the SGSR Ruggie survey concluded that while most allegations of human rights abuse were made against businesses operating in the extractive and retail industries, 28% and 21% respectively, there were also a significant number of complaints against businesses in other sectors e.g. pharmaceutical and chemical (12%), infrastructure

²⁰⁰ On the Margins of Profit note 152 at 7.

²⁰¹ See e.g. the difference in approach between the UN Norms, note 7 and the UN Guiding Principles, note 2 discussed *infra* at 1.6.2.

and utilities (9%), financial services (8%).²⁰² While the survey also identified that the complaints emanated predominantly from the developing world, specifically Asia and the Pacific (28%), Africa (22%) and Latin America (18%), 3% of allegations related to Europe and 7% to North America.²⁰³ Furthermore, some 15% of allegations related to ‘global’ activities, that is ‘where is it was alleged that a company action impacted rights in two or more regions simultaneously.’²⁰⁴ This last statistic in particular, lends support to the assertion by Human Rights Watch that it is misleading to assume that human rights abuses are ‘highly segmented and limited to a few sectors’ and therefore incapable of happening on a global level.²⁰⁵ Quite clearly they *do* occur on a global level.

1.4 The Business Response to the New CSR Paradigm

*...the great industrial managers, their bankers and still more the men
composing their silent ‘control,’ function today more as princes and ministers
than as promoters or merchants.*²⁰⁶

Of course, despite Berle and Dodd’s early twentieth century conclusions about the social obligations of corporations, in reality, and as famously pronounced by Milton Friedman, making a profit for shareholders had become the sole purpose of companies by the end of the millennium.²⁰⁷ Any shift towards a CSR paradigm which challenged this *status quo* was not welcomed by the business community on the whole. The proponents of the liberal economic theory driving globalisation were particularly opposed to any refashioning of corporate duties.²⁰⁸ Change would inevitably lessen market control and increase the likelihood of regulatory capture, according to Hayek:

So long as the management has the one overriding duty of administering the resources under its control as trustees of the shareholders and for their benefit, its hands are largely tied; and it will have no arbitrary power to benefit this or that particular

²⁰² Ibid at 9.

²⁰³ Ibid at 10.

²⁰⁴ Ibid.

²⁰⁵ On the Margins of Profit note 152 at 5.

²⁰⁶ Berle (1932) note 49 at 1366-1367.

²⁰⁷ Friedman (1970) note 74 at 32.

²⁰⁸ See for example the US submission to the UNHCHR on the UN Norms on the Responsibility of Transnational Corporations and Other Business Entities with Regards to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26th August 2003 (on file with author).

interest. But once the management of a big enterprise is regarded as not only entitled but even obliged to consider in its decisions whatever is regarded as the public or social interest, or to support good causes and generally to act for the public benefit, it gains indeed an uncontrollable power – a power which would inevitably be made the subject of increasing public control.²⁰⁹

What Hayek fails to acknowledge is that the ‘uncontrollable power’ of TNCs was already being exercised without concomitant ‘public control.’ Unsurprisingly, the business community and its representatives resisted calls for any form of regulation arguing that social responsibility was outside the remit of business and amounted to unwarranted interference in the private sector. In particular, they argued that human rights obligations and their development did not pertain to private business actors, rather they were the sole preserve of the State. It was not for business ‘to act as moral arbiters.’²¹⁰ This view is reflected widely in responses to a variety of CSR initiatives. For example the International Organisation of Employers in its submission to the UN High Commissioner for Human Rights (UNHCHR) regarding the UN Norms project stated that ‘developing and applying international human rights is an issue for states alone.’²¹¹ In a similar vein, the US submission to the UNHCHR asserted that the attempt to impose human rights obligations on business was ‘dangerous shifting’ responsibility from States to private actors.²¹²

Nevertheless, as claims of human rights abuses occurred with increasing frequency, different conceptions of the corporation, as well as business obligations, came to the fore. John Parkinson describes an alternative business model:

...the organisational view regards companies as social institutions with characteristics determined by public policy enshrined in law and whose legitimacy depends on their contribution to the public good. The state has a corresponding right to redefine relationships within companies and with outsiders to ensure that an appropriate conception of the public interest is served.²¹³

²⁰⁹ F.Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy, Vol.III*, (Routledge, 1982) at 82.

²¹⁰ P.T.Muchlinksi, ‘Human Rights and Multinationals: Is There a Problem?’ 77 Int’l Affairs 31-37 (2001) at 35.

²¹¹ Submission by International Organisation of Employers (IOE) to the UNHCHR on the UN Norms on the Responsibility of Transnational Corporations and Other Business Entities with Regards to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26th August 2003 Norms (on file with author). The Norms are addressed in greater detail in Chapter 3, section 3.2.1.2.

²¹² US submission to the UNHCHR on the UN Norms note 208.

²¹³ Parkinson note 179 at 55-56.

It is *this* understanding of the role of business actors that underpins the calls for binding CSR rules, but it is one that is only partially fulfilled. As will be demonstrated, the notion of social responsibility has gained grudging acceptance within the business community but the imposition of State regulation is opposed vociferously.

In the earliest days of CSR, the meagre reaction of the business community to these new challenges to its commercial operations only served to infuriate and frustrate civil society. Traditional corporate philanthropic gestures and out of court settlements merely added to the belief that business operated outside of regulatory frameworks. For example, in June 2009 when Shell made a ‘humanitarian gesture’ by setting up a trust fund to benefit the

Ogoni people of Nigeria its action was met with a mixed response because it was part of an out of court settlement to the Ogoni claimants and potentially damaging legal proceedings in the US courts were dropped as a result.²¹⁴ Shell did not accept any responsibility for the human rights violations that had taken place. Chevron Texaco received even greater criticism for its remediation programme in the Ecuadorean Oriente region. Over several decades, the Ecuadorean government chose to take no action when confronted with human rights abuses perpetrated by Texaco against the indigenous peoples of the environmentally-sensitive Oriente.²¹⁵ The Inter-American Commission on Human Rights reported on the situation and concluded that the Republic of Ecuador itself had violated human rights standards by failing to adequately control the activities of oil companies within its territory. It considered that:

...the absence of regulation, inappropriate regulation or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention.²¹⁶

²¹⁴ E.Pilkington, ‘Shell pays out \$15.5m over Saro-Wiwa killing,’ The Guardian, 9th June 2009 <http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa> [last accessed 4.1.10]; For Shell’s perspective on the case see: http://www.shell.com/home/content/nigeria/news_and_library/press_releases/2009/saro_wiwa_case.html [last accessed].

²¹⁵ A.Fabra, ‘Indigenous Peoples, Environmental Degradation and Human Rights: A Case Study,’ in A.Boyle & M.Anderson, (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996) (hereinafter ‘Fabra’) 245; MacLeod (1999) note 88.

²¹⁶ Inter-American Commission on Human Rights, ‘Report on the Situation of Human Rights in Ecuador,’ OEA/Ser.L/V/II.96, Doc.10 rev 1, 24 April 1997 (Washington D.C.: General Secretariat of Organization of American States) at 89.

It was also extremely critical of the oil firms themselves and their use of sub-standard technology which led to the discharge of oil onto the land and into the waterways of the Oriente as well as the release of harmful toxic waste via waste pits and flaring.²¹⁷ Eventually, after several unsuccessful class actions brought, over several years, in New York State under the Alien Tort Claims Act.²¹⁸ Texaco undertook to remediate the affected land to the value of US \$40 million but this has been deemed inadequate by the indigenous population and NGOs and there is an ongoing campaign to try to force the company to increase the payout anywhere up to US \$27 billion.²¹⁹

Humanitarian undertakings, such as contributing to or even building infrastructure such as roads, schools and medical facilities, came to be viewed suspiciously in a post-Enron world.²²⁰ Energy trader Enron had engaged in generous external corporate philanthropy throughout its existence but failed to take care of the interests of its employees and pension holders, large numbers of whom suffered severe financial loss when the company failed due to large scale fraud. More than that, post-Enron, business philanthropy was deemed insufficient, despite its long history.²²¹ The advent of CSR meant that ‘doing good’ was no longer adequate, the new paradigm demanded that a business ‘do no harm’ to the people it employed and to the communities it encountered in its commercial operations.

Nonetheless, the international legal system continued to offer no redress or remedy and in the absence of domestic regulatory frameworks, home States, almost invariably, were not

²¹⁷ Ibid at 80-82.

²¹⁸ The allegations led to an unsuccessful class action first in *Texas (Sequihua v. Texaco)* and finally in New York State: *Aguinda, Maria et al. v. Texaco Inc.* USDC (SDNY) 93 Civ 7527, 1994 US Dist. LEXIS 4718 (April 11, 1994); 945 F. Supp. 625 (November 12 1996); 241 F.3d 194 (February 23 2001); 142 F. Supp. 2d 534 (May 30 2001) . See also generally, MacLeod (1999) note 88.

²¹⁹ <http://chevrontoxico.com/news-and-multimedia/2008/1201-chevrons-27-billion-liability-in-ecuadors-amazon-confirmed.html> [last accessed 20.8.11]; See generally <http://chevrontoxico.com/> [last accessed 20.8.11]. For Texaco’s opposing position see: <http://www.texaco.com/sitelets/ecuador/en/> [last accessed 20.8.11].

²²⁰ For an overview of the collapse of Enron see, D.Campbell & S.Griffin, ‘Enron and the End of Corporate Governance,’ in S.MacLeod, (ed.), *Global Governance and the Quest for Justice: Volume 2 Corporate Governance* (Hart: Oxford, 2006) 47-72.

²²¹ On business philanthropy see e.g. P.Blumberg, ‘Corporate Responsibility and the Social Crisis’ 50 Boston Univ. L. Rev. 155 (1970); K.Wedderburn, ‘The Social Responsibility of Companies’ 15 Melbourne University Law Review 4-30 (1985) at 13-14; H.Manne, ‘The Limits and Reach of Corporate Altruism’ 59 Virginia L. Rev. 708 (1973).

in a position to address claims arising from the extraterritorial activities of business enterprises domiciled in their territory. By rolling back State power and demanding the furtherance of private interests, globalisation rendered many States simply unable, or indeed unwilling, to implement or enforce human rights standards. Such failings on the part of a host State are not an unusual occurrence and highlight the complexities of a problem where a State *and* a commercial actor are in the wrong.²²² As highlighted previously, the drive to create ‘a hospitable investment environment’²²³ left many developing nations at the mercy of the IMF and World Bank and their demands to stabilize, privatize and liberalize their economies.

In the face of bad publicity, reputational damage and most importantly the fear of loss of profits as a result of boycotts,²²⁴ business had to be seen to be doing *something* and so the commercial response was to default to self-regulation. Myriads of voluntary codes of conduct were devised which set out the human rights standards and principles by which each business enterprise agreed to abide.²²⁵ They appeared on corporate websites and in corporate literature, disparate in style and in content from one business to the next, and referring *inter alia* to human rights standards, humanitarian law, labour standards and environmental principles in a disordered fashion.²²⁶ Industry groupings sought to bring a measure of coherence to code of conduct mania by attempting to coalesce particular industries and sectors under one set of principles with success limited to a few sectors.²²⁷ Notwithstanding the ad hoc approach, some of the initiatives are well regarded and

²²² See e.g. *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) relating to the building of the Yadana gas pipeline in Burma/Myanmar. UNOCAL was accused of complicity in numerous human rights abuses by the Burmese military government including knowingly using forced labour extracted by the threat of rape and torture. For more on the Yadana project and UNOCAL’s settlement see <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnocallawsuitreBurma> [last accessed 20.8.11].

²²³ Ratner note 62 at 460.

²²⁴ See for example the campaigns against Shell, Texaco and Esso cited at notes 174-176.

²²⁵ For some early examples of Codes of Conduct see those reproduced in Blanpain note 84 at 329–86.

²²⁶ See generally on codes of conduct: S.J. Rubin, ‘Transnational Corporations and International Codes of Conduct’ 30 Am. Univ. L. Rev. 903 (1981); Williams note 84; C. Glinski, ‘Self-Regulation of Transnational Corporations: Neither Meaningless in Law Nor Voluntary’ in S. MacLeod, (ed.), *Global Governance and the Quest for Justice: Volume 2 Corporate Governance*, (Hart: Oxford, 2006) 197-220.

²²⁷ See e.g. the Kimberley Process discussed below; International Code of Conduct for Private Security Service Providers, 9 November 2010 http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf [last accessed 20.8.11]. For an overview see <http://www.icoc-psp.org/> [last accessed 20.8.11].

reasonably successful. For example, the WHO Framework Convention on Tobacco Control.²²⁸ Likewise, the Kimberley Process (KP)²²⁹ which emanated from UN General Assembly Resolution 55/56²³⁰ has been deemed largely a success in a few short years since its inception²³¹ although regrettably that perception is changing.

Beginning in 2000, the KP has sought, through the use of a Certification Scheme, to eliminate the exploitation of so-called ‘blood’ or ‘conflict’ diamonds mined in conflict zones. Trading in conflict diamonds perpetuated wars, stifled development and contributed to extensive human rights violations in countries such as Angola, Sierra Leone and the Democratic Republic of Congo. The UN Security Council responded with numerous resolutions attempting to stem the trade in conflict diamonds.²³² Today it is calculated that less than 1% of diamonds traded on the international market are conflict diamonds, ‘compared to estimates of up to 15% in the 1990s’ and the KP has ‘helped stabilise fragile countries and supported their development.’ Even so, some commentators take the view that the KP lacks ‘proper enforcement’ which limits its effectiveness because of the reliance on individual States to monitor compliance with the Certification Scheme.²³³ Nonetheless, the KP has strived to address these weaknesses and it is evident that it has

²²⁸ <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>

²²⁹ For an overview of its work see <http://www.kimberleyprocess.com/> [last accessed 20.8.11].

²³⁰ Resolution adopted by the General Assembly, The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts, UNGA Res. A/RES/55/56 of 29 January 2001, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/562/75/PDF/N0056275.pdf?OpenElement> [last accessed 20.8.11].

²³¹ See also ‘The Kimberley Process Certification Scheme, Third Year Review,’ November 2006, Submitted by the Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme http://www.kimberleyprocess.com/documents/third_year_view_en.html [last accessed 20.8.11] at 15. See also generally: A.R.Harrington, ‘Faceting the Future: The Need for and Proposal of the Adoption of a Kimberley Process-Styled Legitimacy Certification System for the Global Gemstone Market’ 18 *Transnat’l L. & Contemp. Problems* 353 (2009).

²³² For the UN response see e.g. Angola: UNSC Resolution 1173 of 12 June 1998 and UNSC Resolution 1176 of 24 June 1998 prohibiting the direct or indirect import from Angola to their territory of all diamonds not controlled through the Certificate of Origin issued by the Government of Angola, UNSC Resolution 1237 of 7 May 1999 panel of experts appointed; Sierra Leone:

²³³ P.White, ‘It’s Greek to me: The Case for Creating an International Agency to Enforce International Accounting Standards to Promote Harmonization and International Business Transactions’ 27 *Wis. Int’l L. J.* 195 (2009) at 213-214.

achieved much during its brief existence.²³⁴ Unfortunately the successes are now being offset by the ongoing failure to address various problems of non-compliance, in particular in relation to Zimbabwe. This has caused great dissatisfaction among NGOs, leading to disengagement with the KP on the grounds that ‘there is a significant, and widening, gap between how the Kimberley Process presents itself, and what it is actually achieving.’²³⁵

Overall, however, such voluntary strategies were perceived by many as mere sticking plasters and did little to stem the tide of corporate misbehaviour because they did not act as a deterrent, nor did they offer redress or remedies for human rights violations. Indeed they served only to encourage further accusations of ‘whitewashing’ and ‘greenwashing’ blending into a veritable finger pointing rainbow of ‘bluewashing’ and ‘redwashing’ and ultimately the less colourful ‘CSR-washing.’ Put simply, the terms refer to business actors which implement codes of conduct or participate in voluntary CSR schemes for public relations and marketing purposes as opposed to more altruistic reasons. ‘Greenwashing’ is defined in the Oxford English Dictionary as ‘the creation or propagation of an unfounded or misleading environmentalist image’ while ‘bluewashing’ refers to businesses which seek to become involved with UN bodies and CSR projects such as the UN Global Compact in order to project a positive CSR image and possibly to exercise influence within the UN.²³⁶

As the not-for-profit CorpWatch explains in blunt terms:

When the Secretary-General of the United Nations joins the heads of such corporations on the podium, or when a UN agency joins such companies in a joint venture, a disturbing message is sent to the public. As the UNDP guidelines put it, when a UN agency ‘is engaged in a public relations activity within the framework of a corporate relationship, a mutual image transfer inevitable takes place. This is especially true in the era of corporate branding. With the image transfer, the UN’s

²³⁴ The criticisms regarding monitoring and enforcement were addressed in: ‘The Kimberley Process Certification Scheme, Third Year Review,’ November 2006, Submitted by the Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme http://www.kimberleyprocess.com/documents/third_year_view_en.html [last accessed 20.8.11]. Recommendations regarding improvements to the enforcement element are made at 75.

²³⁵ Civil Society Press Release, 23 June 2011 ‘Civil society expresses vote of no confidence in conflict diamond scheme’ <http://www.globalwitness.org/library/civil-society-expresses-vote-no-confidence-conflict-diamond-scheme> [last accessed 20.8.11].

²³⁶ See K.Bruno/J.Karliner/CorpWatch, ‘Tangled Up In Blue: Corporate Partnerships at the United Nations’ (TRAC-Transnational Resource and Action Center, September 2000) <http://s3.amazonaws.com/corpwatch.org/downloads/tangled.pdf> [last accessed 20.8.11] (hereinafter ‘Tangled up in Blue’); see also The Economist, ‘Bluewashed and Boilerplated: Taking Care of Business? A breakthrough in international corporate diplomacy,’ 17 June 2004 <http://216.35.68.215/node/2771522> [last accessed 28.8.11]. The UN Global Compact in general and the dangers of bluewashing specifically are discussed in Chapter 4 of this dissertation.

positive image is vulnerable to being sullied by corporate criminals, while companies get a chance to 'bluewash' their image by wrapping themselves in the flag of the United Nations.²³⁷

Finally, 'redwashing' is an emerging and less common term used to describe situations of philanthropy where the businesses donating to charitable causes take 'too much credit for their social contributions' and get 'more bang out of their social marketing buck than the charities.'²³⁸ Conley and Williams in their helpful empirical study of the CSR movement describe the problem thus:

An initial observation is that the very existence of a coherent CSR movement may invite insincerity. A company could learn the culturally appropriate behaviors and participate in the CSR discourse without significantly changing their real world behavior. In this view, CSR participation is little more than a show of voluntary reform intended to head off government mandates, preempt NGO attacks, and succor favor with the minority of CSR-conscious consumers.²³⁹

They conclude that 'at least some skepticism is warranted' when it comes to examining the motives of business' involvement with CSR models²⁴⁰ and there is no evidence to suggest that anything has changed in the intervening years since their 2005 study.

As public awareness of commercial exploitation increased, the demands for truly responsible business models soared and so the CSR movement was born. Far from being an easy birth, the CSR movement has had to wrestle with numerous problems, not least conflicting definitions of key concepts. Fundamental disagreements arose between stakeholders i.e. States, business actors, international organisations, NGOs, trade unions and other members of civil society in relation to the nature, form and scope of any obligations as well as enforcement, redress and remedies.. The next section addresses the key problems and disagreements and explains why a binding global framework must operate in tandem with local and regional soft law initiatives to provide a solution.

²³⁷ Tangled Up In Blue *ibid* at 7.

²³⁸ A.Rowan, '(Redwashing) Will thousands of red iPods, T-shirts and cellphones really make the world a better place?' *Unlimited Magazine*, November/December 2007 <http://www.unlimitedmagazine.com/money/redwashing/#ixzz0bIMCy4WB> [last accessed 20.8.11].

²³⁹ Conley & Williams note 3 at 14.

²⁴⁰ Conley & Williams *ibid* at 15.

1.5 Is An International Legal Response Necessary?

1.5.1 The issue of extraterritoriality

Even if it is agreed that commercial actors *do* have social responsibilities, specifically human rights obligations, extraterritoriality presents a major stumbling block to accountability. As highlighted, accelerating globalisation by its very nature led to a huge expansion in transnational or crossborder business activities.²⁴¹ Developing countries were encouraged or required to become investor-friendly environments, creating regulatory and tax frameworks advantageous to business, in line with the prevailing liberal economic theory.²⁴² In the dash to be the most business-friendly host nation, human rights (and environmental) obligations were frequently ignored.²⁴³ Businesses, invariably from the industrialised north, engaged in a ‘race to the bottom’ or ‘bottom-feeding’ in order to profit from the inevitably cheaper labour and operating conditions, as well as lax regulatory frameworks.²⁴⁴ Modern day forum shopping, in other words. This convergence created conditions whereby human rights abuses could occur with impunity.

Typically, the business would be headquartered in a northern, industrialised home State and operate a locally-incorporated subsidiary in a host developing State. Frequently, the legal requirement of local incorporation was the mechanism utilised by developing countries to maintain a measure of control over natural resources, for example, or perhaps to impose a modicum of corporation tax.²⁴⁵ Alternatively, the home State business entity would use locally-based suppliers in the host State. Thus two separate but interrelated issues arise. The transnational nature of the commercial activity seems to raise questions of legal jurisdiction but conversely, local incorporation of a legal person, i.e. a corporation, means that national jurisdiction has precedence.²⁴⁶

²⁴¹ *Infra* at Section 1.2.

²⁴² *Ibid.*

²⁴³ See the examples of Ecuador, Nigeria, Colombia and Burma/Myanmar cited in notes 174-176, 141-146 and 222.

²⁴⁴ *Infra* at Section 1.2. See also Ratner note 62 at 460.

²⁴⁵ See for example Ecuador note 175.

²⁴⁶ *Case Concerning the Barcelona Traction, Light and Power Co. Ltd.* ICJ Rep. 3 [1970] 32-51 *passim*. Corporations have the nationality of the place of incorporation.

Quite clearly, corporate entities incorporated in a host State are subject to the jurisdiction of the local courts and legal system, as are any other business entities domiciled there. In such circumstances, local law applies but all too often the courts are unable or unwilling to uphold human rights standards.²⁴⁷ Denied a remedy in such situations, some victims have sought redress in the courts of the home State where a parent company or contractor is based.²⁴⁸ Often the courts of home States will not, or are at least reluctant to, interfere with another State's internal sovereignty by declaring jurisdiction over a claim and decline jurisdiction on the grounds of *forum non conveniens* and comity.²⁴⁹

Added to this, an absence of any *international* legal means of holding the commercial perpetrators of human rights abuses accountable or responsible, means that the victims are left without redress or remedy. It is this injustice that drove the CSR movement, most of all the demands for legally binding international regulation. Despite various international initiatives, it is generally acknowledged that a global instrument remains improbable. Nevertheless, in a recent report, the tone of the UK's Joint Committee on Human Rights was bleak but not without hope:

An international agreement on business and human rights is unlikely in the near future. However, the impact of business on rights is a global issue that ultimately requires a global solution. We are concerned that reluctance by states to take unilateral action coupled with failure to commit to an international solution will mean that little progress is made. We believe that an international solution should be the

²⁴⁷ See e.g. *Maria Aguinda v. Texaco Inc.* note 218. The Ecuadorean courts were extremely reluctant to hear claims in relation to Chevron/Texaco's activities in the Oriente region. See also Fabra note 215 at Note 111.

²⁴⁸ See e.g. the Alien Tort Claims Act litigation in the USA. Alien Tort Claims Act 28 USC 1350. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India in December, 1984* ('Bhopal I') 634 F. Supp. 842 (S.D.N.Y. 1986); *Bi, Bano et al v. Union Carbide Chemicals and Plastic Inc. et al and Abdul Wahid et al v. Union Carbide Chemicals and Plastic Inc. et al.* US Court of Appeal (2nd Circuit) NY 26 January 1993, 984 F.2d 582; *Sequihua, Ignacio et al. v. Texaco Inc.* 847 F. Supp. 61 (January 27 1994); *Aguinda, Maria et al. v. Texaco Inc.* USDC (SDNY) 93 Civ 7527, 1994 US Dist. LEXIS 4718 (April 11, 1994); 945 F. Supp. 625 (November 12 1996); 241 F.3d 194 (February 23 2001); 142 F. Supp. 2d 534 (May 30 2001); *Alomang v. Freeport McMoRan Inc.* 97-1349 (La.App. 4 Cir. 3/4/98), 718 So. 2d 971; *Beanal v. Freeport McMoRan Inc.* 969 F. Supp. 362 (April 10 1997); *Jota et al. v. Texaco Inc.* 157 F.3d 153 (October 5 1998); *John Doe et al. v. Unocal Corp et al.* 963 F. Supp. 880 (March 25 1997); 27 F. Supp. 2d 1174 (November 18 1998); *Bano, Sajida et al. v. Union Carbide Corporation* 2000 WL 1225789 (S.D.N.Y.) (August 28 2000); *Wiwa v. Royal Dutch Petroleum Company* 226 F.3d 88, 2000 WL 1290355 (2nd Cir. (N.Y.)), (September 14 2000). *Doe v. Unocal* 963 F.Supp. 880 (C.D. Cal. 1997) (Unocal I), 110 F.Supp. 2d 1294 (C.D. Cal 2000) (Unocal II), on appeal, 2002 WL 31063976 (9th Cir. 2002); *Esther Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport and Trading Company* US Court of Appeal (2nd Circuit) 06-4800-cv, 06-4876-cv (September 17 2010) http://www.law.ed.ac.uk/file_download/communities/272_kiobelcourtofappeals17-09-2010.pdf [last accessed 22.8.11] See also D.Shelton, *Remedies in International Human Rights Law*, (2nd ed.), (Oxford: OUP, 2006) (hereinafter 'Shelton (2006)' at 160-172 which traces the history of the resurgence of the Alien Tort Claims Act; Shamir note 84; Ramsey note 88.

²⁴⁹ See e.g. *Maria Aguinda* *ibid.* See also *Kiobel* *ibid.*

ultimate aspiration of any debate on business and human rights. There is considerable scope for joint working on a regional and globally to agree a consistent approach to business and human rights. We recommend that the Government develops such joint-working programmes.²⁵⁰

This dissertation will justify the need for a coherent global solution, together with local action, by explaining how the existing international and regional business and human rights initiatives are inadequate as well as explaining why the traditional vertical conception of human rights, i.e. enforceable only against States, is no longer applicable.

1.5.2 The issue of voluntarism or the ‘business case.’

As the examples of human rights violations by business actors proliferated, the regulatory debate raged with stakeholders falling into two distinct, and now familiar, irreconcilable factions.²⁵¹ On the one hand, the ‘business case’ sought to minimise regulatory attempts and advocated pure self-regulation via voluntary codes of conduct and industry-based schemes.²⁵² Voluntarism is predicated on the idea of the business case for CSR²⁵³ and in the words of Olivier De Schutter it is ‘at first impression highly convincing’ as an argument.²⁵⁴ The business case proceeds from the assumption that adherence to CSR standards makes good business sense. Put simply, the argument is that CSR is economically advantageous for business, and in particular that consumers will favour companies which act in an ethically responsible manner. Firms that act consistently with CSR standards will not lose competitiveness. Rather they may actually *enhance* their competitive position through improvements to their image and thus their marketing

²⁵⁰ House of Lords/House of Commons Joint Committee on Human Rights, ‘Any of our business? Human Rights and the UK private sector,’ First Report of Session 2009-10, Vol.1, HL Paper 5-I, HC 64-I, 16th December 2009 at 96 para.17.

²⁵¹ Originating in the work of C.C.Walton, *Corporate Social Responsibilities* (Wadsworth: Belmont CA, 1967) at 18. See: A.B.Carroll, ‘Corporate Social Responsibility: Evolution of a Definitional Construct’ 38 *Business Society* (1999) 268-295 at 272.

²⁵² See e.g. the keynote speech by the Chief Legal Counsel for Royal Dutch/Shell at the International Law Association’s 69th Conference, 26 July 2000, ‘Foreign Investment, Human Rights and Development: Integration or Fragmentation?’ [on file with author].

²⁵³ For an outline of the business case argument see e.g. O.C.De Schutter, ‘Corporate Social Responsibility European Style’ 14 *European Law Journal*, 203–236 (2008) (hereinafter ‘De Schutter’) at 217-219.

²⁵⁴ De Schutter *ibid* at 218. See e.g. A.Martinuzzi, S.Gisch-Boie & A.Wiman, Research Institute for Managing Sustainability, ‘Does Corporate Responsibility Pay Off? Exploring the links between CSR and competitiveness in Europe’s industrial sectors’ http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/101124_csr_comp_final_report_short_version_final_en.pdf [last accessed 27.8.11].

prospects. De Schutter writes that there is an inherent danger in linking good corporate behaviour to ‘economic returns.’²⁵⁵ He concludes that such an approach fails to acknowledge that CSR may not be profitable and that by encouraging firms to comply with CSR standards because it is commercially advantageous may in fact implicitly permit non-compliance or implementation when it becomes apparent that CSR actually increases costs.²⁵⁶ He further argues that the business case for voluntarism is ‘fragile’ because it depends on a competing number of factors such as the initiatives adopted by a business, the costs of implementation, impact and context.²⁵⁷ Finally he warns that adherence to the business case:

serves to create the impression that the development of CSR will make natural progress, in a sort of evolutionary growth driven by market mechanisms, without such progress having to be encouraged or artificially produced by an intervention of public authorities. There is a very thin line between the idea that ‘CSR is profitable for business’ and the idea that ‘CSR may take care of itself’. This consequence should be avoided at all costs.²⁵⁸

Those who argue for a voluntarism-based approach to CSR therefore need to respond to the following question: if CSR does in fact enhance competitiveness, then why does business choose voluntary measures only? What does business have to fear from non-voluntary measures? There are a variety of potential commercial reasons for a business case response.

Aside from what appears to be a generalized distaste for regulation,²⁵⁹ it seems that there is also a perception that imposed CSR will be more expensive in terms of production costs such as wages and employee benefits, and administration. The argument is that this extra

²⁵⁵ De Schutter *ibid.*

²⁵⁶ De Schutter *ibid.*

²⁵⁷ De Schutter *ibid.* at 219.

²⁵⁸ De Schutter *ibid.*

²⁵⁹ See for example, business responses to the EU Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, at 3, COM (2001) 366 final (18 July 2001) http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf [last accessed 22.8.11]. See also the State responses to the consultation conducted by the OHCHR on the proposed UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to human rights obligations UN Doc. E/ CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003 and which became part of the ‘Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights E/CN.4/2005/91, 15 February 2005. Excerpts from the submissions to the OHCHR can be viewed here: <http://reports-and-materials.org/UN-submissions-excerpts-16-Nov-2004.doc> [last accessed 22.8.11].

expense will affect the competitiveness of corporations in the global marketplace. Such perceptions are linked to a neo-liberal, *laissez faire* attitude to commercial activities, that is, the view that the market is the most efficient mechanism to dictate how business operates. Only minimal regulation, as necessary to correct the standard ‘market failures’, is therefore necessary or appropriate. Wouters and Chanet explain the decision thus:

Proponents of the ‘business case’ explain that corporations are financially rewarded for behaving responsibly in various ways. They argue that not only consumers, but also investors and even workers attach importance to corporations’ human rights records and have a clear preference for responsible businesses. Thus, the market itself acts as an important and sufficient incentive for corporations to take human rights into account, since responsible behavior leads to higher profits. This assumption leads them to conclude that a voluntary approach to corporate responsibility is sufficient.²⁶⁰

This is a position espoused historically by the majority of States²⁶¹ although the empirical evidence supporting it is weak.²⁶² As David Vogel points out, ‘companies will engage in CSR only to the extent that it makes business sense for them to do so’ but it only makes good business sense ‘if the costs of the more virtuous behaviour remain modest.’²⁶³ He concludes that ‘the market for virtue is not sufficiently important to make it in the interest of all firms to behave more responsibly.’²⁶⁴ In other words, there will always be some business actors which choose to ignore societal pressures to behave in a socially responsible manner.²⁶⁵ Nevertheless, there will also be what John Parkinson calls ‘enlightened’ business actors which see the wider and inherent benefits of ethical behaviour irrespective of the economic impact:

Enlightened companies will recognise that responsible behaviour is often a prerequisite for long-term profitability, but ethically and socially desirable conduct

²⁶⁰ Wouters & Chanet note 90 at 266-267 para 12.

²⁶¹ See the State responses to the Norms cited at note 259. Although many States objected to the perceived ultra vires activities of the Sub-Committee for the Promotion and Protection of Human Rights, most were concerned about the idea that business enterprises would become objects of international law.

²⁶² See e.g. D.McBarnet, ‘Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability’ (hereinafter ‘McBarnet’), in D.McBarnet, A.Voiculescu & T.Campbell, (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, Cambridge, 2007) 9- 56. Also available as an Oxford Legal Studies Research Paper No. 3/2008.

²⁶³ Vogel note 65 at 4.

²⁶⁴ Vogel *ibid* at 16.

²⁶⁵ See for example Afrimex (UK) Limited discussed in detail in Chapter 5 at Section 5.6.; Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008, URN 08/1209 (Afrimex Final Statement) <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases/final-statements> [last accessed 22.8.11].

should not be seen merely as a means of promoting competitive success. Rather managers should regard ethical and social values as possessing independent weight, and should accept that respect for them will sometimes require companies to make less than the maximum possible profits.²⁶⁶

These ‘enlightened’ companies fall within Thomas McInerney’s Group A or Group B categories of business actors.²⁶⁷ He writes:

Many regulatory scholars recognize that there are four types of companies with which regulators have to deal. These four types include: those who know the law and are willing to follow it (Group A); those who do not know the law but would like to be law abiding (Group B); those who know the law and do not want to follow it (Group C); and those who do not know the law and do not wish to be law abiding (Group D). Most CSR literature does not even reflect these basics. As this analysis suggests, Group A firms are willing to comply on intrinsic grounds.²⁶⁸

The logical conclusion, therefore is that a voluntary CSR framework is effective only in relation to the already enlightened, for as McInerney surmises ‘it seems that it is precisely Group A that represents its greatest source of support.’²⁶⁹ He continues plaintively, ‘[s]urely CSR must be more ambitious than seeking to ensure that the good continue to be good?’²⁷⁰

This is the crux of the matter. The businesses which operate with the most flagrant disregard for human rights standards will never adhere to a voluntary framework and this is the key reason for opposing the business case for self-regulation. Rogue business elements operating across the globe serve to underline the pressing need for a binding international legal architecture. Voluntary CSR and ‘market forces’ will never be ‘strong enough’ to secure responsible behaviour by such actors ‘over and above their obligation to comply with their legal obligations.’²⁷¹

²⁶⁶ Parkinson note 179 at 62.

²⁶⁷ T.McInerney, ‘Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility’ 40 *Cornell Int’l L.J.* 171-200 (2007) at 185.

²⁶⁸ Ibid. McInerney cites e.g. R.Baldwin & M.Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP: Oxford, 1999).

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ De Schutter note 253 at 205.

Furthermore, while a large majority of consumers claim that they would choose ethical products despite the extra expense or boycott businesses which violate human rights, the reality is very different.²⁷² Wouters and Chanet argue rightly:

The idea that good responsible behaviour leads to increased profits may be a good incentive for corporations to act responsibly, but it should never be seen as the ultimate reason for responsible behaviour. Corporations have to behave responsibly because it is their duty to do so, not because it helps them to make more profits.²⁷³

They agree with the principal thrust of this dissertation, declaring that the ‘business case does not suffice’ and that ‘an appropriate regulatory framework is needed.’²⁷⁴

Such a view was adopted by a group composed largely of NGOs, trade unions and other members of civil society which oppose the purely voluntary, market-driven business case for CSR. Rather, they demand hard regulation and nothing less than a full blown international covenant will suffice.²⁷⁵ As the UN Development Programme (UNDP) put it in 1999:

...multinational corporations are too important and too dominant a part of the global economy for voluntary codes to be enough. Globally agreed principles and policies are needed...²⁷⁶

This binary division muddled the waters for many years as supporters of each approach extolled the virtues of their favoured methodology: this ultimately resulted in stalemate.²⁷⁷ The tension played out subsequently in every international organisation in which there has been a debate about CSR, with the so-called ‘business case’ for voluntarism prevailing. Thus, the UN Global Compact (a forum for business leaders), the OECD and the European Union analysed in Chapters 4, 5 and 6 respectively continue to emphasize the voluntary

²⁷² See e.g.; McBarnet note 262 at 17-18; Vogel note 65 at 16.

²⁷³ Wouters & Chanet note 90 at 267 para. 13.

²⁷⁴ Ibid at para. 20.

²⁷⁵ See e.g. NGO responses to the UN Norms note 259.

²⁷⁶ UNDP, Human Development Report 1999: Globalization with a Human Face,’ (OUP: New York/Oxford, 1999) http://hdr.undp.org/en/media/HDR_1999_EN.pdf [last accessed 22.8.11] at 100.

²⁷⁷ See generally e.g. H.Ward, ‘Corporate Social Responsibility in Law and Policy,’ in N. Boeger, R. Murray, R. & C. Villiers, (eds), *Perspectives on Corporate Social Responsibility* (Cheltenham: Edward Elgar, 2008) 8-38.

nature of CSR. As a result no enforceable regulatory or dispute settlement mechanism has developed.

These definitional problems continue to this day as there is no one favoured definition of CSR, with stakeholders adopting positions which in some cases remain poles apart.²⁷⁸ At a basic level CSR has become a term of art which symbolises that *all* businesses have obligations beyond the financial and commercial and which includes social obligations, particularly in the spheres of human rights and the environment but there is no consensus as to how these obligations are to be imposed, whether they ought to act as a deterrent or indeed whether they ought to provide redress for those on the receiving end of business misconduct. States for the most part have consistently resisted a hard regulatory CSR framework and thus with clear institutional support, the term CSR has come to represent voluntarism. As this dissertation will demonstrate, such an approach is inconsistent with effective CSR largely because it enables too many businesses to escape regulatory capture.

1.6 State and Institutional Responses to Business and Human Rights

1.6.1 State responses

While civil society demands for enforceable CSR standards gathered pace and support, some politicians and even States looked to national measures to regulate the extraterritorial behaviour of corporate nationals. Some states responded by implementing mandatory social reporting for companies.²⁷⁹ Others found existing domestic legal provisions being used in new and creative ways which resulted in some odd bedfellows and a ‘battle’ for Harold Koh’s previously mentioned concept of ‘internalization’ of international human rights.²⁸⁰ For example, no one could have imagined that the anonymous and arguably derelict eighteenth century US Alien Tort Statute (ATS) would have been at the forefront of federal court challenges to US business misbehaviour overseas, albeit that these were

²⁷⁸ See the discussion Chapter 5 *infra* regarding the European Union.

²⁷⁹ See KPMG Advisory N.V./United Nations Environment Programme/Global Reporting Initiative/Unit for Corporate Governance in Africa, ‘Carrots and Sticks - Promoting Transparency and Sustainability: An update on trends in Voluntary and Mandatory Approaches to Sustainability Reporting 2010’ <http://www.globalreporting.org/NR/rdonlyres/D0302A8A-D38D-4D1E-876E-C5F111E499CA/4198/Carrots2010final.pdf> [last accessed 22.8.11]. For example: France New Economic Law, Loi 2001 – 420 du 15 Mai 2001, Loi relative aux nouvelles regulations économiques; Other examples include South Africa, Norway, UK and Australia.

²⁸⁰ Koh (1998) note 97 at 663.

largely unsuccessful challenges due to the propensity of *forum non conveniens* dismissals.²⁸¹ US courts have required that there be a sufficient ‘link to state action to justify considering it [the business] to be acting for or with the state’²⁸² thus the ATS appears to apply only in situations of business complicity in human rights abuses.²⁸³ A

recent Appeals Court decision in 2010, however, took a stricter view and in a surprising judgment in *Kiobel et al v. Royal Dutch Petroleum Company et al*, the court concluded that:

corporate liability is not a norm that we can recognize and apply in actions under the ATS because the customary international law of human rights does not impose any form of liability on corporations (civil, criminal, or otherwise).²⁸⁴

This is a regressive decision and according to Judge Leval ‘[t]he majority’s rule conflicts with two centuries of federal precedent on the ATS, and deals a blow to the efforts of international law to protect human rights.’²⁸⁵ In October 2011, however, the US Supreme Court agreed to hear an appeal against the decision of the Second Circuit and the outcome is eagerly awaited.²⁸⁶ It seems clear that if the Supreme Court upholds the decision then the potential role of the ATS as a means of redress will end.

²⁸¹ See note 248 for a list of Alien Tort Statute litigation. The statute is also sometimes referred to as the Alien Tort Claims Act (ATCA).

²⁸² Shelton (2006) note 248 at 171 referring to *Doe v. Unocal* 963 F.Supp. 880 (C.D. Cal. 1997) (Unocal I), 110 F.Supp. 2d 1294 (C.D. Cal 2000) (Unocal II), on appeal, 2002 WL 31063976 (9th Cir. 2002). See also *Wiwa v. Royal Dutch Petroleum Co.* 96 Civ. 8386 (KMW), 2002 US Dist. LEXIS 3293 (S.D.N.Y. Feb.2002).

²⁸³ See generally Joseph note 88.

²⁸⁴ *Esther Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport and Trading Company* US Court of Appeal (2nd Circuit) 06-4800-cv, 06-4876-cv (September 17 2010) http://www.law.ed.ac.uk/file_download/communities/272_kiobelcourtofappeals17-09-2010.pdf [last accessed 22.8.11] at 46. But see the opinion of Judge Leval at 50-88 who while concurring with the majority judgment disagrees vehemently with what he perceives to be the granting of immunity for corporate human rights violations. See Chapters 2 and 3 infra for further discussion.

²⁸⁵ Ibid at 88.

²⁸⁶ Order List: 565 U.S. Monday October 17 2011. 10-1491 Certiorari Granted, *Kiobel, Esther et al. v. Royal Dutch Petroleum et al.* ‘The petition for a writ of certiorari is granted, and the case is to be argued in tandem with No. 11-88, *Mohamad v. Rajoub*,’ <http://www.supremecourt.gov/orders/courtorders/101711zor.pdf> [last accessed 20.10.11].

In England, the law of torts was applied effectively to the activities of companies operating in southern Africa.²⁸⁷ Such national endeavours are limited in range, lack a critical mass of substantive success²⁸⁸ and in any event are outside the scope of this dissertation.

Nevertheless, these particular limited precedents and their limited ability to act as a deterrent or provide redress merely serves to underscore the need for a normative international approach to CSR.

1.6.2 Institutional responses: the UN

International and other supranational organisations responded slowly to the calls from civil society for the implementation of global CSR standards and their numerous and diverse attempts to render corporate actors liable for human rights violations have ended either in ignominy and failure or in widely accepted resignation as to their limitations to act as deterrents or to offer redress for human rights violations. From early attempts by the UNCTC which operated in the environment of the New International Economic Order²⁸⁹ to more recent endeavours in the shape of the UN Global Compact and the UN Norms,²⁹⁰ it has been obvious that the international community is unable to agree upon a coherent CSR methodology.

This chaotic and disparate state of affairs was deemed unsatisfactory by UN Secretary-General Kofi Annan and in 2005 he appointed Professor John Ruggie of Harvard University as the Secretary-General's Special Representative on Business and Human Rights with a mandate to identify the issues and to come up with some solutions.²⁹¹ Ruggie was granted an initial two year mandate²⁹² by the Commission on Human Rights

²⁸⁷ *Connelly v. RTZ Corp plc and another* [1997] 4 All ER 335 (HL); *Lubbe et al. v. Cape plc* [2000] 4 All ER 268 (HL); *Ngcobo v. Thor Chemical Holdings Ltd* 9th October 1995 (CA) unreported (TLR 10 November 1995); *Sithole v. Thor Chemical Holdings Ltd* (TLR 15 February 1999).

²⁸⁸ See Koh (2004) note 65 for a critique of the ATS.

²⁸⁹ UNGA Res.3201 of 9 May 1974, UN GAOR Supp. (No.1) 6th Special Sess., UN Doc. A/9559 (1974) 'The Declaration on the Establishment of a New International Economic Order.' The UNCTC is discussed in detail in Chapter 3.

²⁹⁰ The UN Norms and the UN Global Compact are discussed in Chapters 3 and 4 *infra* respectively.

²⁹¹ Human Rights Council Resolution 2005/69, Human rights and transnational corporations and other business enterprises, 20th April 2005.

²⁹² *Ibid.*

which was extended by one year²⁹³ in order to enable him to complete the final report under that mandate and he was granted a further three year mandate in 2008.²⁹⁴ In 2008 in Ruggie's final report under his 2005 mandate, he describes the problem thus:

The business and human rights debate currently lacks an authoritative focal point. Claims and counter-claims proliferate, initiatives abound, and yet no effort reaches significant scale. Amid this confusing mix, laggards - States as well as companies - continue to fly below the radar.²⁹⁵

The report also unveiled the benchmark standard of 'Protect, Respect and Remedy' which pinpointed the three principles that ought to apply in regulating corporate behaviour. This encompassed several important ideas. Significantly the Protect, Respect and Remedy agenda recognised that the primary duty to protect human rights rests with States *but* that business does have a 'baseline'²⁹⁶ responsibility to respect human rights and, perhaps most crucially, that there is a requirement to establish an adequate and appropriate remedy for any human rights abuses which fulfill the dual functions of punishment and redress.²⁹⁷ According to Ruggie these three principles together 'form a complementary whole in that each supports the others in achieving sustainable progress.'²⁹⁸

Aiming to provide a CSR focal point and implement the Protect, Respect and Remedy agenda, the 2008 Special-Representative mandate conferred by the Human Rights Council specifically authorised Ruggie 'to identify, exchange and promote best practices and lessons learned' in the field of CSR and to consult with 'international and regional organizations,' among others, on CSR issues.²⁹⁹ The SGSR was mandated to:

(a) To provide views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from

²⁹³ UN HRC Press Release <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/19207DD921EE5D22C12572AC00702E2C?opendocument> [last accessed 22.8.11].

²⁹⁴ Human Rights Council Resolution 8/7, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 18th June 2008 http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf [last accessed 22.8.11].

²⁹⁵ 'Protect, Respect and Remedy note 2 at para.5.

²⁹⁶ Ibid at para.24.

²⁹⁷ Ibid at para. 82

²⁹⁸ Ibid at 5.

²⁹⁹ 4(e) and (g) Human Rights Council Resolution 8/7 note 294.

abuses by or involving transnational corporations and other business enterprises, including through international cooperation;

(b) To elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders;

(c) To explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities;

(d) To integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children;

(e) Identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact;

(f) To work in close coordination with United Nations and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council;

(g) To promote the framework and to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including States, national human rights institutions, international and regional organizations, transnational corporations and other business enterprises, and civil society, including academics, employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations, including through joint meetings;

(h) To report annually to the Council and the General Assembly.

Obviously these duties were to be carried out while taking account of the underlying principles of 'Protect, Respect and Remedy,' namely that the primary duty of the *State* is to protect citizens from human rights abuses, that the responsibility incumbent upon *business* is to respect human rights (essentially to 'do no harm')³⁰⁰ and that the necessity of ensuring access to adequate remedies for those who have suffered human rights violations at the hands of business is paramount. Businesses must exercise 'due diligence' when carrying out commercial activities to ensure that human rights requirements are met, furthermore, this due diligence requirement extends to the supply chain.³⁰¹ Ruggie defines due diligence as:

³⁰⁰Protect, Respect and Remedy note 2, at 9 para 24 and at 17 paras 54 and 55.

³⁰¹ Ibid paras 56-64.

...a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities.³⁰²

So there were two clear strands to Ruggie's proposals, firstly *preventing* human rights abuses by business actors and secondly, ensuring that the victims of such abuses have *effective access to redress*. Undoubtedly the provision of effective remedies for human rights violations by business is the area most in need of serious attention and in the opinion of Ruggie is seriously 'underdeveloped' 'patchwork' and 'flawed' and can only be satisfactorily addressed by combining the three principles.³⁰³ In order to address this inchoate state of affairs Ruggie has outlined the minimum elements required for an effective remedy, clearly drawing on established human rights discourse.³⁰⁴ An effective remedy should be 'legitimate,' 'accessible,' 'predictable,' 'equitable,' 'rights-compatible' and 'transparent' which in essence means that it ought to be independent, non-discriminatory, fair and with clearly defined procedures.³⁰⁵ Ruggie's project, rightly or wrongly, is the key global CSR project of the moment especially as his Guiding Principles on Business and Human Rights based on the Protect, Respect and Remedy framework were approved by the Human Rights Council in June 2011,³⁰⁶ and so it seems logical to view the examples identified throughout this dissertation through a 'Ruggie lens.' As will be demonstrated, some, but not all, of the Ruggie criteria are met by existing international CSR initiatives.

In order to move towards implementation of the Protect, Respect and Remedy framework, Ruggie's Preliminary Work Plan outlined the so-called 'operational phase' of the Mandate and represented a response to those critics who were unhappy with what they perceived to

³⁰² Ibid para.24.

³⁰³ Ibid at 9 para. 26 and at 22 para. 87.

³⁰⁴ See e.g. Shelton (2006) note 248 at 38-54.

³⁰⁵ Protect, Respect and Remedy note 2 at 22 para 92.

³⁰⁶ Guiding Principles note 2; Human Rights Council Resolution 17/4, Human rights and transnational corporations and other business enterprises, 15 June 2011 A/HRC/17/L.17/Rev.1 (adopted 16 June 2011) <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G11/141/87/PDF/G1114187.pdf?OpenElement> [last accessed 8.7.11].

be a merely principled approach to the problem, lacking in concrete action.³⁰⁷ It was evident that a multi-stakeholder approach was crucial to this phase and he was very keen to see ‘what works, what doesn’t, and where the gaps are’ by drawing upon the experiences of all international institutions involved with business and human rights.³⁰⁸ This high-profile experiential methodology is to be welcomed as in recent years there has been reluctance in some quarters, most notably on the part of the European Union, to learn from the CSR practice of others.³⁰⁹ Ruggie sought to amass this shared information to create what is described as ‘a backdrop to the mandate’s own processes of developing guiding principles.’³¹⁰ It is Ruggie’s belief that in doing so it will ‘strengthen the overall international architecture in the business and human rights domain.’³¹¹ The question is whether existing initiatives have anything positive to contribute to this architecture. In submitting his final report under the original mandate Ruggie recognised throughout that the ‘Protect, Respect and Remedy’ mantra was simply a framework for action and acknowledges that it was a merely a baseline, or starting point, and clearly indicated the aspiration for practical tactics for moving the process forward. Unanimous approval of the Guiding Principles by the Human Rights Council is certainly a step forward. Further progress is heavily dependent upon States, however, and while it is clear that some, like Norway for example, are supportive of Ruggie’s goals, the fact remains that the majority of States remain resolutely opposed to the imposition of mandatory human rights standards upon business.³¹²

³⁰⁷ Preliminary Work Plan Mandate of the Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises 1 September 2008-30 June 2011 (10 October 2008), <http://www.reports-and-materials.org/Ruggie-preliminary-work-plan-2008-2011.pdf> [last accessed 22.8.11] (hereinafter ‘Ruggie Work Plan’).

³⁰⁸ Ruggie Work Plan *ibid* at 3.

³⁰⁹ See Chapter 5 *infra*; see also MacLeod (2007) note 103; see also N.D.White & S.MacLeod, ‘EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility’ 19 EJIL 965-988 (2008).

³¹⁰ Ruggie Work Plan note 307 at 3.

³¹¹ *Ibid* at 4.

³¹² See e.g. UK Foreign and Commonwealth Office’s Public Consultation on Promoting High Standards of Conduct by Private Military and Security Companies Internationally: Summary of Responses, 16th December 2009, Government response. See also The Secretary of State for Foreign and Commonwealth Affairs, Ministerial Statement of 16 December 2009 Private Military and Security Companies (Standards of Conduct) <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091216/wmstext/91216m0003.htm> [last accessed 24.8.11]; The Secretary of State for Foreign and Commonwealth Affairs, Written Ministerial Statement of 21 June 2011, Promoting High Standards in the Private Military and Security Company Industry <http://www.fco.gov.uk/resources/en/press-statement/2011/June/wms-omscs-210611> [last accessed 21.8.11].

Moreover, as will be demonstrated in Chapter 3 the Guiding Principles depart from the 2008 formulation of the Protect, Respect and Remedy framework in several respects and are attracting much criticism from civil society and scholars.³¹³ The failure to impose binding human rights duties on business actors combined with a lack of enforceable remedy and redress means that the Protect, Respect and Remedy framework may not significantly ‘strengthen the overall international architecture in the business and human rights domain’ as hoped by Ruggie. This dissertation will demonstrate that concrete action in the form of mandatory duties and enforceable remedies are necessary to hold business actors to account for their human rights violations.

³¹³ See e.g. S.Deva, ‘Guiding Principles on Business and Human Rights: Implications for Companies’ 9(2) European Company Law 101-109 (2012).

Chapter 2

Business Actors as Subjects of International Law: Redressing the ‘ideological poverty of the Vattelien worldview.’¹

The eventually dominant Vattel tradition is not merely a tradition of international law. It implies a pure theory of the whole nature of international society and hence of the whole nature of the human social condition; and it generates practical theories which rule the lives of all societies, of the whole human race. it is nothing but mere words, mere ideas, mere theory, mere values – and yet war and peace, human happiness and human misery, human wealth and human want, human lives and human life have depended on them for two centuries and more.²

2.0 Introduction

As discussed in Chapter 1, transnational business activities raise complex issues of accountability and responsibility because the increasing power and influence of transnational business actors challenge traditional conceptions of State-centric international law. Respect for State sovereignty and territorial jurisdiction inhibit accountability and responsibility measures and failure by the international community to ensure that responsibility results in impunity. Furthermore, States do not yet recognise in general that commercial enterprises may have mandatory duties under international law and this is reflected in the soft law approaches to CSR analysed in Chapters 4, 5 and 6 which do not impose any binding obligation on businesses to adhere to human rights standards. Businesses are not being held to account for human rights violations via consistent or formal external regulation, although there are numerous self-regulation initiatives.³ What this means is that the victims of human rights abuses are left without redress against business actors which perpetrate, or are linked to, abuses. Nevertheless, the transnational element of the problem need not hinder accountability, rather it offers opportunities for solutions to the problem. Some of these possible solutions are discussed in subsequent Chapters.

¹ P.Allott, *Health of Nations: Society and Law Beyond the State* (Cambridge University Press: Cambridge, 2002) (hereinafter ‘Allott (2002)’) at 59 para. 2.50.

² P.Allott, *Eunomia: New Order for a New World*, (2nd ed.) (Oxford: OUP, 2001) (hereinafter ‘Allott (2001)’) at 243 para. 13.105.

³ Infra Chapters 3, 4, 5 and 6.

The prevailing Vattelien paradigm within which international law operates adheres to a subject-object dichotomy in relation to international legal personality. Accordingly, this means that only States can be subjects of international law because only they, on this analysis, exercise sovereign power and business actors (and others such as natural persons and NGOs) are merely objects. This dissertation operates on the premise that non-State business actors may properly be regarded as current subjects of international law and, as such, are bound by international human rights law. Failing that, business actors *ought* to be regarded as either subjects or participants in international law and thus bound by its rules. This chapter sets out the theoretical basis for these hypotheses.

Firstly, it examines the nature of international legal personality as it stands currently. Secondly, it rejects the traditional Vattelien analysis that only States and a very narrow category of other entities such as international organisations may be properly regarded as subjects of international law and establishes that business enterprises, and corporations in particular, have historically been treated as subjects of international law with concomitant elements of international legal personality. Often, this personality is derivative but there are examples of corporate entities acting with, what could be described as, a measure of objective legal personality. An examination of the legal status of the Dutch and British East India Companies, the Hanseatic League of northern Europe and the United Fruit Company demonstrates that there have always been entities acting on the international plane which do not fit into the State template, yet which possessed international rights and duties and acted *like* States. At the very least business actors *participate* in international legal processes and in applying a participatory analysis as advocated by Higgins,⁴ they therefore ought to be bound by international law.

Thirdly, and in the alternative, if such historical examples do not serve to support the assertion that business actors can *already* be categorised as subjects of international law, it is argued that, in any event, there is no reason in international law for any business actor to avoid responsibility for internationally wrongful acts. It is clear that in a globalised world, States have long acknowledged the international legal personality and status of private

⁴ R.Higgins, *Problems and Processes: International Law and How We Use It* (OUP: Oxford, 1994) (hereinafter 'Higgins (1994)') at 5.

enterprises. Since the latter half of the twentieth century, States have engaged increasingly with business actors as subjects of international law and this can be demonstrated by examining the decisions of international tribunals relating to business actors which are based upon both general principles of law and treaty obligations. This includes decisions of the International Court of Justice (ICJ) and the International Centre for the Settlement of Investment Disputes (ICSID), among others.

Finally, it is evident from the substantive provisions of numerous international covenants that States *do* regard private business entities as subjects of international law, or participants at the very least. Consequently, there is no reason in international law for business actors to escape responsibility for breaches of international law, specifically, human rights violations. The steady resistance to mandatory provisions in this regard must therefore be attributed to a lack of political will and a desire to maintain the international *status quo*.

2.1 International Legal Personality

2.1.1 The Traditional Doctrine of International Legal Personality: The Subject-Object Dichotomy

*We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.*⁵

States and business actors cite the lack of international legal personality as one of the key reasons for denying that private business actors have binding obligations, and thus responsibility, under international law.⁶ Specifically, and similarly to individuals, business actors have not been regarded traditionally as subjects of international law, rather they are

⁵ Higgins (1994) note 4 at 49.

⁶ See e.g. the response of the USA and other States Responses to the Consultation conducted by the OHCHR on the proposed UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to human rights obligations UN Doc. E/ CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003 and which became part of the 'Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights E/CN.4/2005/91, 15 February 2005. Excerpts from the submissions to the OHCHR can be viewed here: <http://reports-and-materials.org/UN-submissions-excerpts-16-Nov-2004.doc> [last accessed 22.8.11] (hereinafter 'Responses to the Norms Consultation'). For discussions of the issue see e.g. J.A.Zerk, *Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 73 and 92-94; I.Bantekas, 'Corporate Social Responsibility in International Law,' 22 B.U. Int'l L.J. 309 (2004); D.Vagts, 'The Multinational Enterprise: A new Challenge for Transnational Law' 83 Harv. L. Rev. 739-792 (1970) at 49-50. See also Higgins note 4 at 49-50.

categorised as objects⁷ and as such are denied international legal personality. Such an interpretation of international law bars the application of human rights obligations to private business actors. Pellet criticises this refusal to recognise ‘the international legal personality of private persons’ because it is based on ‘clearly ‘ideological’ reasons’⁸ which operate to ‘avoid facing the consequences of questioning the monopoly of States over international law.’⁹ This dissertation does not assert that international legal personality is a requirement for imposing legally binding obligations on business actors, but given that the absence of international legal personality is often put forward as a justification for the refusal of States to create binding legal obligations, it is important to examine the doctrine. Even though the ‘subject-object dichotomy’¹⁰ continues to prevail, nevertheless it can be shown that business actors can in fact meet the criteria for subject status and thus legal personality.

Charlesworth and Chinkin note that the status of ‘subject’ of international law is entrenched in the Montevideo Convention criteria for Statehood, the most important of which is the exercise of sovereign power,¹¹ and which ‘establishes a model for full international personality that other claimants for international status cannot replicate.’¹² It is, however, argued that business actors can and do exercise some elements of sovereign power on occasion and thus arguably meet the key element of international personality.

⁷ See generally D.Vagts, ‘The Multinational Enterprise: A new Challenge for Transnational Law’ 83 Harv. L. Rev. 739-792 (1970); Zerk *ibid* at 104; F.Johns, ‘The Invisibility of the Transnational Corporation: an Analysis of International Law and Theory’ 19 Univ. of Melbourne L. Rev. 893 (1994).

⁸ A.Pellet, ‘The Second Death of Euripide Mavrommatis? Notes on the International Law Commission's Draft Articles on Diplomatic Protection’ 7 The Law and Practice of International Courts and Tribunals 33-58 (2008) (hereinafter ‘Pellet’) at 38 para.8.

⁹ Pellett *ibid* at 39 para.10. In this article Pellet discusses the ‘fiction’ of diplomatic protection arguing that a State does not assert its own rights when acting on behalf of its nationals contrary to the long-established Mavrommatis principle: *Mavrommatis Palestine Concessions (Greece v. UK)*, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30) http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf [last accessed 22.10.11] at 12 para.21. See also R.Higgins, ‘Conceptual Thinking about the Individual in International Law’ 24 NYL. Sch. L. Rev. 11 (1978-1979) (hereinafter ‘Higgins (1978)’) at 16; A.Vermeer-Künzli, ‘As If: The Legal Fiction in Diplomatic Protection’ 18 EJIL 37-68 (2007) (hereinafter ‘Vermeer-Künzli’).

¹⁰ Higgins (1994) note 4 at 50.

¹¹ 26 December 1933, 3802 League of Nations Treaty Series (1936) at 19 <http://treaties.un.org/doc/Publication/UNTS/LON/Volume%20165/v165.pdf> [last accessed 5.9.11], Art.1 ‘The State as a person of international law should possess the following qualifications: (a) a permanent population ; (b) a defined territory ; (c) government ; and (d) capacity to enter into relations with the other States.’

¹² H.Charlesworth & C.Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press: Manchester, 2000) at 124.

ILC Special Rapporteur Gaja outlined the conventional definition of international legal personality in his first ILC report on the responsibility of international organizations:

...one has to start from the premise that responsibility under international law may arise only for a subject of international law. Norms of international law cannot impose on an entity 'primary' obligations or 'secondary' obligations in case of a breach of one of the 'primary' obligations unless that entity has legal personality under international law.¹³

Thus international legal personality and the subject-object dichotomy are apparently irrevocably entwined. According to this particularly conservative view of international law, international organisations now excepted,¹⁴ States adhere largely to the traditional position that legal personality attaches only to subjects of international law.¹⁵ In so doing they render the majority of non-State actors, and therefore private businesses entities in particular, devoid of any responsibility for violations of international law.¹⁶ Yet it is the concept of international legal personality that is apparently a necessary condition of action under international law. As Jan Klabbers points out, however, 'one does not need legal personality to conclude treaties, to perform acts of recognition, to impose conditions on others, or indeed, to violate international law.'¹⁷ He then questions the entire utility of the theory:

What then does legal personality signify, if it does not constitute a threshold condition for performing legal acts? What is the point of legal personality if it seemingly has no discernible practical ramifications, and if one can perform various legal acts without it?¹⁸

¹³ Special Rapporteur Giorgio Gaja, 'First report on responsibility of international organizations,' International Law Commission, Fifty-fifth session, 26 March 2003, A/CN.4/532 (Hereinafter 'Gaja, First report') http://untreaty.un.org/ilc/documentation/english/a_cn4_532.pdf [last accessed 7.9.11] at para.15.

¹⁴ See discussion of international organisations *infra* at Sections 2.2.1.1. and 2.2.1.2.

¹⁵ See E.Lauterpacht, (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht, (Volume I: The General Works)*, (Cambridge: CUP, 1970) at 136 for a discussion of the traditional position.

¹⁶ For the traditional position see: *Jurisdiction of the Courts of Danzig, Advisory Opinion*, 1928 PCIJ. (ser. B) No. 15 (Mar. 3) http://www.icj-cij.org/pcij/serie_B/B_15/01_Compotence_des_tribunaux_de_Danzig_Avis_consultatif.pdf [last accessed 9.9.11] at 17.

¹⁷ J.Klabbers, 'The Concept of Legal Personality' 11 *Ius Gentium* 35-66 (2005) (hereinafter 'Klabbers') at 38. See also discussion *infra* at Section 2.2.4 on the performance of international legal acts by business actors.

¹⁸ Klabbers *ibid.*

He asserts that international legal personality is an ambivalent concept and that it ‘has more to do with political recognition of relations between actors and those relations’ relevancies, than with anything else.’¹⁹ So where does this leave international law?

The most significant problem with the subject-object perspective or the ‘object theory of the individual’²⁰ is that it is inherently State-centric. There is no space for other actors, let alone the individual. Certainly, as indicated above, this has been the ‘classic view.’²¹ Indeed some international lawyers, such as François Rigaux, still hold this view²² but most significantly it remains in favour with many States²³ and thus can be used to justify opposition to binding rules. This largely positivist conviction²⁴ admits that only ‘objects and subjects exist in the international legal system.’²⁵ There have always been scholars, however, who disagree fundamentally with this ‘bizarre Vattelien legal world-view’²⁶ where States are preeminent at the expense of individuals. Thus there are those who think that the individual is, or ought to be, at the centre of international law and not merely categorised as objects, as well as those who consider the subject-object doctrine ought to be dispensed with altogether. Each of these positions will be examined in turn.

¹⁹ Klabbers *ibid.*

²⁰ See e.g. G.Manner, ‘The Object Theory of the Individual in International Law’ 46 AJIL 428-449 (1952).

²¹ Higgins (1994) note 4 at 39; R.Jennings & A.Watts, *Oppenheim’s International Law*, (9th ed.), (Addison Wesley Longman: New York, 1996) (hereinafter ‘Oppenheim’) at 16; See also I.Seidl-Hohenveldern, Corporations in and Under International Law (Grotius, 1987) (hereinafter ‘Seidl-Hohenveldern’) at 5. For an overview see also Higgins, Conceptual Thinking note 9. See also H.Lauterpacht, ‘The Subjects of International Law’ in E.Lauterpacht note 16, 136-150; J.Klabbers, ‘I Can’t Get No Recognition: Subjects Doctrine and the Emergence of Non-State Actors’ in J.Petman & J.Klabbers, *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff: Leiden/Boston, 2003) 351-369.

²² F.Rigaux, *Transnational Corporations* in M.Bedjaoui, (ed.), *International Law: Achievements and Prospects* (UNESCO/Kluwer: Paris and Dordrecht, 1991) 121-132 at 129. See also e.g. Mendelson note 3.

²³ See e.g. Pellet note 8; State responses to UN Norms note 6.

²⁴ Higgins (1978) note 9 at 13.

²⁵ Higgins (1994) note 4 at 49. Examples of those who adhere to this view include D.Anzilotti, *Cours de droit international*, 134 Vol.I (Paris: Sirey, 1929, reprint 1999); G.Schwarzenberger, *International Law* (3rd ed.) (Stevens; London, 1957); Manner note 21; Rigaux note 23.

²⁶ Allott (2002) note 1 at 56 para 2.44.

2.1.1.1 The Individual as a Subject of International Law

*Does it suffice to admit that the individual's good is the ultimate end of the law but refuse the individual any capacity in the realisation of the good?*²⁷

Hersch Lauterpacht famously regarded the individual as the 'ultimate subject' of international law by virtue of the creation of human rights²⁸ thus rejecting 'the view that States alone are subjects of international law.'²⁹ He reminds us that 'states are composed of individual human beings' and that:

behind the mystical, impersonal and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely, individual human beings.³⁰

As Elihu Lauterpacht explains:

...the position of the individual in international law was long a matter of major concern to Hersch...In due course, his thinking developed into a direct and deep involvement in what became the most important facet of the decline of absolute State sovereignty, namely, the international protection of the rights of man.³¹

Similarly, Kelsen considered 'erroneous' the 'traditional opinion' that only States could be subjects of international law.³² He rejected the notion that international law 'by its very nature' was 'incapable of obligating and authorizing individuals.'³³ Given the 'formal adherence' of positivists to 'object theory'³⁴ this might seem to be a somewhat surprising conclusion. Kelsen's theory is of course based on the notion that 'all law is regulation of human behavior' and that the 'only social reality to which legal norms can refer are the relations between human beings.'³⁵ He argues, therefore, that 'a legal obligation as well as a legal right cannot have for its contents anything but the behavior of human individuals.'

²⁷ D.P.O'Connell, *International Law*, (2nd ed.), (Stevens: London, 1970) (hereinafter 'O'Connell') at 116.

²⁸ H.Lauterpacht, *International Law and Human Rights*, (Stevens and Sons: London, 1950) (hereinafter 'Hersch Lauterpacht, International Law and Human Rights') at 61.

²⁹ E.Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge University Press: Cambridge, 2010) at 251.

³⁰ H.Lauterpacht, 'The Groatian Tradition in International Law' 23 BYIL 1-53 (1946) at 27.

³¹ E.Lauterpacht note 30 at 251.

³² H.Kelsen, *General Theory of Law and State* (Harvard University Press: Cambridge, Mass., 1949) [translated by Anders Wedberg] (hereinafter 'Kelsen') at 342.

³³ Kelsen *ibid* at 342.

³⁴ Manner note 21 at 432.

³⁵ Kelsen note 34 at 342.

Concluding that States are simply ‘juristic’ persons he thus asserts that without human beings, international law would be devoid of content and ‘would not obligate or authorize anybody to do anything.’³⁶ A similar argument can also be seen throughout the later work of Allott.³⁷

By placing the individual at the heart of international law and acknowledging the primacy of human rights, this approach would therefore naturally impose duties on all other international actors, including business actors, to respect those rights. In any event, it is clear that there has always been some debate as to whether individuals, both natural and legal, and business actors in particular, could be classified as subjects of international law.³⁸ It appears, however, that there has been a paradigm shift among even positivist legal scholars, away from the strict binary of the subject-object classification towards what can be termed a more elastic conception of international law. So, for example, Jennings and Watts in the ninth edition of Oppenheim’s *International Law*, while not placing the individual at the centre of international law like Lauterpacht, Kelsen and Allott, nevertheless write that while ‘States are primarily’ the subjects of international law, they are ‘not exclusively’ the subjects of international law.³⁹ They contend that subject status is contextual and case-specific:

To the extent that bodies other than states directly possess some rights, powers and duties in international law they can be regarded as subjects of international law, possessing international personality. It is a matter of inquiry in each case whether - and if so, what - rights, powers and duties in international law are conferred upon any particular body.⁴⁰

For Jennings and Watts the modern position has clearly and unquestionably moved on from the traditional conception as they elaborate in a footnote:

In the first three editions of this work [Oppenheim’s *International Law*] the view was expressed that states only and exclusively are the subjects of international law. It is

³⁶ Kelsen *ibid.*

³⁷ See e.g. Allott (2001) note 2 at 243 para.13.105; P.Allott, ‘Thinking another world: ‘This cannot be how the world was meant to be’ 16 *EJIL* 255 (2005) at 264.

³⁸ Oppenheim note 22 at 16 note 1. See also e.g. M.Shaw, *International Law*, (6th ed.), (Cambridge: CUP, 2003) at 250 (hereinafter ‘Shaw’); Manner note 21; See also International Law Commission, Fifty-second session, Geneva, 1 May-9 June and 10 July-18 August 2000, First report on diplomatic protection by Mr. John R. Dugard, Special Rapporteur, A/CN.4/506 (hereinafter ‘Dugard Report’) at paras 23-24.

³⁹ Oppenheim note 22 at 16.

⁴⁰ Oppenheim *ibid.*

now generally accepted that there are subjects other than states, and practice amply proves this.⁴¹

Examples of ‘atypical’ subjects of international law include the Holy See, the Sovereign Order of Malta, Free Cities, member states of federations, and the International Committee of the Red Cross i.e. entities which are not States but which exercise elements of sovereign power and have international rights and obligations.⁴²

Furthermore, the International Law Commission has recently revisited the question of international legal personality in the context of international organisations⁴³ and thus:

the intergovernmental organization is established as a subject of international law, with separate will and personality, and with rights and duties on the international stage. With this status achieved, the responsibility of organizations for breaches of international law is undeniable, at least in theory. Full recognition though has been a slow process.⁴⁴

Of course, this dissertation argues, in the following section, that business actors can also be considered to be subjects of international law. So it is clear that States are no longer the exclusive subjects of international law, if indeed they ever were, and it is therefore difficult not to conclude that the subject-object doctrine is a fiction designed to maintain the primacy of States.

While many scholars adhere to this modified version of the subject-object doctrine, others advocate its abandonment altogether, on the basis that a system which privileges States ignores the reality of the ‘fabric of international law.’⁴⁵ As O’Connell writes

The individual as the end of community is a *member* of the community, and a member has status: he is not an object. It is not a sufficient answer to assert that the state is the medium between international law and its own nationals, for the law has often fractured this link when it failed in its purpose.⁴⁶

⁴¹ Oppenheim note 22 at 16 note 1.

⁴² C. Walter, ‘Subjects of International Law,’ in R. Wolfrum, (ed.), *The Max Planck Encyclopedia of Public International Law*, (OUP: Oxford, 2008), online edition, www.mpepil.com [last accessed 2.9.11].

⁴³ See e.g. Gaja First Report note 14.

⁴⁴ N.D. White & S. MacLeod, ‘EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility’ 19 EJIL 965-988 (2008) (hereinafter ‘White & MacLeod’) at 972.

⁴⁵ Higgins (1978) note 9 at 16. See also O’Connell note 28 at 116; Pellet note 8.

⁴⁶ O’Connell note 28 at 116.

Likewise Higgins is firm in her rejection of Vattelian dogma and in her assessment, we should speak simply of ‘participants’⁴⁷ in international law, writing that:

We have all been held captive by a doctrine that stipulates that all international law is to be divided into ‘subjects’ - that is those elements bearing, without the need for municipal intervention, rights and responsibilities; and ‘objects’ - that is the rest.⁴⁸

Thus the doctrine demands that if an entity is not a subject it must by definition be an object and consequently States have ‘been able to block the access of individuals to certain arenas.’⁴⁹ The only conclusion, says Higgins, is that all objects of international law must therefore be ‘like ‘boundaries‘ or ‘rivers‘ or ‘territory‘ or any of the other chapter headings found in traditional textbooks.’⁵⁰ Higgins refuses to subscribe to this narrow, fixed and rule-based perception of international law stating that she believes ‘every step of this argument to be wrong.’⁵¹ She cites historical examples of non-State actors being recognised as more than mere objects of international law:

Plutrach and later Francisco de Vittoria in 1532 both wrote in terms that effectively acknowledge that non-State entities had internationally recognized legal rights. De Vittoria, of course, was speaking of the Indian Kingdoms of America. A century later Grotius, in his *De jure belli ac pacis* of 1625 was refining the idea.⁵²

Higgins thus offers an alternative model, arguing that while certain topics such as the law of the sea or issues around territorial boundaries are of great legal interest to States, nevertheless, the interests of individuals:

lie in other directions: in protection from the physical excesses of others, in their personal treatment abroad, in the protection abroad of their property interests, in fairness and predictability in their international business transactions and in securing some external support for the establishment of a tolerable balance between their rights and duties within their national State.⁵³

⁴⁷ Higgins (1994) note 4 at 50; Higgins, *Conceptual Thinking* note 9 at 16. See also Dugard Report note 39 at para.24.

⁴⁸ Higgins (1994) *ibid* at 49.

⁴⁹ Higgins (1978) note 9 at 16. The thrust of Higgins’ argument relates to human individuals nevertheless the argument applies to legal persons.

⁵⁰ Higgins (1994) note 4 at 49.

⁵¹ Higgins (1994) *ibid* at 49.

⁵² Higgins (1994) *ibid* at 49. See also the so-called ‘atypical’ subjects of international law cited in Section 2.2.1.

⁵³ Higgins (1978) note 9 at 16.

She concludes that ‘the topics of minimum standard of treatment of aliens, requirements as to the conduct of hostilities and human rights’ are not ‘simply exceptions conceded by historical chance within a system of rules that operates as between States.’⁵⁴ More precisely they should be considered:

part and parcel of the fabric of international law, representing the claims that are naturally made by individual participants in contradistinction to State participants.⁵⁵

Higgins therefore rejects the positivist view that international law consists of a system of unchanging rules which then requires ‘some specific rule’ that permits ‘the individual to be a subject of international law.’⁵⁶ The participant model recognises the role played in international processes by a variety of non-State actors, including business actors and civil society, as well as individual human beings. It is a model which makes sense if we consider that under it *all* participants would have both rights *and* duties under international law. The effect is thus twofold. Firstly, the rights of individuals are enhanced because a participant model places the individual in a more advantageous legal position than the positivist’s individual-as-object, who operates only as a passive recipient of international law. So for example, claims may be pursued by individuals in additional fora.⁵⁷ Secondly, a participant model brings business actors within the scope of international legal provisions, especially in relation to human rights by recognising that they are not only the recipients of rights but also dutyholders under international law.

Thus it is possible to conclude that the category of ‘subject’ is not closed but even if it were, a participatory model of international law would include business actors. As it stands, the Vattelien model which venerates the State remains largely intact, even if there are increasing challenges to that supremacy. In any event, even if the subject-object dichotomy prevails, it can be shown firstly, that business actors may exercise sovereign

⁵⁴ Higgins (1978) *ibid*.

⁵⁵ Higgins (1978) *ibid*. Higgins model draws on Myres McDougall’s work on participants in international law. See e.g. M. McDougall, ‘Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry’ 4 *J. Conflict Resolution* 337 (1960). For a discussion of the participatory model, see e.g. K. Knop, ‘Re/Statements: Feminism and State Sovereignty in International Law’ 3 *Transnat’l L. & Contemp. Probs* 293 (1993).

⁵⁶ Higgins (1978) *ibid* at 14.

⁵⁷ See generally e.g. Higgins (1978) *ibid* at 25.

power and therefore fall within the category of subjects of international law. Secondly, it can also be shown that business actors are already participants in international law.

2.1.2.2 Business Actors as Subjects of International Law

Trying to shoehorn business actors into the prevailing subject-object paradigm seems to miss the fundamental point. It becomes an exercise in what is and what is not a State or at least what resembles a State and is ‘unhelpful.’⁵⁸ The State should not be at the heart of international law, rather the individual should take centre stage, nevertheless, the current position in international law ought to be examined because business actors can be categorised as subjects of international law even under traditional criteria. Section 2.1.2.3 identifies numerous examples of situations where business actors have been treated as subject of international law by States.

Writing in 1994, Rigaux stated emphatically ‘that transnational corporations are neither subjects nor quasi-subjects of international law’ and are ‘affected by the rules of international law only when these are mediated by a state legal order.’⁵⁹ According to this view, therefore, it would appear that the traditional tenets of international law logically require that ‘the creation or adaption of international regulatory regimes that impose human rights responsibilities upon corporations’ demands ‘a radical departure from the structure of international orthodoxy.’⁶⁰ Such a reductive view of international law is, however, not helpful and in the words of Louis Henkin, assuredly ‘misleading if not mistaken.’⁶¹ Brownlie, while acknowledging the controversial nature of business actors’ putative ‘candidature’ as subjects’ is open to the possibility nevertheless.⁶² Likewise the

⁵⁸ Dugard Report note 39 at para.24.

⁵⁹ Rigaux note 23 at 129.

⁶⁰ D.Kinley, & J.Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ 44 Va.J. Int’l L. 931-1023 (2004) (hereinafter ‘Kinley & Tadaki’) at 944-945.

⁶¹ L.Henkin, *International Law: Politics and Values* (Dordrecht ; London: Martinus Nijhoff, 1995) 16-17.

⁶² I.Brownlie, *General Principles of Public International Law*, (7th ed.), (Clarendon Press, Oxford, 2008) at 65; Shaw note 39 at 249. Shaw also describes them as possible candidates.

Third US Restatement of Foreign Relations Law concedes that their status is mutable stating that they have ‘not yet achieved independent status in international law.’⁶³

Brownlie is cautious in his analysis and although he is willing to accept that there are certain situations where business entities do *participate* on the international plane, he does not consider that they possess international legal personality as a consequence.

Furthermore he warns ominously ‘against facile generalizations on the subject of legal personality.’⁶⁴ He outlines his position thus:

...corporations of municipal law, whether private or public corporations, engage in economic activity in one or more states other than the state under the law of which they were ‘incorporated’ or in which they have their economic seat. The resources available to the individual corporation may be greater than those of the smaller states, and they can, and do, make agreements, including concession agreements, with foreign governments, and in this connection in particular, jurists have argued that the relations of states and foreign corporations as such should be treated on the international plane and not as an aspect of the normal rules of governing the position of aliens and their assets on the territory of state. In principle, corporations in municipal law do not have international legal personality.⁶⁵

Brownlie concludes that candidature for the status of subject is dependent on both context and ‘the relation of the particular entity to the various aspects of the substantive law.’ This is a sort of ‘pick and mix’ approach which does nothing to ensure the consistency of international law. In refusing to recognise business actors as having international legal obligations, international law is not morally neutral, rather, the human rights of individuals are undefended in order to protect State sovereignty and so enables abuses to go unpunished. This is ethically unforgivable, as Allott writes:

how can any morally sensitive person, knowing what happened in the twentieth century and seeing the prospects of the twenty-first century, fail to recognise a heavy burden of moral responsibility to do whatever can be done to improve human reality?⁶⁶

Grant, similarly to Brownlie, is unwilling to categorise business actors as subjects proper and instead identifies what he calls, an ‘intermediate’ category of non-State actors between

⁶³ *Third US Restatement of Foreign Relations Law* (American Law Institute, 1986) at 126.

⁶⁴ Brownlie note 63 at 67.

⁶⁵ Brownlie *ibid* at 66.

⁶⁶ Allott (2002) note 1 at 33 para 1.6.2.

States and natural persons, that has ‘proliferated and assumed a role in international society.’⁶⁷ He is nonetheless willing to go beyond Brownlie’s analysis by saying that this intermediate category necessitates a re-evaluation of what constitutes ‘a person under international law.’⁶⁸ This group encompasses ‘corporations, political or religious parties or movements, organized interest groups, transnational ethnic communities, and other non-governmental organizations’ as well as numerous inter-governmental organisations.⁶⁹ Grant doubts whether ‘in truth writers ever really excluded non-states actors from international law’ he also asserts that, at minimum, ‘modern developments have increased the relative legal status of such actors.’⁷⁰

On this analysis it would appear obvious that private business actors will never satisfy the political criteria for classification as subjects of international law with attendant obligations. Such an approach, while acknowledging that non-State actors have long been present on the international stage in a variety of guises, relegates them to the level of ‘participants’ denied the rank of ‘subject.’⁷¹ Business actors, on this analysis, continue to lack the requisite level of autonomy to be subjects of international law and thus responsible for internationally wrongful acts, such as human rights violations. This is in direct contrast to international organisations which, ‘have reached the stage of objective legal personality, making them responsible in their own right for breaches of international law.’⁷² The recent work of the International Law Commission (ILC) reflects this position.⁷³

Unlike international organisations, which are accepted on the international plane by virtue of associated international objective legal personality, corporations remain excluded.⁷⁴

⁶⁷ T.D.Grant, ‘Defining Statehood: The Montevideo Convention and its Discontents’ 37 Colum. J. Transnat’l L. 403-457 (1999) (hereinafter ‘Grant’) at 406.

⁶⁸ Grant *ibid*.

⁶⁹ Grant *ibid* at 405-406.

⁷⁰ Grant *ibid*.

⁷¹ Higgins (1994) note 4 at 49-50; See also N.Jägers, ‘The Legal Status of the Multinational Corporation Under International Law’ in Addo, M.K., (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, (London: Kluwer Law International, 1999) 259; Kinley & Tadaki note 61 at 944.

⁷² White & MacLeod note 45 at 967.

⁷³ Gaja, First Report note 14 at para. 42.

⁷⁴ Gaja, First Report *ibid* at para. 42.

There is, however, no reason to suppose that international legal personality for business actors is a chimera. As the present author, together with Nigel White has noted, international recognition of intergovernmental organisations has been a sluggish and painful process.⁷⁵

Starting with the *Reparations Case* in 1949 and culminating in the recent work of the International Law Commission, the international community has moved towards a position where international organisations are recognised as subjects of international law with associated rights and duties.⁷⁶ The *Reparations Case* confirmed the separate legal personality of the UN, however, it was another three decades before the ICJ expressly noted that international organisations were:

subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are a party.⁷⁷

The generally prevailing view, however, was, and is, that neither individuals nor corporations are subjects of international law and derive any meagre international legal personality from the will of the states creating them reflecting the traditional Austinian or ‘flat earth’⁷⁸ position enunciated by the PCIJ in the *Lotus* decision:

International law governs relations between independent states... [which] emanate from their own free will...⁷⁹

An Austinian analysis will elicit an enquiry as to where the power lies and will conclude that it rests solely with the state or law-maker. Within such a voluntarist analysis, international law depends upon the engagement of states. Any imposition of international obligations is thus dependent upon state consensus. On this analysis, therefore, individuals possess a modicum of legal personality. So, for example, individuals are recognised as ‘subjects’ of international law under the Statute of the International Criminal

⁷⁵ White & MacLeod note 45 at 970.

⁷⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion I.C.J. Reports 1949, 174

⁷⁷ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion [1980] ICJ Rep 73, at 89–90.

⁷⁸ White & MacLeod note 45 at 972.

⁷⁹ *The Case of the SS Lotus*, PCIJ Series A, No.10 (1927) 18.

Court and as such bear responsibility for commission of genocide, crimes against humanity and war crimes.⁸⁰ Brownlie, however, takes issue with the use of such terminology to describe the status of natural legal persons:

There is no general rule that the individual cannot be a 'subject of international law,' and in particular contexts he appears as a legal person on the international plane. At the same time to classify the individual as a 'subject' of the law is unhelpful, since this may seem to imply the existence of capacities which do not exist and does not avoid the task of distinguishing between the individual and other types of subject.⁸¹

Special Rapporteur Gaja, however, in his First ILC Report cites the *LaGrand*⁸² case as an example of the ICJ's changing attitude toward the question of individuals as subjects of international law:

The Courts's assertion of the legal personality of international organizations needs to be viewed in the context of its more recent approach to the question of legal personality in international law. The Court stated in the *LaGrand* case that individuals are also subjects of international law.⁸³

In *LaGrand* the ICJ concluded that the Vienna Convention on Consular Relations created individual rights, specifically that an individual is entitled to have the relevant consular post informed of his or her detention by the receiving State.⁸⁴ Gaja continues, contemplating that the ICJ will inevitably have to acknowledge the international legal personality of actors other than IGOs, specifically non-governmental organisations:

This approach may lead the Court to assert the legal personality even of non-governmental organizations. It would be difficult to understand why individuals may acquire rights and obligations under international law while the same could not occur with any international organization, provided that it is an entity which is distinct from its members.⁸⁵

If the law is shifting towards recognition of NGOs then the same argument applies to business actors. While individuals have acquired both responsibilities and rights, as

⁸⁰ Rome Statute of the International Criminal Court July 17, 1998, UN Doc. A/CONF.183/9; 37 ILM 999 (1998) (as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999) Article 25.

⁸¹ Brownlie note 63 at 65.

⁸² *LaGrand* (Germany v. USA), Judgment 27 June 2001, ICJ Reports (2001) <http://www.icj-cij.org/docket/files/104/7736.pdf>

⁸³ Gaja, First Report note 14 at para.17 citing *LaGrand*, *ibid* at para.77.

⁸⁴ *LaGrand*, *ibid*, citing Art.36(1) Vienna Convention on Consular Relations, 24 April 1963, UNTS 596, Vol. 1, 261 http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

⁸⁵ Gaja, First Report note 14 at para.17.

demonstrated, commercial enterprises, have not been generally regarded as possessing any international legal personality and as such do not bear responsibilities under international law, in particular responsibility for human rights violations and/or violations of international humanitarian law. This is despite the fact that business actors have also acquired rights and obligations under international law:

The overall effect of the decolonization period with respect to corporate-host state relations was thus to emphasize the rights of states and the **duties of TNEs**. Developing states asserted a right to expropriate with little or no compensation and to gain favourable economic development agreements that they could renegotiate on better terms. They also proposed duties on investors to comply with host country law and policies.⁸⁶ [emphasis added]

It is clear, therefore, that business actors have long been regarded as suitable recipients of international legal duties. In contrast to the situation of individuals, however, the jurisprudence of the ICJ does little to illuminate the issue. While regarding corporations as legal entities which are separate from their shareholders, the ICJ has only been able to consider and rule on the rights of corporations rather than their responsibilities, notably the right to diplomatic protection.⁸⁷ Nevertheless, the judgment in the infamous *Barcelona Traction* seems to reinforce the domestic law status of corporations with the Court stating that '[m]unicipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them.'⁸⁸

Diplomatic protection is not an automatic right, rather it is a discretionary power to be exercised by the state of nationality.⁸⁹ This position has been reaffirmed recently by the court in the *Case Concerning Ahmadou Sadio Diallo* but the fact that corporations have a *right* to claim diplomatic protection actually serves to support the assertion that they are

⁸⁶ S.Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' 111 Yale. L. J. 443-545 (2001) (hereinafter 'Ratner') at 457.

⁸⁷ *Case Concerning The Barcelona Traction, Light and Power Company Limited* (Second Phase) [1970] ICJ Reports 3 (Judgment of 5 February 1970) <http://www.icj-cij.org/docket/files/50/5387.pdf> [last accessed 5.9.11].

⁸⁸ *Barcelona Traction* *ibid* at para.41.

⁸⁹ *Barcelona Traction* note 88 at paras 79, 94 and 99; Art. 2 ILC Draft Articles on Diplomatic Protection with commentaries (2006), Official Records of the GA, 61st session, Supp. 10 (A/61/10) http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf [last accessed 5.9.11]. Early drafts of Art.2 made reference to discretion but the final draft omits it. See also e.g. Seidl-Hohenveldern note 22 at 8.

recognised as subjects of international law.⁹⁰ As Pellet argues, the notion that a State exercises diplomatic protection in defence of its *own* rights,⁹¹ *son droit propre*, is a legal fiction. Rather, the State ‘represents the rights and interests of the protected person’ in this case, a corporation.⁹² The fiction is maintained for doctrinal coherence and for the purpose of maintaining State sovereignty:

It is the powerful voice of legal positivism and the sovereignty of the State which is at the heart of the legal construction obviously destined to bar individuals from international legal personality.⁹³

These combine to create a ‘complete lack of symmetry’ where a State may protect its injured national ‘against the State which caused the harm’ but:

the State which suffers harm as a result of the act of an individual cannot complain to the State of which that person is a national.

So if a business actor abuses human rights in a host State, that State cannot protect the rights of its nationals against the private actor via international courts. If, however, the assets of that same business actor were to be appropriated by the host State without compensation, the company’s home State would be able to exercise diplomatic protection in order to protect its national. There is something clearly wrong with this picture and Pellet concludes that the ‘one-way street’ is determined not by any sense of justice but by the power of politics and economics.⁹⁴

It is also arguable that the mere fact that business actors may claim rights under international law necessarily implies that they may also bear obligations.⁹⁵ Klabbers

⁹⁰ *Case Concerning Ahmadou Sadio Diallo* ICJ Reports (2007) (Preliminary Objections) <http://www.icj-cij.org/docket/files/103/13856.pdf> [last accessed 22.10.11] at para.61.

⁹¹ *Mavrommatis* note 9 at 12. In exercising diplomatic protection a State is ‘asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.’ See also *Nottebohm Case* (Liechtenstein v. Guatemala) ICJ Judgment of April 6th 1955 <http://www.icj-cij.org/docket/files/18/2674.pdf> [last accessed 22.10.11] at 24: ‘Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State.’

⁹² Pellet note 8 at 38 para.8. See also Dugard Report note 39 at paras 12-13.

⁹³ Pellet *ibid* at 40 para.11.

⁹⁴ Pellet *ibid* at 39 para.9. Although diplomatic protection vis-à-vis human rights violations by State actors is the best way to protect human rights, Dugard Report note 39 at paras 21 and 29; Vermeer-Künzli note at 41 and 57.

⁹⁵ H.Koh, ‘Separating Myth from Reality About Corporate Responsibility’ *Litigation* 7 J. of Int’l Economic L. 263-274 (2004) (hereinafter ‘Koh (2004)’) at 265. See *infra* at 1.2 for more on this point in relation to human rights, specifically the ECHR.

argues that ‘performing legal acts’ is ‘evidence of personality as well as a simultaneous constitutive of personality.’⁹⁶ If this is the case then why should it not also be the case that performing *illegal* acts, such as human rights violations, also evidences personality?

Notwithstanding such flawed logic, the traditional Vattelien, post-Westphalian narrative of States as the sole subjects of international law with attendant rights, obligations and duties holds fast and a conservative view of international law prevails. This is despite the slowly increasing categories of exceptions, rendering corporations ostensibly devoid of international legal constraint. In this light it is difficult not to view the present international legal system as a deeply unjust ‘unsociety’ where ‘states dominate’ and which is ‘markedly less representative of humanity’⁹⁷ than one that prioritises the individual.

2.1.2.3 Early Historical Examples of Business Actors as Subjects of International Law

Several historical anomalies in the Westphalian approach can be identified, however, upon an examination of how corporations operating internationally have been treated by States historically and in more recent times. It can be demonstrated that States have clearly considered corporations to be subjects of international law *or* at least capable of engaging international responsibility in a derivative manner and consequently ‘are another candidate for functionally limited international legal personality’⁹⁸ at a minimum. There are several historical examples which support such an analysis although some commentators such as Sornarajah might oppose this assertion on the grounds that ‘there is little in common between these old corporations and the multinational corporation of times.’⁹⁹ While there may be structural differences, such differences do not undermine the contention that there is documented evidence going back centuries that commercial entities have been treated as subjects of international law.

⁹⁶ Klabbbers note 18 at 57.

⁹⁷ I.Scobbie, ‘The Holiness of the Heart’s Affection’: Philip Allott’s Theory of Social Idealism’ in A.Orakhelashvili, (ed.), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011) 168-195 (hereinafter ‘Scobbie’) at 180.

⁹⁸ Walter, C., ‘Subjects of International Law,’ in R. Wolfrum, (ed.), *The Max Planck Encyclopedia of Public International Law*, (OUP: Oxford, 2008), online edition, www.mpepil.com [last accessed 2.9.11] para.19

⁹⁹ M.Sornarajah, *The International Law on Foreign Investment*, (2nd ed.), (Cambridge University Press, Cambridge, 2004) at 66.

Firstly, on the basis of Royal Charters established as far back as the 17th century, the Dutch and British East India Companies exercised key elements of what would today be recognised as sovereign power.¹⁰⁰ So for example, these ‘little republics’¹⁰¹ exercised various sovereign powers including, in the case of the British East India Company, ‘the right to have its contracts treated as international treaties and the right to make war’¹⁰² as well as issuing currency, governing territories and maintaining ‘standing armies’ which ‘engaged in military action.’¹⁰³ Max Huber in the *Islands of Palmas* arbitration concluded that:

The acts of the Dutch East India Company (Generale Geoctroyeerde Nederlandsch Oost-Indische Compagnie) in view of occupying or colonizing the regions at issue in the present affair must, in international law be entirely assimilated to acts of the Netherlands State itself.¹⁰⁴

Further, he found that under the Treaties of Münster and Utrecht the Dutch East and West India Companies ‘were entitled to create situations recognized by international law’ even to the extent of concluding conventions of a political nature,¹⁰⁵ thus exercising important elements of sovereign power.

So the powers of the East and West India Companies were derived from and usually exercised on behalf of the sovereign state in question and therefore to a certain extent they are based upon the traditional perception of international law as reflecting the will of states. Steven Ratner concludes that they ‘were effectively controlled by the government,’¹⁰⁶ however, he also acknowledges that they had, along with their home States ‘substantial rights vis-à-vis host states and (to the extent that anyone in the North noticed)

¹⁰⁰ D.Garrett, ‘The Corporation as Sovereign’ 60 Me. L. Rev. 129 (2008) at 133.

¹⁰¹ Robert Lowe MP, ‘Law of Partnership and Joint Stock Companies,’ HC Deb 1 February 1856 vol. 140 cc110-47 at 134, http://hansard.millbanksystems.com/commons/1856/feb/01/law-of-partnership-and-joint-stock#S3V0140P0_18560201_HOC_37 [last accessed 21.10.11]; Garrett *ibid*.

¹⁰² D.J.Greenwood, ‘The Semi-Sovereign Corporation,’ Utah Legal Studies Paper No. 05-04 (2005) <http://ssrn.com/abstracts=757315> [last accessed 21.10.11] at 1, also published as bepress Legal Series (2005) Paper 708.

¹⁰³ Garrett note 101 at 133.

¹⁰⁴ *The Islands of Palmas Case (or Miangas)* (The Netherlands v. United States) , Award of the Tribunal 4th April 1928 at 25; 2 RIAA 829 (1928).

¹⁰⁵ *The Islands of Palmas Case* *ibid*.

¹⁰⁶ Ratner note 87 at 453.

their populace.¹⁰⁷ Thus the powers exercised demonstrate an historical acceptance of corporations as actors and participants on the international plane, if not outright subjects.

There is even an argument that the 12th century Hanseatic League pre-dated the East India Companies by constituting ‘an early version of an internationalized corporate body’ or a *communis mercator*¹⁰⁸ which exercised elements of sovereign functions.¹⁰⁹ The Hansa (or Hanse) was a mercantile network of towns established in northern Germany which created ‘protective and social alliances’ throughout Europe.¹¹⁰ It emanated from the desire to trade and to coordinate military expeditions targeting piracy and, in the view of some, the Hansa towns ‘almost assumed the proportions of small democracies.’¹¹¹ Indeed the thirteenth century endeavours of the Hansa towns to tackle piracy are regarded as ‘[p]erhaps the earliest multilateral efforts against piracy’ and ‘united German cities because defense at sea was necessary against the swarms of pirates in the Baltic, North Sea, and elsewhere.’¹¹²

Despite the lack of what could be described as legal sovereign status and territorial aspirations,¹¹³ the Hanseatic League unquestionably demonstrated certain sovereign qualities. So for example, internally it founded a democratic legislative body known as the Hansetag, which was the focus for coordinated improvements to infrastructure (especially canal networks) and exercised ‘autonomy in all inner affairs.’¹¹⁴ The members of the League had: ‘...free choice of civic rulers from the fittest elements, a right to govern themselves, and if need be to form alliances, and the right to tax themselves’¹¹⁵ although it

¹⁰⁷ Ratner *ibid* at 454.

¹⁰⁸ P.Dollinger, *The Emergence of International Business 1200-1800: Volume 1: The German Hansa* (Routledge: 1970) (English translation reprinted from the French, Routledge, 2000) (hereinafter ‘Dollinger’) at xvii.

¹⁰⁹ Walter, C., ‘Subjects of International Law,’ in R. Wolfrum, (ed.), *The Max Planck Encyclopedia of Public International Law*, (OUP: Oxford, 2008), online edition, www.mpepil.com [last accessed 2.9.11] para.19.

¹¹⁰ H.Zimmern, *The Hansa Towns* (T. Fisher Unwin: London, 1889) at 11 (hereinafter ‘Zimmern’).

¹¹¹ Zimmern *ibid* at 34.

¹¹² S.J.Menefee, ‘The New ‘Jamaica Discipline’: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea’ 6 Conn. J. Int’l L. 127 (1990) at 132.

¹¹³ Encarta, ‘Hanseatic League’ http://au.encarta.msn.com/text_761559716_0/Hanseatic_League.html (29.7.09)

¹¹⁴ Zimmern note 111 at 40.

¹¹⁵ Zimmern *ibid*.

is also true that the League did not maintain a permanent military force, ‘common seal or officials or institutions of its own.’¹¹⁶

Externally, its sovereign characteristics were clear:

...the Hansa from its earliest origin, though organized for the ends of peace, was from its commencement and throughout its existence a militant body, ever watchful to punish infringement of its rights, ever ready to extend its authority, ever prompt to draw the sword or send forth its ships against offenders.¹¹⁷

To that end the League declared war on Denmark after the Hanseatic port of Visby was seized by the King of Denmark and victory resulted in the granting of significant ‘indemnities, strategic territories and other concessions.’¹¹⁸ Nevertheless, it should be noted that:

The Hansa remained an anomalous institution which puzzled contemporary jurists. It was not a sovereign power, for it remained within the framework of the [Holy Roman] Empire and its members continued to owe some measure of allegiance to many different overlords ecclesiastical or lay.¹¹⁹

Notwithstanding this limitation, the Hanseatic League is an interesting example of an early entity which does not fit into the mold of sovereign State. Neither can it be properly described by reference to modern transnational enterprises, however, it *is* illustrative of a commercial entity recognised on the international stage. Epstein even goes so far as to suggest that a form of self-regulating CSR underpinned the League:

At its inception, the Hanseatic League and its members ‘were well appreciated as honorable merchants who ensured quality and fought against unscrupulous practices’ through vigorous affinity regulation by the membership.¹²⁰

While the existence of CSR in the Middle Ages is questionable, these examples do serve to demonstrate that States have long considered business actors to be subjects of international law.

¹¹⁶ Dollinger note 109 at xvii.

¹¹⁷ Zimmern note 111 at 34.

¹¹⁸ Encarta, ‘Hanseatic League’ http://au.encyarta.msn.com/text_761559716___0/Hanseatic_League.html [29.7.09]

¹¹⁹ Dollinger note 109 at xvii.

¹²⁰ E.M.Epstein, ‘The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux’ 44 Am. Bus. L. J. 207 (2007) at 210-211.

More recently, during the early to mid part of the twentieth century, companies were again permitted to wield enormous power within their spheres of influence, to the extent that, for example, the United Fruit Company expanded until it owned all of Guatemala's 'railways, ports and key shipping lines'¹²¹ although its dominance could be seen throughout Latin America.

These historical examples all point to States considering business actors to be subjects of international law or at least able to exercise elements of sovereign power which is a crucial element for establishing international legal personality under traditional conceptions of international law.

2.2 Business Actors as Subjects of Modern International Law

The early attempts described in the previous section demonstrate that the topic of business actors as subjects of international law has never been black and white. Questions of status are, however, a late twentieth century development inextricably linked to globalisation and the rise of commercial power:

...the need to qualify the international legal position of transnational corporations is mainly a development of the period after 1945.¹²²

Even within a Westphalian paradigm, it was inevitable that as the economic and political power of transnational business actors increased, their participation in international law would also increase. Post-1945, States have certainly been ever more willing to recognise corporations as participants, if not subjects outright, in international law that have rights, obligations and responsibilities, specifically on the basis of international covenants.

Wolfgang Friedmann, writing in 1964, concluded unequivocally that 'private corporations are participants in the evolution of modern international law'.¹²³ This is especially true

¹²¹ L.Turner, 'Multinational Companies and the Third World' 30 *The World Today* No.9 394-402 (Sep.,1974) at 394. See also P.Chapman, *Bananas: How the United Fruit Company Shaped the World*, (Canongate, 2004); S.May & G.Plaza, *The United Fruit Company in Latin America*, (Washington: National Planning Association, 1958).

¹²² C.Walter, 'Subjects of International Law,' in R. Wolfrum, (ed.), *The Max Planck Encyclopedia of Public International Law*, (OUP: Oxford, 2008), online edition, www.mpepil.com [last accessed 2.9.11] para.19.

¹²³ W.Friedmann, *The Changing Structure of International Law* (1964) at 230. See also M.Kamminga, 'Corporate Obligations under International Law,' Responses to the Norms Consultation note 6 at 1.

within the context of international investment. Steven Ratner talks of ‘host states and TNEs’ adjusting their ‘economic and legal relationship through economic development agreements’ which ‘clearly defined a set of rights and duties between the TNE and the host state.’¹²⁴ An examination of decisions of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) as well as international conventions reveals the truth of his assertion.

In terms of rights under international law, there are various examples. Thus, as highlighted earlier in this chapter,¹²⁵ corporate actors are entitled to claim the nationality of the State in which they are incorporated and consequently may claim the right of diplomatic protection. This is founded upon the well established twin, substantive and procedural, principles of diplomatic protection of citizens abroad and State responsibility for injuries to aliens.¹²⁶ Described by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions Case*¹²⁷ as an ‘elementary principle of international law’ it was also firmly upheld in relation to corporations by the International Court of Justice in *Barcelona Traction*.¹²⁸ As Richard Lillich comments:

Even as bitter a critic of diplomatic protection as Judge Padilla Nervo admitted in the Barcelona Traction Case that ‘[f]or the time being, the principle which recognizes the capacity of a State to intervene, by way of diplomatic protection of a company of its own nationality, has proved to be a fair and well-balanced safeguard or insurance, both for the investor and for the State, where foreign companies operate.’¹²⁹

As highlighted in Section 2.1.2.2., however, there is an asymmetry to this principle which leads to the conclusion that corporations receive all of the benefits of international law without the same emphasis on corresponding responsibilities. The world that Lillich

¹²⁴ Ratner note 87 at 456.

¹²⁵ *Infra* Section 2.2.2.2.

¹²⁶ See: R.B.Lillich, *International Law of Responsibility for Injuries to Aliens* (University Press of Virginia: Charlottesville, 1983); C.F.Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon Press: Oxford, 1967); Sornarajah note 99 at 17.

¹²⁷ PCIJ Ser.A No.2 (1924) at 12.

¹²⁸ *Barcelona Traction* note 88 *passim*.

¹²⁹ R.B.Lillich, ‘The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack’ 69 AJIL 359-365 (1975) at 364 citing *Barcelona Traction* note 88 Judge Padillo Nervo’s Separate Opinion <http://www.icj-cij.org/docket/files/50/5405.pdf> [last accessed 5.9.11] at 245.

describes is one where the rights of business actors are safeguarded but the rights of human beings violated by those same business actors are not.¹³⁰

Numerous corporate actors have sought the diplomatic protection of their State of incorporation in a wide variety of circumstances.¹³¹ The position was recently reaffirmed in the *Case Concerning Ahmadou Sadio Diallo*.¹³²

Another category of right arises in relation to the taking of property. A company is permitted to bring a claim against a State which has expropriated its property unlawfully.¹³³ In so doing, the international community is again recognising private business actors as subjects of international law because jurisdiction is dependent upon the consent of the parties to the dispute. Such claims may be made in a variety of fora. For example the Convention on the Settlement of Investment Disputes was established to deal specifically with disputes between States and the nationals of other Contracting States and is very widely ratified.¹³⁴ Article 25 of the ICSID Convention¹³⁵ outlines the extent of the Centre's jurisdiction:

Article 25

- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

While Article 25(2)(b) extends the right to corporate actors:

- (2) 'National of another Contracting State' means:

¹³⁰ See e.g. Dugard Report note 39 at para.14.

¹³¹ See e.g. *Anglo Iranian Oil Co. Case (United Kingdom v. Iran)* (Preliminary Objections) IC Rep. 93 [1952]; *Interhandel Case (Switzerland v United States of America)* (Interim Measures of Protection) ICJ Rep 105 [1957]; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* I.C.J. Rep. 15 (1989).

¹³² *Republic of Guinea v. Democratic Republic of Congo* (Preliminary Objections) ICJ (2007) at para.61 <http://www.icj-cij.org/docket/files/103/13856.pdf> [last accessed 5.9.11].

¹³³ See e.g. *Texaco Overseas Petroleum Co. v. Libyan Arab Republic* 17 ILM 1 (1978); *Government of Kuwait v. AMINOIL* 66 ILR 519 (1982).

¹³⁴ 157 as of 5 May 2011 <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main> [last accessed 4.9.11].

¹³⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Convention, Regulations and Rules (International Centre for Settlement of Investment Disputes), ICSID/15 April 2006 <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> [last accessed 4.9.11].

- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Furthermore there is parity between State and corporate parties to the ICSID dispute settlement mechanism. For example, both parties must consent to the jurisdiction of ICSID,¹³⁶ either party may request conciliation proceedings¹³⁷ and costs are split between the parties (unless the tribunal or the parties decide otherwise).¹³⁸

As of January 2010, ICSID had concluded one hundred and eighty-one cases since its inception and is therefore an important example of State practice in relation to business actors. It demonstrates that corporations may be parties to international agreements and treated as the equals of States in many important aspects.

Another example of State practice are the rules of the Iran-US Claims Tribunal. Corporations which are nationals of either party to the constituent agreement may be a 'claimant.'¹³⁹ Furthermore, an examination of other treaties where obligations are imposed upon corporations, offers additional support for the claim that private business enterprises are already regarded as subjects of international law. For example, under the UN Convention on the Law of the Sea 1982 the restrictions relating to appropriation of the seabed apply to natural and juridical persons as well as states.¹⁴⁰ Likewise the Convention on Civil Liability for Oil Pollution Damage 1969 provides that the owner of a ship (natural

¹³⁶ Art.25(1).

¹³⁷ Art.28(1).

¹³⁸ Administrative and Financial Regulations, Chapter III Financial Provisions Regulation 14 Direct Costs of Individual Proceedings Reg.14(3)(d).

¹³⁹ Articles II and VII of the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981 <http://www.iusct.org/claims-settlement.pdf> [last accessed 5.9.11].

¹⁴⁰ UN Convention on the Law of the Sea 1833 UNTS 3 Art.137(1) 'nor shall any State or natural or juridical person appropriate...'

or legal person) will be held liable for pollution caused by that ship.¹⁴¹ Article VI of the Outer Space Treaty governs the activities of ‘non-governmental entities’ in relation to outer space, in particular, the moon and other celestial bodies.¹⁴² More recently, Article 10 of the UN Convention Against Transnational Organized Crime makes reference to the liability of legal persons above and beyond the criminal liability of the natural persons involved.¹⁴³

So it is clear that the international community recognises that private actors may incur international responsibility in some contexts but why not human rights responsibilities?

Andrew Clapham, in the context of the International Criminal Court, has argued that:

As long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons also have the necessary international legal personality to enjoy some of these rights and conversely be prosecuted or held accountable for violations of their international duties.¹⁴⁴

The only possible conclusion is that there is no desire on the part of the international community to do so.

There is, however, little or no agreement at international law as to whether human rights obligations ought to apply business enterprises at all, let alone the nature and degree of any applicable obligations. Chapter 3 considers each of these issues in turn. What *is* clear is that there is no reason to suggest that business actors cannot be subjects of international law. Whether that is a desirable goal is another matter, as Pellet notes, ‘the advent of multinational corporations becoming the major actors in international relations’ may be something that ‘we want to deplore or something we want to applaud.’¹⁴⁵ There is no doubt that they exercise great power and are the recipients of many benefits under

¹⁴¹ Convention on Civil Liability for Oil Pollution Damage November 29, 1969 973 UNTS 3, as replaced by the 1992 Protocol 27 November 1992 1956 UNTS 255, as amended in 2000.

¹⁴² Treaty on the principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, 27 January 1967, 610 UNTS 205.

¹⁴³ UN Convention Against Transnational Organized Crime, 15 November 2000 UNTS http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf [last accessed 22.10.11]. See also A.Clapham, ‘On Complicity’ in M.Henzelin & R.Roth, (eds), *Le droit penal à l’épreuve de l’internationalisation*, (Paris: LGDJ, Genève: Georg, Bruxelles: Bruylant, 2000) 241-274 at 261.

¹⁴⁴ A.Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court,’ in M.Kamminga & S. Zia-Zarifi, (eds), *Liability of Multinational Corporations under International Law*, (Kluwer, 2000) 139-195 at 190.

¹⁴⁵ Pellet note 8 at 55 para.36.

international law but there is a need to impose obligations on them, in particular human rights obligations. Of course, one way to avoid the subject-object debate altogether would be to consider the participation model as a more suitable option.

2.3 The Impact of the New Governance Paradigm on Business Actors as Subjects of and Participants in International Law

*As the bipolar state system of the Cold War disappeared and non-state, substate, and supranational actors rode the tide of globalization, pundits and many scholars began heralding the era of complex, multi-level, global governance, tied together by networks.*¹⁴⁶

In the aftermath of the Cold War a new way of thinking about international law emerged. It builds upon and echoes Higgins' participatory theory of international law in many ways and sees non-State actors moving towards a more formalised role in international legal processes. As a consequence, and in response to 'public doubts and suspicions about the activities of at least certain international organizations' and the 'perception of elite transgovernmental interactions taking place within them,' various participatory and so-called stakeholder initiatives emerged.¹⁴⁷ It is at this point that we see the links between a participatory approach to international law and a new governance paradigm being established. Slaughter describes the emerging participatory and stakeholder initiatives as a 'pluralist mix of global governance mechanisms' which could be 'folded into larger 'mixed networks' of governmental and private actors.'¹⁴⁸ This new global governance theory portrays an international legal system where:

the democratic state is in the midst of a shift to a 'post-regulatory' model characterized by a weakening of top-down governmental regulation in favour of a diffusion of rights and responsibilities among governments, private companies, NGOs and other interested parties. Power in other words, is to be spread and shared.¹⁴⁹

¹⁴⁶ A.Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' 24 Mich. J. Int'l L. 1041 (2003) (hereinafter 'Slaughter') at 1045.

¹⁴⁷ Slaughter *ibid* at 1054-1055.

¹⁴⁸ Slaughter *ibid* at 1057.

¹⁴⁹ J.M.Conley & C.A.Williams, 'Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement' 31 J. Corp. L. 1 (2005) (hereinafter 'Conley & Williams') at 6; see also e.g. D.M.Trubek & L.G.Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' 13 Colum. J. Eur. L. 539 (2006-2007).

This new governance paradigm is characterised by a ‘diffusion of regulatory power among networks of state and non-state actors that transcend national boundaries’¹⁵⁰ and, in particular, the ‘loosening of the sharp distinction between states and markets and between the public and the private.’¹⁵¹

Business actors, NGOs and others became involved in this ‘decentring’¹⁵² in numerous different fora¹⁵³ and thus the new governance regime represents contemporary acknowledgement of the plurality of international legal processes. For the purposes of this dissertation, however, it is simply the latest example of business actors participating in international legal processes.

Participatory and stakeholder approaches have been particularly prevalent in relation to the CSR efforts of international organisations as will be seen throughout the remainder of this dissertation. They have ‘instituted a raft of ‘outreach efforts’ to global civil society, enhancing transparency, hosting NGO meetings, and acknowledging and promoting ‘global policy networks.’”¹⁵⁴ For example, and as discussed in Chapter 5, while the OECD has historically given formalised roles to both business actors and trade unions in the context of the Guidelines on Multinational Enterprises, more recently the participation of NGOs has been sanctioned.¹⁵⁵ Furthermore, the process which resulted in the UN Guiding Principles on Business and Human Rights is a clear illustration of these outreach efforts.¹⁵⁶ Likewise, the multistakeholder UN Global Compact is a good example of a global policy

¹⁵⁰ Conley & Williams *ibid* at 31.

¹⁵¹ C.Scott, ‘Regulation in the Age of Governance: The Rise of the Post-Regulatory State,’ Australian National University, National Europe Centre Paper No.100, 6 June 2003, at 3 <http://hdl.handle.net/1885/41716> [last accessed 10.11.10].

¹⁵² J.Black, ‘Decentring Regulation: The Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World,’ *Current Legal Problems* 103-146 (2001). See also generally, J.Black, ‘Constitutionalising Self-Regulation’ 59 *Modern Law Review* 24-56 (1996); J.Black, ‘Proceduralizing Regulation: Part I’ 20 *Oxford Journal of Legal Studies* 597- 614 (2000); J.Black, ‘Proceduralizing Regulation: Part II’ 21 *Oxford Journal of Legal Studies* 33- 58 (2001).

¹⁵³ Slaughter note 147 at 1055.

¹⁵⁴ Slaughter *ibid* at 1055.

¹⁵⁵ Chapter 5 *infra* at Section 5.4. OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, <http://www.oecd.org/dataoecd/43/29/48004323.pdf> [last accessed 30.8.11] (hereinafter ‘OECD Guidelines 2011’).

¹⁵⁶ See also *infra* Chapter 1 Section 1.6.2 and Chapter 3 Section 3.3.

network and indeed was established with that aim.¹⁵⁷ Surya Deva also cites the UNGC as a possible example of the change in categorisation of business actors as subjects.

At a wider level, the ‘public-private’ partnership represented a deviation in the generally state-centric nature of international law: it not only reflected the growing influence of non-states actors such as multinational corporations...in international law making, but might also be interpreted as an incremental step towards their recognition as subjects of international law.¹⁵⁸

It can of course be argued that these networks and mechanisms wield little or no real power and constitute mere talking shops,¹⁵⁹ and Slaughter has certainly described them as ‘haphazard’ and ‘chaotic.’¹⁶⁰ Nevertheless they demonstrate that the international community has moved well beyond thinking of international law only in terms of the subject-object dichotomy. The bigger problem of course, is that while business actors have been invited to the regulatory ‘table,’ States and the international organisations they dominate have chosen not to impose obligations on them.

2.4 Conclusion

Mendelson has written that:

‘[I]nternational law remains, as it has always been, essentially a law between States, and it is on States that its obligations fall. This is empirically true as a matter of both historical and contemporary fact.’¹⁶¹

This chapter argues that such an analysis is wrong. While it may have been true a century ago that ‘international lawyers could content themselves with the proposition that ‘States are the only subjects of international law’¹⁶² it is certainly no longer the case. Rather international law has always recognised that certain non-State actors may be bound by international legal obligations.¹⁶³ The law is not static and it is clear that, in any event, adherence to a State-only system of international obligations is undesirable and morally

¹⁵⁷ Discussed at Chapter 4 *infra*.

¹⁵⁸ S.Deva, ‘Global Compact: A Critique of the UN’s ‘Public-Private’ Partnership for Promoting Corporate Citizenship’ 34 *Syracuse J. Int’l L. & Com.* 107-151 (2006) at 109.

¹⁵⁹ See e.g. the EU Multistakeholder Forum discussed in Chapter 6 *infra* at Section 6.3.

¹⁶⁰ Slaughter note 147 at 1065.

¹⁶¹ Response by Professor Maurice Mendelson, Responses to the Norms Consultation note 6 at para. 17.

¹⁶² O’Connell note 28 at 80.

¹⁶³ Oppenheim note 22 at 16.

repugnant in a progressively globalised world. An international legal order which privileges ‘the interests of States or ruling elites over those of humanity as a whole’¹⁶⁴ simply ‘cannot be the way the world was meant to be.’¹⁶⁵

¹⁶⁴ Scobbie note 98 at 170.

¹⁶⁵ P.Allott, ‘Review Essay Symposium: Philip Allott’s *Eunomia* and The Health of Nations Thinking Another World: ‘This Cannot Be How the World Was Meant to Be’ An event to mark the retirement of Professor Philip Allott, Professor of International Public Law,’ University of Cambridge, 28–29 May 2004, 16 EJIL 255 (2005) at 260.

Chapter 3

Business and Human Rights: The Case for a New Horizontality

*Globalization...has created powerful non-State actors that may violate human rights in ways that were not contemplated during the development of the modern human rights movement. This development poses challenges to international human rights law, because, for the most part, that law has been designed to restrain abuses by powerful states and state agents, not to regulate the conduct of non-state actors....*¹

3.0 Introduction

*Given their importance in the world, it is really remarkable that corporations have not received more attention in the evolution of international law, particularly international human rights law.*²

Since their creation, human rights have protected the individual from the excesses of the State as mediated through governments. Thus, human rights apply vertically between individuals and the States rather than horizontally between individuals and private actors. This has been the position since the establishment of a human rights paradigm after the Second World War and continues to the present day.³ Thus under international law currently it is States alone that bear mandatory duties and obligations to protect the individual from human rights violations. In a globalised world, however, and as argued in Chapter 1, it is clear that private actors, specifically business actors pose a direct threat to individuals by abusing human rights, even if it is not always intended.⁴ As Geoffrey Chandler, a former director of Shell Petroleum, as well as the founder of Amnesty International's Business Group and CSR pioneer, put it:

The corporate world touches the lives of people more closely than any other constituency, giving it immense potential for good or harm. To...the wealthy beneficiaries in a wealthy country, its benefits are obvious. It also brings significant

¹ D.Shelton, 'Protecting Human Rights in a Globalized World' 25 Boston College Int'l & Comp. L. Rev. 273-322 (2002) (hereinafter 'Shelton (2002)') at 279.

² D.Weissbrodt, 'Business and Human Rights' 74 Univ. of Cincinnati L. Rev. 55-73 (2005) (hereinafter 'Weissbrodt (2005)') at 59.

³ For a history of the development of international human rights law see e.g. H.Steiner, P.Alston & R.Goodman, *International Human Rights Law in Context: Law Politics Morals* (3rd ed.) (OUP: Oxford, 2007) (hereinafter 'Steiner, Alston & Goodman') at 58-133. See also M.Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkley: University of California Press, 2008).

⁴ Infra Sections 1.2 and 1.3. See also Note, 'Organizational Irrationality and Corporate Human Rights Violations' 122 Harvard Law Review, 1931-1952 (2009) for an interesting explanation of why some business actors violate human rights often without intending to do so.

benefits to the developing world through investment, employment, technology, skills and access to markets. But together with these benefits has come collateral damage – to individuals, to the environment, to communities. Whether directly or indirectly, companies encounter problems which we would now classify under the generic heading of human rights. In their supply chains they can meet exploitative child labour, discrimination, risks to health and life, forced labour. The extractive industries can be involved in the spoliation of the environment and the destruction of communities. In contexts of conflict and human rights violations they confront a need for security which is too often provided by ill-disciplined state security forces.⁵

Many commentators ascribe intention to commercial actions which violate human rights, citing the profit motive as key. Stephens argues that there ‘is tremendous profit to be made from abusive behavior’ because ‘in the absence of effective regulation, corporations often seek to maximize profit at the expense of basic rights.’⁶ Irrespective of the intent behind human rights violations, this chapter seeks to explain why mandatory rules are necessary.

Chapter 1 of this dissertation highlighted numerous specific examples of such abuses, which can be classified in different groups.⁷ Steven Ratner categorises three different ways in which businesses can be involved in human rights violations. Firstly, situations where ‘governments have neither the interest nor the resources to monitor corporate behaviour.’⁸ He cites Freeport-McMoRan in Irian Jaya and Texaco in Colombia as ‘extreme cases’ where ‘those entities exercise significant power in certain regions, often with little interference by the government.’⁹ Secondly, he uses the example of South Africa during apartheid to illustrate a situation where the State ‘uses various corporate resources in its own abuses of human rights.’¹⁰ Thirdly, he argues that the increased internationalisation of business activities and business actors has encouraged ‘bottom-feeding’ whereby the pursuit of ‘fewer regulatory burdens, including human rights

⁵ G.Chandler, Keynote Speech, JUSTICE/Sweet & Maxwell conference, ‘Corporate Liability: Human Rights and the Modern Business,’ 12th June 2006 at 1 <http://www.reports-and-materials.org/Chandler-keynote-address-Justice-12-Jun-2006.doc> [last accessed 6.7.11].

⁶ B.Stephens, ‘Corporate Liability: Enforcing Human Rights Through Domestic Litigation’ 24 *Hastings Int'l & Comp. L. Rev.* 401 (2001) at 401.

⁷ *Infra* at Section 1.3.1 in particular Table 1 and Table 2.

⁸ S.Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ 111 *Yale. L. J.* 443-545 (2001) (hereinafter ‘Ratner’) at 462.

⁹ Ratner *ibid*.

¹⁰ Ratner *ibid* at 462-463.

regulations' has become an important goal for many transnational businesses.¹¹ This dissertation focuses on the first and third categories.

Given the wealth of information in the public domain disseminated by NGOs and the media, the proliferation of court cases in various jurisdictions, as well as the emergence of numerous international initiatives addressing the problem (examined in Chapters 4, 5 and 6 of this dissertation), it is now impossible to deny that horizontal violations of human rights by business actors occur on a regular basis or to contest that they involve serious and often life-threatening abuses. As Steiner, Alston and Goodman point out, this raises important questions about accountability:

For human rights proponents the growth of corporate power raises the question of how to ensure that the activities of transnational corporations in particular are consistent with human rights standards and of how to promote accountability when violations of those standards occur.¹²

Clearly in such circumstances the international community ought not to be able to indulge in its historical 'tendency to look the other way'¹³ and this dissertation argues that it should look to establishing mandatory duties for business actors in relation to human rights, given the limited achievements of voluntary initiatives over the past couple of decades discussed in this and subsequent chapters.

The problem is simply that the international community still remains unwilling to extend the reach of human rights to private actors by responding to the actual horizontality through legal horizontality, hence the continued reliance on self-regulation via codes of conduct and voluntary projects.

Regulatory capture of such behaviour does not require great legal contortions, however, nor does it threaten the fabric of the international legal order, indeed, Chapter 2 illustrated clearly that international law already applies to business actors in a variety of circumstances. Muchlinksi, while believing that the bad behaviour by business actors is

¹¹ Ratner *ibid* at 463.

¹² Steiner, Alston & Goodman note 3 at 1388.

¹³ Weissbrodt (2005) note 2 at 55.

overstated, nevertheless seems to agree that there is a need to put in place binding regulatory measures pointing out that:

It is not difficult to create technical legal solutions to the question of corporate responsibility for human rights violations. The real issue is whether the political will exists to put them in place.¹⁴

It is this latter point which is, as is so often the case, a stumbling block but one which needs addressing urgently.¹⁵ For as Steiner, Alston and Goodman also state, ‘a human rights regime which addresses itself effectively only to states will become increasingly marginalized in the years ahead.’¹⁶ Various commentators believe that horizontality is both achievable and desirable, although they do not necessarily describe the proposition in terms of vertical and horizontal duties.¹⁷

For example, Ratner argues that horizontality is easily attainable and sums it up neatly, stating that non-State actors such as business enterprises ‘may pose a threat to human dignity - either acting with the state or alone - so that any contemporary notion of human rights must contemplate duties on those entities as well.’ Ratner was writing a decade ago and as will be demonstrated, contemplation of businesses as dutyholders has been superficial in the extreme in the years since. Furthermore, Ratner contends that recognition of such duties can be achieved by simple extension of the scope of existing human rights standards, writing that ‘[t]his step does not entail the recognition or development of new human rights’ rather ‘it requires the identification of new

¹⁴ P.T.Muchlinski, ‘Human Rights and Multinationals: Is There a Problem?’ 77 Int’l Affairs 31-47 (2001) (hereinafter ‘Muchlinski (2001)’) at 47.

¹⁵ See discussion *infra* at Section 3.2.1.1 regarding the lack of political will being the reason for the failure of the UNCTC Draft Code on Transnational Corporations and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.

¹⁶ Steiner, Alston & Goodman note 3 at 1383.

¹⁷ See for example the work of David Weissbrodt. Weissbrodt (2005) note 2; D.Weissbrodt, ‘International Standard-Setting on the Human Rights Responsibilities of Businesses’ 26 Berkeley J. Int’l L. 373-391 (2008) (hereinafter ‘Weissbrodt (2008)’); D.Weissbrodt & M.Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ 97 AJIL 901 (2002) (hereinafter (Weissbrodt & Kruger’). See also H.Koh, ‘Separating Myth from Reality About Corporate Responsibility’ *Litigation* 7 J. of Int’l Economic L. 263-274 (2004) here Koh argues for an international treaty; S.Deva, ‘UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in Right Direction?’ *Beppress Legal Series, Working Paper no.112* (2004) <http://law.bepress.com/cgi/viewcontent.cgi?article=1270&context=expresso&sei-redir=1#search=%22norms%20business%20human%20rights%22> [last accessed 15.7.11] (hereinafter ‘Deva’); J.Campagna, ‘United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers’ 37 J. Marshall L. Rev. 1205 (2003-204) (hereinafter ‘Campagna’).

dutyholders.¹⁸ Thus creating new subjects of international law as envisioned in Chapter 2 of this dissertation but also imposing something beyond a simple ‘cut and paste’ of human rights obligations. He elaborates:

the notion of corporate duties represents a departure from the emphasis on the state as dutyholder and seeks to justify that new direction. That position starts from a jurisprudential premise - that the rights of individuals give rise to not only a variety of duties but also a variety of dutyholders.¹⁹

His argument is rooted firmly in the work of Joseph Raz who has concluded that:

there is no closed list of duties which correspond to to the right...A change of circumstances may lead to the creation of new duties based on the old right.²⁰

Thus it is possible for existing human rights norms to apply to the ‘new’ dutyholders.

Furthermore, Raz argues that:

...one may know of the existence of a right...without knowing who is bound by duties based on it or what precisely are these duties.²¹

On this analysis, States cannot argue that human rights obligations apply only to a closed category of dutyholders and business actors cannot feign ignorance of a duty in order to escape responsibility for human right violations. Raz seems to be saying that the existence of the right is key rather than any specific awareness of duties imposed by it, therefore, the traditional verticality of human rights norms becomes irrelevant.

3.1 The Lack of Political Will to Create a Legal Horizontality

But what of Muchlinski’s concern about the lack of international political will to enshrine a new human rights horizontality within a binding legal framework? Lack of resolve on the part of governments,²² supported at every turn by the international business community, rather than legal impediment prevents the implementation of formal accountability

¹⁸ Ratner note 8 at 469.

¹⁹ Ratner *ibid* at 468.

²⁰ J.Raz, *The Morality of Freedom*, (Oxford: Clarendon Press, 1986) at 171.

²¹ Raz *ibid* at 184.

²² Muchlinski (2001) note 14 at 47.

mechanisms at the international level exemplified by the failure of the UNCTC Draft Code of Conduct and the UN Norms project analysed later in this chapter.²³

Of course such reticence to regulate and enforce human rights is not limited to the sphere of business actors. Lack of enforcement of human rights norms against States is a perennial and overwhelming problem for the international community and there is a genuine fear that by focusing on human rights violations by business actors, it will detract from egregious behaviour by many States.²⁴ It is therefore extremely important that regulation of business actors does not take place at the expense of enforcement of human rights standards against States. This is something that has been reiterated frequently by SGSR Ruggie on numerous occasions, by States and by commentators.²⁵ It is axiomatic that the vast majority of human rights abuses are perpetrated by States or those seeking to represent the State, one need only look at the contemporary situations in, for example,

²³ Sections 3.2.1.1 and 3.2.1.2 respectively.

²⁴ See e.g. State responses referred to and attached to the Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, E/CN.4/2005/91, 15 February 2005, http://www.business-humanrights.org/Categories/UNintlorgs/UNintergovernmentalorgs/UN/SubmissionstoUN-2004consultation-businesshumanrights?sort_on=sortable_title&batch_size=10&batch_start=11 [last accessed 26.10.11] (hereinafter 'Report of the UNHCHR'). Members of civil society, including NGOs, trade unions and academics, as well as individual business actors and business organisations also made submissions to the UNHCHR.

²⁵ See e.g. *ibid*; Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie A/HRC/8/5 7 April 2008 <http://198.170.85.29/Ruggie-report-7-Apr-2008.pdf> [last accessed 31.8.11] (hereinafter 'Protect, Respect and Remedy (2008)') at paras 9 and 18.

Burma (Myanmar),²⁶ Sudan,²⁷ Iran,²⁸ Russia²⁹ or North Korea³⁰ to witness States engaging in extra-judicial killings, torture, forced labour, erosion of basic freedoms including curtailing political participation and detention without trial. Industrialised nations fare no better. The USA is subject to ongoing accusations of major human rights abuses in relation to, for example, ‘extreme criminal punishments’ and counterterrorism.³¹ Likewise, the UK has been held liable for human rights violations arising from its counterterrorism activities in relation to indefinite detention of terrorist suspects and allegations of torture.³²

Notwithstanding the appalling behaviour of some States, the international community would be remiss if it were to simply ignore the actions of business actors. If human rights are universal, then it does not matter who violates them and regulation of business actors ought to run parallel to States’ international human rights obligations, not as a replacement. It sends out a very negative message when States, including permanent members of the UN Security Council, do nothing to reign in the worst human rights excesses of their corporate nationals. There needs to be a move away from the traditional vertical application of

²⁶ Human Rights Watch, ‘World Report 2011: Burma,’ January 2011 <http://www.hrw.org/en/world-report-2011/burma> [last accessed 7.7.11] at 1.

²⁷ US Department of State, ‘2010 Human Rights Report: Sudan,’ Bureau of Democracy, Human Rights and Labor, 2010 Country Reports on Human Rights Practices, April 8, 2011 <http://www.state.gov/documents/organization/160477.pdf> [last accessed 7.7.11] at 1.

²⁸ Human Rights Council Sixteenth session, Interim report of the Secretary-General on the situation of human rights in Iran, A/HRC/16/7514 March 2011 http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.75_AUV.pdf [last accessed 23.8.11] at para.55. On 24 March 2011, the Human Rights Council voted in favour of creating a Special Rapporteur on the on situation of human rights in Iran. Human Rights Council Resolution, Situation of human rights in the Islamic Republic of IranA/HRC/RES/16/9, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/125/34/PDF/G1112534.pdf?OpenElement> [last accessed 7.7.11].

²⁹ Amnesty International, ‘World Report 2011: The State of the World’s Human Rights - Russian Federation,’ http://files.amnesty.org/air11/air_2011_full_en.pdf [last accessed 7.7.11] 270-273 at 270.

³⁰ Human Rights Council Resolution, Situation of human rights in the Democratic People’s Republic of Korea, 8 April 2011, A/HRC/RES/16/8 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/125/27/PDF/G1112527.pdf?OpenElement> [last accessed 7.7.11].

³¹ Human Rights Watch, ‘World Report 2011: United States of America,’ <http://www.hrw.org/en/world-report-2011> [last accessed 7.7.11] 609-624 at 609.

³² See for example *A. and Others v. Secretary of State for the Home Department* [2004] UKHL 56 <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm> [last accessed 23.8.11]. See also the decisions of the Grand Chamber of the European Court of Human Rights in *Al-Jedda v. United Kingdom* (application no. 27021/08) ECtHR 7 July 2011 and *Al-Skeini and Others v. United Kingdom* (application no. 55721/07) ECtHR 7 July 2011. In *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin) (21 August 2008) the English High Court concluded in response to allegations of UK involvement with torture that, ‘by seeking to interview BM in the circumstances described and supplying information and questions for his interviews, the relationship of the United Kingdom Government to the United States authorities in connection with BM was far beyond that of a bystander or witness to the alleged wrongdoing, paras 87-88.

human rights towards a horizontal and more people-centred approach, as opposed to one where remedies are available only if the victim is ‘lucky’ enough to have experienced vertical abuse.

To that end, Chapter 3 argues for direct and binding application of substantive international human rights obligations to commercial entities i.e. horizontality. This is *not* a plea for business to ‘solve all of the world’s problems’ single-handed.³³ It is acknowledged that the *primary* legal obligation to protect human rights rests with States and this is of course recognised in key international instruments including the UN Charter³⁴ and the ICCPR³⁵ as well as in other UN business and human rights initiatives such as the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights³⁶ and the UN Guiding Principles (GPs) approved by the UN Human Rights Council in June 2011.³⁷ (Situations where the State is complicit in the human rights violations is outside the scope of this dissertation and while it will be referred to on occasion in general terms, it will not be addressed in detail. The focus is on the stand alone, most severe violation of human rights by business actors because this is the area where there is least regulation.³⁸) The Guiding Principles do not go far enough, however, because they do not *oblige* businesses to respect human rights, rather they *encourage* business actors to respect human rights standards. This is in direct contrast to earlier attempts to regulate the behaviour of transnational business actors, most notably the UNCTC Draft Code and the Norms, both of which intended to create mandatory rules on

³³ Keynote speech by the Chief Legal Counsel for Royal Dutch/Shell at the International Law Association’s 69th Conference, 26 July 2000, ‘Foreign Investment, Human Rights and Development: Integration or Fragmentation?’ [on file with author].

³⁴ Charter of the United Nations USTS 993 (1945) <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> [last accessed 23.10.11] Arts 1, 2, 55 and 56.

³⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171, entered into force Mar. 23, 1976, Preamble and Art.2.

³⁶ UN Norms on the Responsibility of Transnational Corporations and Other Business Entities with Regards to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26th August 2003 (hereinafter ‘Norms’).

³⁷ Human Rights Council Resolution 17/4, Human rights and transnational corporations and other business enterprises, 15 June 2011 A/HRC/17/L.17/Rev.1 (adopted 16 June 2011) <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G11/141/87/PDF/G1114187.pdf?OpenElement> [last accessed 8.7.11].

³⁸ For a discussion of complicity see e.g. A.Clapham, ‘On Complicity’ in M.Henzelin & R.Roth, (eds), *Le droit penal à l’épreuve de l’internationalisation*, (Paris: LGDJ, Genève: Georg, Bruxelles: Bruylant, 2000) 241-274; A.Clapham & S.Jerbi, ‘Categories of Corporate Complicity in Human Rights Abuses’ 24 *Hastings Int’l & Comp. L. Rev.* 339-350 (2001); M.Mafessanti, ‘Corporate Misbehaviour and International Law: Are there Alternatives to Complicity?’ 6 *S.C. Journal of Int’l L. & Bus.* 167 (2010).

some level. Chapter 3 therefore examines these early UN attempts at regulation as well as expanding on the work of the UN Special Representative on business and human rights, John Ruggie and his Guiding Principles referred to in Chapter 1. Furthermore it argues against the public/private divide in the human rights sphere in relation to business actors, suggesting instead that international human rights law already applies to business actors and if it does not, then human rights duties ought to be imposed on them. Finally, this chapter considers briefly which human rights ought to give rise to duties for business actors and concludes that it is not necessary to elaborate every individual applicable human right.

3.2 Early UN Attempts at Regulating Business in Relation to Human Rights

3.2.1 The International Labour Organisation's Tripartite Declaration, the UN Commission on Transnational Corporations Draft Code and the Norms on the Responsibility of Transnational Corporations and Other Business Entities with Regards to Human Rights

For nearly forty years, the UN has attempted to address the problems posed by errant transnational business enterprises and to that end numerous diverse projects were undertaken with varying degrees of success. This section, focuses on the historical role of the Draft Code of the UN Commission on Transnational Corporations (UNCTC)³⁹ and the UN Sub-Commission on the Protection and Promotion of Human Rights' Norms.⁴⁰ In addition to the Draft Code and the Norms there were also early attempts by the international community to regulate business behaviour through the efforts of the UN's specialized agency, the International Labour Organisation (ILO) beginning in the mid-1970s and which operated in parallel with the UNCTC.⁴¹

While this section does not examine the ILO in detail, it is, however, noteworthy for its tripartite structure, which involves States, employers and labour, thereby deviating from the state-centric norm of international law and which importantly is reflected in later

³⁹ The UNCTC was established by ECOSOC as an advisory body. ECOSOC resolution 1913 (LVII) E/RES/1913 (LVII) of December 5, 1974.

⁴⁰ Norms note 36.

⁴¹ Around the same time the OECD also began its efforts to regulate corporate behaviour through its Guidelines for Multinational Enterprises 15 ILM 961-980 (1976) which are discussed in greater detail in Chapter 6. The 2000 Revision can be found at 40 ILM 237 (2001). The 2011 Guidelines updated on 25 May 2011 can be found at <http://www.oecd.org/dataoecd/43/29/48004323.pdf> [last accessed 24.8.11].

initiatives in the business and human rights sphere.⁴² Albeit non-binding, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ‘invites governments of State Members of the ILO, the employers’ and workers’ organizations concerned and the multinational enterprises themselves’ to ‘observe’ the principles enshrined within it.⁴³ Shelton comments that ‘regulation is made easier by the participation of labor and business in the law-making and supervisory procedures of the ILO’⁴⁴ i.e. a multistakeholder approach. As a clear example of a multistakeholder initiative involving all relevant actors, arguably the Declaration provided a template of best practice for other projects such as the Global Compact, addressed in Chapter 4. While the Declaration is limited to workers’ rights, and does not extend to other human rights, it is nevertheless significant because it recognises that business entities have the power to violate international standards and thus seeks to regulate that power, albeit voluntarily, as well as accepting the appropriateness of asking them to adhere to those international standards. This dissertation is focused on more general regulatory attempts in relation to human rights.

Starting with the UNCTC’s endeavours during the 1970s and continuing into the twenty-first century with the Norms project of the Sub-Commission for the Promotion and Protection of Human Rights, these UN attempts at regulatory capture sought the creation of a treaty-based apparatus for the enforcement of human rights obligations against business enterprises but both resulted in a failure to agree on a unified approach to CSR

⁴² ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 17 ILM 422 (1978) adopted by the Governing Body of the International Labour Office at its 204th Session, Geneva, November 1977, 41 ILM 186 (2002). Article 7 of the Constitution of the International Labour Organisation, 1 April 1919, <http://www.ilo.org/ilolex/english/iloconst.htm> [last accessed 26.10.11], sets out the tripartite structure involving states, employers and labour.

⁴³ Tripartite Declaration *ibid.* Developing states ‘pressed for an ILO conference which could adopt a binding international code for MNEs’ although ultimately the non-binding Tripartite Declaration was settled upon after representations by the corporate sector, P.T.Muchlinski, *Multinational Enterprises and the Law* (2nd ed.) (OUP: Oxford, 2007) (hereinafter ‘Muchlinski (2007)’) at 474-475.

⁴⁴ Shelton (2002) note 1 at 281.

standards and ultimately the projects collapsed, albeit for different reasons.⁴⁵ Initially at least it seems that the UN (or more accurately its constituent members) was unable or unwilling to put in place a credible device for the application of human rights obligations to business enterprises.

3.2.1.1 UNCTC: A Code of Conduct for Transnational Corporations

Looking back at the story of the UNCTC, it is clear that all of what would be considered modern and familiar CSR issues were deliberated during the drafting of its putative Code of Conduct for TNCs i.e. voluntarism versus legally binding measures; addressees (should the Code apply to States alone, to TNCs alone or to both?); monitoring and sanctions. Ultimately it was decided that in the absence of any kind of agreement, the Draft Code should be ‘an instrument of moral persuasion’ rather than a binding document and a treaty-based option was abandoned early on in the process.⁴⁶ Notwithstanding this, commentators such as Rubin took the view that even a non-binding Code could be effective and observed by business actors to the same extent as mandatory norms.⁴⁷

State involvement with the UNCTC was highly politicised, with regional and economic groupings disagreeing fundamentally.⁴⁸ Developing nations in particular objected to TNCs

⁴⁵ For an overview of the work of the UNCTC and the Draft Code see Muchlinski (2007) note 43 at 119-120 and 660-662; T.L.Brewer & S.Young, *The Multilateral Investment System and Multinational Enterprises*, (Oxford: OUP, 1998) at 88 et seq. For more on the UNCTC see S.J.Rubin, ‘Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development’ 10(4) Am. U. J. Int. L. & POL’Y 1275-1289 (1995) (hereinafter ‘Rubin (1995)’ at 1276; P.Hansen & V.Aranda, ‘An Emerging International Framework for Transnational Corporations’ 14 Fordham Int’l L. J. 881-891 (1990). On the UNCTC and the Norms see S.MacLeod, ‘The United Nations, Human Rights and Transnational Corporations: challenging the international legal order,’ in N.Boeger, C.Villiers & R.Murray, (eds), *Perspectives on Corporate Social Responsibility*, (Edward Elgar Publishing: Cheltenham, 2008 at 64-84; On the Norms see Weissbrodt (2008) note 17; Weissbrodt & Kruger note 17, Deva note 17; Campagna note 17; See also e.g. D.Kinley, J.Nolan & N.Zerial, ‘The Norms are dead! Long live the Norms! The politics behind the UN Human Rights Norms for Corporations’ in D.McBarnet, A.Voiculescu & T.Campbell, (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 459-475 (hereinafter ‘McBarnet, Voiculescu & Campbell’ and ‘Kinley, Nolan & Zerial (2007a)’); D. Kinley, J. Nolan & N. Zerial, ‘The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations’ (2007) 25 Companies and Securities Law Journal 30 (hereinafter ‘Kinley, Nolan & Zerial (2007b)’).

⁴⁶ ECOSOC, *Report of the Group of Eminent Persons on the Impact of MNC on the Development Process and International Relations* (New York, UN, 1974) at 55.

⁴⁷ Rubin (1995) note 45 at 1276. See also UN Commission on Transnational Corporations, ‘Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature,’ U.N. Doc. EIC.10/AC.2/1978/9 (1978).

⁴⁸ Rubin (1995) ibid at 1285-1286.

in principle, seeking to protect their fledgling sovereignty via regulation, while the developed, industrialised nations perceived the Draft Code as a constraint on business activities and therefore resisted its implementation. Writing at the time, Hellman noted that ‘the developing countries are not willing at this point to renounce part of their newly gained sovereignty to promote control over multinational corporations.’⁴⁹ Steven Ratner explains further:

...host states sought to reign in the power of TNEs by drafting a multinational code of conduct for transnational corporations. This goal had for a long time been a part of the agenda of socialist political leaders in both the North and South. It received its primary impetus from the revelations about United Fruit Company’s and International Telephone and Telegraph’s roles in destabilizing, respectively, the governments of Guatemala in the 1950s and Chile in the early 1970s.⁵⁰

Thus it is significant that the UNCTC acknowledges the power and influence of TNCs in its founding documents. One of its key objectives was:

To secure effective international arrangements for the operation of transnational corporations designed to promote their contribution to national development goals and world economic growth while controlling and eliminating their negative effects.⁵¹

To that end the UNCTC undertook the creation of a Draft Code of Conduct on Transnational Corporations as a ‘priority’⁵² at its first session in 1975.⁵³ Throughout the 1970s and 1980s attempts were made to complete the Code⁵⁴ with the most recent version

⁴⁹ R.Hellman, *Transnational Control of Multinational Corporations* (New York, Praeger, 1977).

⁵⁰ Ratner note 8 at 457.

⁵¹ Commission on Transnational Corporations, Report on the Second Session, 1-12 March 1976 (E/5782; E/C.10/16 Economic and Social Council Official Records, 61st Session Supplement No.5) at 2, para.6(b).

⁵² Muchlinski (2007) note 43 at 660; Rubin (1995) note 45 at 1282.

⁵³ Commission on Transnational Corporations, Report on the First Session 17-28 March 1975 (E/5655; E/C.10/6 Economic and Social Council Official Records 59th Session Supplement No.12) at 2 para. 9.

⁵⁴ See S.Joseph, ‘An Overview of the Human Rights Accountability of Multinational Enterprises,’ in M.Kamminga & S.Zia-Zarifi, *Liability of Multinational Corporations under International Law*, (The Hague/London/Boston: Kluwer Law International, 2000) (hereinafter ‘Joseph’ and ‘Kamminga & Zia-Zarifi’) 75-93 at 84; P.Muchlinski, ‘Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD,’ in Kamminga & Zia-Zarifi 97-117 (hereinafter ‘Muchlinski (2000)’) at 101 (see footnote 12 at 101 for details of the intervening meetings). A putative first draft of the Code was presented at the eighth session of UNCTC in 1982 but it has been criticised by P.T.Muchlinski, *Multinational Enterprises and the Law* (Blackwell: Oxford, 1999) (hereinafter ‘Muchlinski (1999)’) as being an ‘incomplete document’ at 593. Commenting that ‘no drafting had been done on the ‘preamble and objectives’ and that there was considerable disagreement about the substantive content of the Code.

appearing in 1990.⁵⁵ From the outset there was no objection in principle to imposing obligations on TNCs on the basis that they could not be subject to international legal duties and the Draft Code included numerous obligations, including a human rights obligation. As Muchlinski notes, the Draft Code had its roots in the movement towards the New International Economic Order (NIEO) promulgated by the G77 nations and it became apparent that the political problems which plagued the progress of the NIEO spilled over into the UNCTC and led to its ultimate demise.⁵⁶ In particular there was considerable disagreement:

over whether the Code should be addressed only to TNCs, as desired by the Group of 77, or whether it should also extend to the treatment of TNCs by host governments, as desired by the major capital exporting countries. Ultimately the capital-exporting countries succeeded...Thereafter the Draft Code would consist of two main parts: the first on the activities of TNCs, the second on the treatment of TNCs.⁵⁷

Rubin describes the initial meetings in rather colourful terms writing that ‘the first...sessions of the UNCTC turned consideration of a sensible and moderate Group of Eminent Persons report [on TNCs] into a forum for a shouting match.’⁵⁸

Throughout the subsequent process, the G77 group expressed considerable disquiet about TNC activity including *inter alia* preferential treatment demanded by TNCs, political interference, arms trafficking, obstruction of access to technology and a ‘lack of respect of the socio-cultural identity of host countries.’⁵⁹ There was also substantial disagreement

⁵⁵ Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990.

⁵⁶ Muchlinski (1999) note 54 at 593. See also Joseph note 54 at 84.

⁵⁷ Muchlinski (2000) note 54 at 100.

⁵⁸ Rubin (1995) note 45 at 1276. Rubin is referring to is the ECOSOC, *Report of the Group of Eminent Persons on the Impact of MNC on the Development Process and International Relations* (New York, UN, 1974).

⁵⁹ Commission on Transnational Corporations, Report on the Second Session, 1-12 March 1976 (E/5782; E/C.10/16 Economic and Social Council Official Records, 61st Session Supplement No.5) 21, Annex 1 ‘List of Areas of Concern Regarding the Operations and Activities of Transnational Corporations, Note Submitted by the Group of 77.’ Unsurprisingly this attitude was supported by the Soviet Bloc countries, at 26, Annex III, ‘Issues Requiring the Attention of the Commission and the Information and Research Centre on Transnational Corporations.’ Note submitted by the People’s Republic of Bulgaria, the German Democratic Republic, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics.

surrounding the ever contentious issue of compensation for expropriation.⁶⁰ It is clear then that this grouping saw the proposed Code ‘as a means of subjecting the activities of TNCs to greater regulation’ which supports the assertion that there was no general objection to TNCs being subjects of international law, supporting the argument made previously in Chapter 2. In contrast, the industrialised, capital-exporting nations sought to ‘use the Code primarily as a means of protecting TNCs against discriminatory treatment contrary to the international minimum standards accepted by these states.’⁶¹ The industrialised states were keen to confer rights on TNCs and again, the mere fact that states were attempting to ensure the imposition of international standards, no matter their content, indicates that there was no apparent opposition to TNCs being treated as subjects of international law, again reinforcing the conclusions reached in Chapter 2. Thus the Draft Code included specific obligations for TNCs to respect human rights.

In terms of substantive content, however, the 1990, and final, version of the Draft Code’s human rights provision was meagre and generalised:

Respect for human rights and fundamental freedoms

14. Transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations shall conform to government policies designed to extend equality of opportunity and treatment.⁶²

This obligation was not elaborated upon save for subsequent specific provisions relating to the prohibition of activities which supported apartheid and incorporation of the ILO’s

⁶⁰ The Code settled on the ‘adequate’ standard for compensation for expropriation which reflects the Hull Formula of ‘prompt adequate and effective’ compensation favoured by industrialised nations as opposed to the ‘appropriate’ standard preferred by developing states. UNGA Resolution 1803 (XVII) 1962 on Permanent Sovereignty over Natural Resources and UNGA Resolution 3281 (XXIX) 1974 the Charter of Economic Rights and Duties of States both refer to the ‘appropriate’ standard although there was disagreement as to whether it should be a binding obligation. The tension between the different viewpoints is evident in e.g. *Texaco Overseas Petroleum Company v. Libyan Arab Republic* 53 ILR 389 (1977).

⁶¹ Muchlinski (1999) note 54 at 593. See also in relation to the Draft Code, Report of the Second Session 1976, note 59 at 23 Annex II, ‘Areas of Concern Which Relate to Relations Between Transnational Corporations and Governments.’ Note submitted by the delegations from France, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

⁶² Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990 para. 14.

Tripartite Declaration into the Code.⁶³ Nevertheless, a clear duty was set out for TNCs to respect human rights, notwithstanding the eventual decision that that Draft Code would be non-binding nature if it ever came to fruition.

Even if the Draft Code had been implemented, binding or not, its enforcement provisions were relatively weak, and redundant ultimately in the absence of state adoption. In essence, disputes were required to be settled at the domestic level and this included governments acting on behalf of corporate nationals. Nonetheless, a periodic assessment reporting mechanism was also proposed, a classic device used in relation to States under international human rights instruments, and which again suggests no principled objection to TNC's being treated in a similar way to states in international law.⁶⁴

By 1992, however, efforts had reached a stalemate and Joseph concludes that 'the code concept was abandoned due to its apparent ambitiousness and irreconcilable North / South differences.'⁶⁵ Hillemanns agrees, writing that the 'project proved too ambitious in trying to set up an overarching regulation of the activities of transnational corporations and their relationships with host governments.'⁶⁶ Peter Muchlinski points to the political difficulties that stymied the Draft Code asserting that '[i]n the international arena, the fears generated by calls for a New International Economic Order on the part of LDCs led to a reaction by developed nations.'⁶⁷

⁶³ Ibid paras 15 and 25 respectively. Paragraph 15 purported to prohibit TNCs from 'operations and activities' which supported the apartheid regime in South Africa.

⁶⁴ Paragraphs 57, 58 and 69 respectively. Under the Code, the UN Commission on TNCs was to assume an institutional role (para.67). The Commission was given the power to 'Periodically to assess the implementation of the Code, such assessments being based on reports submitted by Governments and, as appropriate, on documentation from United Nations organizations and specialized agencies performing work relevant to the Code and non-governmental organizations represented in the Commission.' (para.69(b)) It was also to perform a clarification function by virtue of para.69(c).

⁶⁵ Joseph note 54 at 84. See also J.A.Zerk, *Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 246.

⁶⁶ C.F.Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' 4 German L.J. 1065-1080 http://www.germanlawjournal.com/pdfs/Vol04No10/PDF_Vol_04_No_10_1065-1080_European_Hillemanns.pdf [last accessed 13.7.11] at 1066.

⁶⁷ Muchlinski (2007) note 43 at 10-11. See also Hillemanns ibid at 1066.

This reaction manifested itself in a shift in focus by the UNCTC which reflected the neo-liberal economic concerns of the capital-exporting nations and the interests of business.⁶⁸ There was still a state-centric focus, although it was more about protection of the principle of state sovereignty than the issue of TNCs as subjects of international law. By 1994, the UNCTC was absorbed into UNCTAD and this effectively ended any possibility of using the Code as a mechanism to control human rights abuses by business actors as priorities changed and the focus shifted towards the arguably ‘positive impacts of FDI and TNCs on development’ and away from ‘controlling the political and economic activities of TNCs.’⁶⁹

The reasons for the demise of the UNCTC and its perceived failings, differ little from those of the Norms just a few years later and appear to be as follows.⁷⁰ Attitudes emerging from the New International Economic Order, the Charter on the Economic Rights and Duties of States and the concept of Permanent Sovereignty over Natural Resources led to developing states querying the wisdom of allowing transnationals access to their territory and their natural resources in particular. The Soviet bloc countries were in favour of regulation for obvious ideological reasons. What is important here, however, is that it appears from the documentation that *at no time did any state, developed or developing, object to the idea that transnational corporations could be bound by international law*. Of course the non-binding nature of the Code influenced this but as Rubin has pointed out that a ‘generally accepted set of standards may eventually’ have had ‘as significant effect as a more formal commitment.’⁷¹ The UNCTC failed due to a lack of political agreement on how to regulate TNCs on the ground, rather than the idea that they could not be brought within the regulatory structure of international law and specifically international human rights law. The *principle* that TNCs could be subject to international law, including international human rights law, was not contested.

⁶⁸ The UNCTC publication *The ‘New Code Environment,’* expands on some of the difficulties faced in creating a globally accepted Code. UNCTC, ‘The New Code Environment,’ UNCTC Current Studies, Series A, No.16, ST/CTC/SER.A/16.

⁶⁹ UNCTAD, ‘UNCTC Evolution,’ <http://unctc.unctad.org/aspx/UNCTCEvolution.aspx> [last accessed 18.7.11].

⁷⁰ See *infra* at Section 3.2.1.2 and Chapter 4 respectively.

⁷¹ Rubin (1995) note 45 at 1286.

The overarching general preoccupation with defending State sovereignty meant that there was little objection to the notion of a legally effective, if not outright legally binding, international instrument which would apply directly to corporations and bring them to account for their actions. In particular there was no objection to human rights obligations being imposed upon TNCs but in any event the proposed enforcement and reporting mechanisms were weak.⁷² Despite the ultimate failure of the UNCTC to implement the Draft Code, its general efforts live on in the ongoing work of UNCTAD where consideration of TNCs issues is an important aspect of its work.⁷³

3.2.1.2 The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises

*...a train wreck...*⁷⁴

After the demise of the UNCTC and its Draft Code, the business and human rights movement entered its extended self-regulation phase with the emphasis on individual corporate codes of conduct and voluntary collective industry initiatives. It became increasingly clear, however, that enlightened self-regulation alone was insufficient to tackle the problem of human rights abuses committed by business. As outlined in Chapter 1, numerous allegations of corporate misbehaviour arose throughout the 1990s and involved accusations of complicity in torture and slavery as well as allegations of direct violation of other human rights standards. In particular, much publicity was given to so-called sweat-shops and the use of child labour.⁷⁵ By the end of the 1990s, the UN began

⁷² Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990.

⁷³ Eg the World Investment Reports. See e.g. UNCTAD World Investment Report 2009: Transnational Corporations, Agricultural Production and Development, (UN: New York, 2009) http://www.unctad.org/en/docs/wir2009_en.pdf [last accessed 21.8.11]; UNCTAD World Investment Report 1993: Transnational Corporations and Integrated International Production, ST/CTC/156 (UN: New York 1993) http://www.unctad.org/en/docs/wir1993_en.pdf [last accessed 21.8.11]. UNCTAD also publishes the journal Transnational Corporations. See UNCTAD, 'UNCTC Evolution,' <http://unctc.unctad.org/asp/UNCTCEvolution.aspx> [last accessed 18.7.11].

⁷⁴ Remarks by John G Ruggie, UN Special Representative for Business and Human Rights, Delivered at a Forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics Bamberg, Germany, 14 June, 2006, <http://198.170.85.29/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf> at 2 [last accessed 24.8.11]. The remarks regarding the Norms were subsequently repeated in 2007.

⁷⁵ See for example: Nike: NikeWatch <http://www.oxfam.org.au/explore/workers-rights/nike> and generally <http://www.oxfam.org.au/explore/workers-rights> [last accessed 24.8.11]; Donna Karan: *Lawsuit Accuses New York's Donna Karan of Running Sweatshops*, New York Times 8th June 2000; See generally: <http://www.business-humanrights.org/Categories/Sectors/Appareltextile>; <http://www.nosweat.org.uk/> and <http://www.cleanclothes.org> [last accessed 24.8.11].

to demonstrate a renewed interest in bringing business actors within its domain, with a specific interest in deterring them from committing breaches of human rights. Two completely contrasting responses emerged from the UN. Firstly, Kofi Annan launched the Global Compact and secondly, the Sub-Commission on the Promotion and Protection of Human Rights produced the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises.⁷⁶ As the Global Compact is an extant project it will be examined separately in more detail in Chapter 4.

3.2.1.2.1 The Emergence of the Norms

A subsidiary body of the then UN Commission on Human Rights,⁷⁷ the Sub-Commission on the Promotion and Protection of Human Rights,⁷⁸ operating under Resolution 1998/8 decided to establish a working group to examine the working methods and activities of transnational corporations.⁷⁹ This resulted in the publication in 2003 of the controversial Norms on the Responsibility of Transnational Corporations and Other Business Enterprises, with a view to their adoption by member states.⁸⁰ What is important to note is that unlike any other post-UNCTC project the Norms sought to impose international legally binding obligations upon business actors.

The Working Group endeavoured to draft a convention template which would impose human rights obligations upon business and which included a proposal for the monitoring and enforcement of those obligations. This agenda was driven by particular members of the Sub-Commission and there was intense internal debate especially in relation to the

⁷⁶ UN Global Compact <http://www.unglobalcompact.org> and the Norms note 36 respectively.

⁷⁷ Replaced by the Human Rights Council, UNGA Res. A/RES/60/251 Human Rights Council, 3 April 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/502/66/PDF/N0550266.pdf?OpenElement> [last accessed 14.7.11].

⁷⁸ Replaced by the Human Rights Council Advisory Committee which was established by Human Rights Council resolution A/HRC/5/1, Institution-building of the United Nations Human Rights Council, 8 June 2007, <http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee.htm> [last accessed 14.7.11].

⁷⁹ Resolution 1998/8 of 20 August 1998. Based on E/CN.4/Sub.2/1995/11, the report (E/CN.4/Sub.2/1996/12 and Corr.1) submitted by the Secretary-General in accordance with its resolution 1995/31 of 24 August 1995 and the background document (E/CN.4/Sub.2/1998/6) prepared in accordance with its resolution 1997/11 concerning transnational corporations.

⁸⁰ Norms note 36.

inclusion of state-owned corporations.⁸¹ Many States viewed the imposition of rights and duties upon business enterprises as a direct challenge to the international legal status quo and as such opposed them vociferously. Accordingly the Norms were met with powerful opposition from many quarters with States such as the USA criticising the imposition of human rights obligations on companies as being contrary to international law.⁸² Others such as Norway praised the Sub-Commission for its endeavours and in particular commended the attempt to put in place *any* type of dispute settlement mechanism.⁸³

The Norms were welcomed and rejected in equal measure. Despite the non-binding character of the Norms, NGOs largely supported the initiative in principle and welcomed this attempt to ensure that business entities respect human rights standards and the move away from exclusively soft law standards via the proposed convention.⁸⁴ On the other hand, many member states, corporations and business organisations rejected the Norms as inappropriate, unworkable and erroneous and contended that they would operate contrary to the state-centric model of international law.⁸⁵ Professor David Weissbrodt, the driving force behind the Norms has noted that the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE) were ‘most forceful in trying to stop the Norms’ and ‘lobbied hard to kill the Norms.’⁸⁶

⁸¹ See Sub-Commission for the Promotion and Protection of Human Rights, Fifty-second session, Report of the sessional working group on the working methods and activities of transnational corporations on its second session, E/CN.4/Sub.2/2000/12, of 28 August 2000, [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2000.12.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.12.En?Opendocument) [last accessed 23.7.11] at paras 27 and 34-36. See also Hillemanns note 66 at 1068.

⁸² US submission to the UNHCHR for the Report of the UNHCHR note 24. For excerpts from the submissions see ‘Excerpts from submissions to United Nations consultation on business & human rights’ (submissions made available to the Business & Human Rights Resource Centre), 16 November 2004 <http://reports-and-materials.org/UN-submissions-excerpts-16-Nov-2004.doc> [last accessed 30.7.11].

⁸³ Norway’s submission *ibid*.

⁸⁴ Report of the UNHCHR note 24, Submission by Amnesty International under Decision 2004/116 on the ‘Responsibilities of Transnational corporations and related business enterprises with regard to human rights’ to the UNHCHR, 29th September 2004. AI Ref. UN 411/2004; See also the Submission by Christian Aid, Submission by Human Rights Watch and Submission by Oxfam to the UNHCHR *ibid*.

⁸⁵ Responses to the Note Verbale from the High Commissioner for Human Rights, Decision 2004/116 of 20 April 2004 ‘Responsibilities of transnational corporations and related business enterprises with regard to human rights.’ For example, see the submissions of the USA and BP. See also E/CN.4/Sub.2/2003/NGO/44 29 July 2003 ‘Joint Written Statement by the International Chamber of Commerce and the International Organization of Employers.’

⁸⁶ Weissbrodt (2005) note 2 at 70.

Given these circumstances, it is therefore not surprising that the Norms foundered and were subsequently rejected by member states at the Commission on Human Rights for procedural reasons on the basis that the Norms had ‘not been requested by the Commission and as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard.’⁸⁷

Notwithstanding this rejection, the Commission on Human Rights at its 60th session, at the behest of the UK and other states, requested that the UN High Commissioner for Human Rights (HCHR):

compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia the draft norms contained in document E/CN.4/Sub.2/2003/12/Rev.2 and identifying outstanding issues.⁸⁸

Further the High Commissioner was asked to identify ‘options for strengthening standards on the responsibilities of transnational corporations...with regard to human rights’ after consideration of existing standards (including the Norms) and extensive stakeholder consultation.⁸⁹ The High Commissioner was also asked:

to consult with all relevant stakeholders in compiling the report, including States, transnational corporations, employers’ and employees’ associations, relevant intergovernmental organizations, non-governmental organizations and treaty bodies.⁹⁰

Before considering the submissions made to the Office of the High Commissioner for Human Rights (OHCHR) in response to the requests, it is instructive to examine the content of the Norms. It should be noted at this point that the Norms must be read in

⁸⁷ Decision 2004/116 ‘Responsibilities of transnational corporations and related business enterprises with regard to human rights’ at (c) (E/CN.4/2004/L.11/Add.7 22 April 2004 Report to the Economic and Social Council on the Sixtieth Session of the Commission, Agenda item 21(b)).

⁸⁸ Ibid at (b).

⁸⁹ Ibid.

⁹⁰ Ibid.

conjunction with the accompanying Commentary which clarifies and elaborates on many of the issues raised.⁹¹

3.2.1.2.2 Content of the Norms

Weissbrodt has described the Norms as the ‘first non-voluntary initiative’ in corporate social responsibility.⁹² They are predicated on some basic human rights instruments, namely the UN Charter and the Universal Declaration on Human Rights (UDHR) which are referred to in the Preamble.⁹³ It is through these instruments that the Sub-Commission proposed to impose the obligation to respect *and* protect human rights upon corporate entities and other business enterprises. Articles 1, 2, 55 and 56 of the UN Charter rooted the Norms in the fundamental requirement to respect and observe human rights and fundamental freedoms. The UDHR makes reference in its preamble to its principles being applicable to ‘every organ of society’ and individuals as well as member states and governments and all should strive to promote respect for human rights, to ensure their universal recognition and to observe them. Weissbrodt places particular importance on this reference⁹⁴ but there was criticism of ‘the imprecision surrounding the source of [the Norms’] authority.’⁹⁵

The Norms Working Group concluded that dozens of international and regional human rights instruments can potentially engage the responsibility of business actors and the Norms reflected this. Varied in scope and nature, they included *inter alia* the Genocide Convention, the Convention Against Torture, the Slavery Convention, the Conventions on the Elimination of All Forms of Racial Discrimination and Discrimination Against Women, the ICCPR and ICESCR, the Geneva Conventions, the Convention on Biological

⁹¹ Commentary on the Norms on the responsibility of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/38/Rev.2, 26 August 2003 (hereinafter ‘Norms Commentary’) [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.38.Rev.2.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.38.Rev.2.En?Opendocument) [last accessed 24.8.11].

⁹² Weissbrodt & Kruger note 17 at 903.

⁹³ USTS 993 (1945) <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> [last accessed 23.10.11] and UNGA res. 217A (III), UN Doc.A/811 10th December 1948 respectively.

⁹⁴ Weissbrodt (2005) note 2 at 61.

⁹⁵ F.Calder & M.Culverwell, ‘Following Up the World Summit on Sustainable Development Commitments on Corporate Social Responsibility’ (Royal Institute of International Affairs, Final Report, February 2005) at 19. See also e.g. Kinley, Nolan & Zerial (2007a) note 45 at 465-466 for comments about the process of creating the Norms.

Diversity, the OECD Bribery Convention, the African Charter on Human Rights, the American Charter on Human Rights and the European Convention on Human Rights.⁹⁶ Reference was also made to the ILO Tripartite Declaration, the OECD Guidelines on Multinational Enterprises and the UN's own Global Compact. So there was a great breadth of human rights coverage but consequently this meant that the obligation incumbent on business actors was formulated in general, vague and non-specific terms.⁹⁷ Unfortunately this led to confusion and a 'lack of clarity as to exactly what was being prescribed and proscribed'⁹⁸ (a criticism also levelled at other initiatives such as the Global Compact and the OECD Guidelines on Multinational Enterprises⁹⁹). Ruggie has criticised the Norms consistently and vociferously and he too has argued that the Norms' approach was too hazy to be workable:

the norms would have extended to companies essentially the entire range of duties that States have, separated only by the undefined concepts of 'primary' versus

⁹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, entered into force Jan. 12, 1951; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987; Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 LNTS. 253, entered into force March 9, 1927; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, entered into force April 30, 1957; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 UNTS 195, entered into force Jan. 4, 1969; Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, entered into force Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, entered into force Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135, entered into force Oct. 21, 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, entered into force Oct. 21, 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS. 3, entered into force Dec. 7, 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS. 609, entered into force Dec. 7, 1978; Convention on Biological Diversity 31 ILM 818 (1991); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 ILM 1, entered into force February 15, 1999; African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force Oct. 21, 1986; Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively; American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 UNTS. 123, entered into force July 18, 1978; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

⁹⁷ Norms note 36 Norms 2 and 10.

⁹⁸ Calder and Culverwell note 95 at 19.

⁹⁹ See discussions *infra* at Chapters 4 and 6.

‘secondary’ obligations and ‘corporate sphere of influence,’ This formula emphasizes precisely the wrong side of the equation: defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights.¹⁰⁰

Upendra Baxi also cautions against what he describes as the Norms’ ‘dense intertextuality’ because of their heavy reliance on a variety of external self-referential hard and, in particular, soft norms:

The ever-proliferating forms, and formats, of ‘soft law’ production entail immense orders of self-referentiality. Each ‘soft law’ declaration thrives on multiple, even protean, references to the litany, even the litter, of prior textual enunciations. This process may be named as self-generating normative cannibalism, or self-devouring conspicuous consumption. Either way, this complicates practices of reading enunciatory texts.¹⁰¹

He concludes that:

[t]his peculiar form of intertextuality remains worrisome for the future of human rights if only because it tends to produce continuing forms of human rights illiteracy for the human rights cognoscenti as well the laity.¹⁰²

[This author can only agree with such a cogent analysis as she frequently feels illiterate.]

This criticism is particularly important because this intertextual approach has been adopted by other business and human rights projects at the international level and despite John Ruggie’s attempts it seems to have been repeated in the Guiding Principles discussed in Section 3.3.

Notwithstanding the effort to compel business actors to yield to general international human rights standards, it is important to note that Norm 1 emphasised that the *primary* responsibility for the promotion and protection of human rights rests with member states at the international and national level and this encompasses ensuring that business actors observe them. Over and above this reiteration of the general principle there was, however,

¹⁰⁰ J.Ruggie, ‘Protect, Respect and Remedy A Framework for Business and Human Rights’ 3 *Innovations: Technology Governance Globalization* 189-212 (2008) at 198.

¹⁰¹ U.Baxi, ‘Market Fundamentalisms: Business Ethics at the Altar of Human Rights’ 5 *Human Rights Law Review* 1-26 (2005) at 5.

¹⁰² *Ibid.*

a specific attempt to impose an obligation upon business entities themselves.¹⁰³ TNCs and others were to be obliged to exercise ‘due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses.’¹⁰⁴

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable people.¹⁰⁵

This has been criticised as being a major departure from traditional international law and was the most controversial aspect of the Norms.¹⁰⁶ However, this is an overstatement because, the Norms quite clearly stated that States have the primary obligation to protect human rights and as has already been shown, in any event TNCs are already the subjects of international law in a variety of areas. The key objection was to the obligation to ‘ensure respect of and *protect* human rights’ because it was felt that this infringed upon duties reserved for States. Nevertheless, a modified and non-binding corporate responsibility to respect human rights, as well as a due diligence requirement, have subsequently been included in the 2011 UN Guiding Principles discussed later in the chapter.¹⁰⁷

The subsequent norms dealt with particular rights, so Norm 2 imposed the obligation to provide equality of opportunity and to refrain from acting in a discriminatory manner. Norm 3 referred to security of the person and prohibited business actors from either engaging in, or benefiting from, war crimes, genocide, crimes against humanity and torture i.e. breaches of international humanitarian law. Part D addressed the rights of workers and laid down a prohibition on forced labour as well as the economic exploitation of children.¹⁰⁸ It also included obligations to provide a ‘safe and healthy working

¹⁰³ Part I of the Norms note 36 sets out some definitions, importantly the definition of TNC and ‘other business enterprise.’ During the drafting phase there was a great deal of discussion about the definition of TNC and ultimately it was felt by the Working Group that implementation of too narrow a definition could allow corporations to evade their responsibility under the Norms. See Weissbrodt & Kruger note 17 at 909.

¹⁰⁴ Norms Commentary note 91 at 4, A.(a).

¹⁰⁵ Norms note 36 Norms at Part A. General Obligations, Norm 1.

¹⁰⁶ Kinley, Nolan & Zerial (2007b) note 45 at 34.

¹⁰⁷ *Infra* at Section 3.3.

¹⁰⁸ Norms note 36 Norms 5 and 6.

environment’ and adequate remuneration and required business enterprises to ensure freedom of association and collective bargaining.¹⁰⁹

It is interesting to note that Part E was entitled ‘Respect for national sovereignty and human rights’ because here again was an emphasis on the national implementation of human rights standards and indeed a more traditional approach to international law. Under Norm 10, businesses were to be required to observe ‘applicable norms of international law, national law and regulations’ in all states in which they operate. They were also specifically prohibited from engaging in bribery.¹¹⁰ Norm 12 stated that:

‘Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization...’¹¹¹

It went on to identify particular rights in this context such as, *inter alia*, the right to development, adequate food and drinking water, privacy, education, housing, and freedom of religion.

Part F, Norm 13 related to consumer protection and good business practices. Part G, Norm 14 imposed minimum standards of environmental protection. Importantly, Part H introduced an implementation and monitoring system and required businesses to do the following:

1. Adopt internal codes of conduct implementing the Norms¹¹²
2. Submit to ‘periodic monitoring and verification by the United Nations’¹¹³
3. Provide ‘prompt, effective and adequate reparation’ to anyone adversely affected by a failure to comply with the Norms.

It is crucial to note that the Norms attempted to implement a binding, independent monitoring, compliance and redress system, which is absent in any voluntary or self-regulation model of corporate social responsibility. This section was essential to the

¹⁰⁹ Ibid Norms 7, 8 and 9.

¹¹⁰ Ibid Norm 11.

¹¹¹ This wording mirrors that used in the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, Article 2(1) state parties are obliged to achieve ‘progressively the full realization of the rights recognized in the present Covenant...’

¹¹² Norms note 36 Norm 15.

¹¹³ Ibid Norm 16.

consideration of the human rights responsibilities of business actors as it imposed specific legal obligations upon them. As has been demonstrated such an attempt is entirely consistent with other areas of international law.

In parallel with Norm 1, Norm 19 stressed yet again that states retained the primary obligation to observe and enforce human rights standards:

‘Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law,’¹¹⁴

But Norm 19 also pointed out that business actors have obligations in international law in fields other than human rights:

... nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights¹¹⁵

Nobody was suggesting that the responsibilities of member states and governments to promote and protect human rights should be diminished. But the question of whether a complementary regime should be imposed on business divided those who responded to the UNHCHR’s *Note Verbale*,¹¹⁶ as reflected in the Report on the Norms, presented to the 61st session of the Commission of Human Rights in March 2005.¹¹⁷

3.2.1.2.3 Objections to the Norms

Who objected to the Norms and on what basis? John Ruggie is scathing in his summary and criticisms of the Norms writing that:

the Norms exercise became engulfed by its own doctrinal excesses. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream

¹¹⁴ Ibid Norm 19.

¹¹⁵ Ibid.

¹¹⁶ Some regard the fact of its assignment to the UNHCHR as indicative of the demise of the Norms, see L.C.Backer, ‘Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law’ 37 Colum.Hum.Rts.L.Rev. (2006) 287 at 287. See also footnotes 2 and 186-189.

¹¹⁷ Report of the UNHCHR note 24. Responses came from States, NGOs, business groups, Trade Unions, universities, individuals and individual corporations.

international lawyers and other impartial observers. Two aspects are particularly problematic in the context of this mandate. One concerns the legal authority advanced for the Norms, and the other the principle by which they propose to allocate human rights responsibilities between states and firms.¹¹⁸

Here Ruggie is referring to the efforts by the drafters of the Norms to draw their legal authority from the international Bill of Rights and the attempt impose direct human rights obligations on business actors.

It is perhaps unsurprising that there was the usual divide between those supporting the ‘business case’ and those supporting the ‘case for obligations.’ So, on the one hand, businesses and trade organisations and many member states objected to the introduction of the Norms and on the other, Non-Governmental Organisations and Trade Union Organisations supported their introduction. This is a fairly crude division. There were of course some member states that supported the initiative. In fact, Norway actually expressed concern about the lack of an effective monitoring system.¹¹⁹ There were even a few business supporters, in particular members of the Business Leaders Initiative on Human Rights (BLIHR).¹²⁰

A good example of an NGO response supporting the Norms was that of Amnesty International. Amnesty had long espoused the Norms initiative¹²¹ and in its submission to the OHCHR, Amnesty praised the comprehensive nature of the norms, in contrast to the narrower approach of, for example, the Global Compact and the OECD Guidelines. Amnesty concluded that the Norms struck an appropriate balance between the obligations of member states and those of business. Amnesty’s position seems to have been that *both* states and business have obligations to protect human rights, stating that:

¹¹⁸ Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97 (2006) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement> [last accessed 24.10.11] (hereinafter ‘Interim Report (2006)’) at para.59.

¹¹⁹ Submission of Norway to the UNHCHR note 79.

¹²⁰ See Kinley, Nolan & Zerial (2007a) note 45 at 464. See generally <http://www.blihr.org/> [last accessed 24.8.11].

¹²¹ Submission by Amnesty International under Decision 2004/116 on the ‘Responsibilities of Transnational corporations and related business enterprises with regard to human rights’ to the UNHCHR, 29th September 2004. AI Ref. UN 411/2004 http://www.humanrights.ch/home/upload/pdf/050729_submissionAIUN-norms_2004.pdf [last accessed 21.7.11]

For human rights standards to contribute to the protection and promotion of human rights by companies, there must be transparent mechanisms and procedures by which to assess compliance with the standards. Companies must be accountable for their success or failure in meeting their human rights responsibilities.¹²²

Amnesty also viewed the Norms as acting as a ‘catalyst for national legal reform’ and a ‘benchmark to judge the adequacy of national laws and regulations.’¹²³ There was also the clear plea for the imposition of ‘transparent mechanisms and procedures’ to assess compliance.¹²⁴ In other words, the Norms should have been binding. This line was adopted by other major NGO players, for example, Christian Aid, Human Rights Watch and Oxfam.¹²⁵

Opposing the Norms for a variety of reasons were among others, the International Chamber of Commerce, the Caux Round Table and the International Organisation of Employers which stated that ‘developing and applying international human rights is an issue for states alone.’¹²⁶ Much of the concern related to so-called ‘overlapping responsibilities.’ The submissions by the business and trade organisations were vociferous in stressing that the primary, and indeed sole, obligation to promote and protect human rights rests with member states and governments. They supported increased ratification of human rights instruments by states.

The most scathing rejection of the Norms was to be found in the submission of the United States of America.¹²⁷ The US submission described the Norms as dangerous and conceptually flawed. The submission contends firstly that the Norms had no status, legal or otherwise, because they exceeded the mandate of the Sub-Commission and did not take the views of member states into account; secondly that the proposed monitoring regime also exceeded the mandate of the Sub-Commission; and finally that the Sub-Commission could

¹²² Ibid at para.5.

¹²³ Ibid at para.4(E).

¹²⁴ Ibid at para.5.

¹²⁵ Submission by Christian Aid, Submission by Human Rights Watch and Submission by Oxfam to the Report of the UNHCHR note 24.

¹²⁶ Submission by IOE to the Report of the UNHCHR note 24.

¹²⁷ Submission of the USA to the Report of the UNHCHR note 24.

not create its own powers and functions. These are all procedural points concerning the powers of the Sub-Commission. They do not amount to a rejection of the principle that business actors could be subjected to human rights obligations in international law.

But the US submission did articulate this view. The US argued that where widespread human rights abuses occur they are a result of *state* action or inaction, ‘not generally’ as a result of acts of ‘private enterprises.’ It is worth pointing out that the US submission undermines itself in the recognition that human rights abuses are ‘not *generally*’ the responsibility of business actors. This wording implies that, in some cases, business enterprises are responsible for human rights abuses. The US submission reiterated that any failure to enforce human rights standards rests with governments at the national level. The submission contended that the Norms were ‘dangerously shifting’ responsibility away from states to private actors.¹²⁸ However, as has been shown, there is no need for the question of whether business actors can be held responsible in international law for human rights abuses to be seen as an *alternative* to the responsibilities of states in this respect. The duty of business actors to positively respect human rights in international law can be constructed as *complementary* or *supplementary* to states’ obligations, and indeed the Norms reflect this position.¹²⁹

The US submission also posited that the Norms were themselves contrary to international law, contending that they were an ‘attempt to impose international obligations on entities that have neither accepted them nor played a part in their creation.’¹³⁰ It considered that the focus of the international community should be on the Global Compact and concluded somewhat dramatically that the Norms ‘have no basis in fact, no basis in law’ and were ‘doomed from the outset.’¹³¹ This position was supported in a submission by Maurice Mendelson, quoted in Chapter 2, that international legal obligations rest solely on States.¹³²

¹²⁸ Ibid.

¹²⁹ Norms note 36 Norm 1 and Norm 19.

¹³⁰ US submission to the Report of the UNHCR note 24.

¹³¹ Ibid.

¹³² *Infra* Section 2.4; Submission by Maurice Mendelson to the Report of the UNHCHR note 24 at paragraph 17. See also M.Mendelson, Comments on Draft Guiding Principles for the Implementation of the UN ‘Protect, Respect and Remedy Framework’ <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions> [last accessed 23.10.11] at para.4.

In essence, Mendelson's analysis, and that of the United States, represents a conservative view of international law. (In fact Mendelson's analysis is incorrect as it fails to recognise entirely the existence of international criminal law as it applies to individuals.) The main problem is that the US submission itself was based neither in fact nor law. It failed utterly to acknowledge the abundant evidence that TNCs have been responsible in their own right, as well as in complicity with states, for violations of human rights.¹³³ Key to its assertions are descriptions of *political* endeavours which seek to address corporate misbehaviour. It categorically failed to demonstrate that there is any reason in international law why business actors should *not* be the subject of international legal standards protecting human rights. The factual situation referred to by the USA and Mendelson simply no longer obtains. As discussed in Chapter 2, there are numerous examples of international treaties which impose legal responsibilities upon business entities. No good reason *in international law* to treat international human rights obligations differently has yet been articulated.

As highlighted in Chapter 1, Section 1.6.2, the Norms debacle led directly to the appointment of SGSR Ruggie in 2005 and the emergence of the Protect, Respect and Remedy framework which is implemented in the UN Guiding Principles on Business and Human Rights 2011.

3.3 UN Guiding Principles on Business and Human Rights

‘...the end of the beginning...’¹³⁴

Chapter 1 of this dissertation set out the history of the mandate and the work of SGSR Ruggie, as well as the ‘Protect, Respect, Remedy’ background to the Guiding Principles.¹³⁵ They are the most important business and human rights initiative of recent years and thus

¹³³ US submission to the Report of the UNHCR note 24.

¹³⁴ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,’ A/HRC/17/31, 21 March 2011, Introduction to the Guiding Principles, <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [last accessed 16.7.11] (hereinafter ‘Guiding Principles’) at 5 para.13.

¹³⁵ Chapter 1 *infra* at 1.6.2.

deserve close attention, not least because of their unanimous adoption by the UN Human Rights Council in June 2011. This section critiques the substantive approach and content of the Guiding Principles.

The product of eight years of extensive research and constructive multistakeholder consultation, the Guiding Principles represent a critical point in the business and human rights narrative and there can be no denying the empirical value of Ruggie's contribution.¹³⁶ Given their substantive approach and content, the GPs have elicited a variety of responses, from the very positive to the extremely negative.¹³⁷ What remains to be seen is how the international community moves forward in the wake of their adoption by the Human Rights Council. It would be easy for the issue to drop off the radar, notwithstanding the appointment of a new Human Rights Council Working Group as recommended by the GPs, or reference to them within, for example, the 2011 update to the OECD Guidelines on Multinational Enterprises.¹³⁸ This section of the chapter considers whether the GPs offer a viable solution to human rights violations by business actors. It concludes that while they may offer a useful template for upstanding business actors to apply to their activities, ultimately they are a weak and disappointing culmination to SGSR Ruggie's tenure because they do not impose binding obligations on business actors as dutyholders to respect human rights nor does it seem likely that they will ensure access to effective remedies for the victims of human rights abuses within the context of the Protect, Respect, Remedy framework.¹³⁹ This means that it is probable that those determinedly less virtuous business actors will continue to evade responsibility. Ruggie describes himself as

¹³⁶ See e.g. P.Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (forthcoming) 3 *Journal of Human Rights and Environment* (2012). Available to download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933426 [last accessed 23.10.11] (hereinafter 'Simons') at 5 [note that page numbers reflect the online SSRN version of this article]; S Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' 31 *Human Rights Quarterly* 299 (2009) at 300-301.

¹³⁷ See discussion *infra* at 3.3.3. For an upbeat assessment of the GPs see e.g. J.H.Knox, 'The Human Rights Council Endorses "Guiding Principles" for Corporations,' 15 *ASIL Insights* 1 August 2011, <http://www.asil.org/pdfs/insights/insight110801.pdf> [last accessed 23.10.11]. For a more negative perspective see e.g. Human Rights Watch, 'UN Human Rights Council: Weak Stance on Business Standards: Global Rules Needed, Not Just Guidance,' 16 June 2011 <http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> [last accessed 8.7.11] (hereinafter 'Human Rights Watch (2011)'); S.Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' 9(2) *European Company Law* 101-109 (2012) (hereinafter 'Deva').

¹³⁸ Chapter 6 *infra*.

¹³⁹ Guiding Principles note 134, Introduction at 4 para.6.

a principled pragmatist but it is difficult to see how the GPs, even accepting that they are a helpful starting point, will help the international community prevent, remedy or punish the most egregious human rights violations by those business actors who are intent on ignoring international human rights standards.¹⁴⁰

3.3.1 Content of the Guiding Principles

3.3.1.1. Introduction and General Principles

The Introduction to the Guiding Principles summarises the history of and background to the work of SGSR Ruggie. It outlines the three phases of his mandates: Firstly, identification and clarification of existing international standards and practices;¹⁴¹ secondly, the recommendation phase and the publishing of the Protect Respect and Remedy framework (PRR);¹⁴² and finally the operationalising phase.¹⁴³ Paragraphs 6, 7 and 8 elaborate on the PRR explaining that the framework rests on the three pillars,¹⁴⁴ that it has been endorsed by governments, business and civil society¹⁴⁵ and that its multistakeholder approach ‘contributed to its widespread positive reception.’¹⁴⁶

Clear about some of the GPs apparent limitations, however, the Introduction states that:

[Human Rights] Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.¹⁴⁷

¹⁴⁰ For Ruggie’s views on the GPs see e.g. Fletcher Forum, ‘Business and Human Rights: Together at Last? A Conversation with John Ruggie’ 35-SUM Fletcher Forum of World Affairs 117-122 (hereinafter ‘Fletcher Forum’).

¹⁴¹ Guiding Principles note 134, Introduction at 3 para.4.

¹⁴² Guiding Principles *ibid*, Introduction at 3 para.5.

¹⁴³ Guiding Principles *ibid*, Introduction at 3 para.9.

¹⁴⁴ Guiding Principles *ibid*, Introduction at 4 para. 6.

¹⁴⁵ Guiding Principles *ibid*, Introduction at 4 para. 7.

¹⁴⁶ Guiding Principles *ibid*, Introduction at 4 para.8.

¹⁴⁷ Guiding Principles *ibid*, Introduction at 5 para.13.

Nevertheless, the GPs are venturing to become a ‘single, logically coherent and comprehensive template’¹⁴⁸ for States and business actors although they are ‘not a tool kit’ to resolve the problem of human rights violations by business because ‘one size does not fit all.’¹⁴⁹ What they do strive to achieve is to identify ‘where the current regime falls short and how it should be improved’¹⁵⁰ and to provide clarification of the obligations and applicable standards via the accompanying commentary.

Ruggie’s report in 2010 set out ‘five priority areas’ which he identified as necessary for ensuring ‘greater policy coherence and effectiveness’ in the State duty to protect and which are elaborated upon to some extent by the GPs:

- (a) safeguarding their own ability to meet their human rights obligations; (b) considering human rights when they do business with business; (c) fostering corporate cultures respectful of rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict-affected areas; and (e) examining the cross-cutting issue of extraterritorial jurisdiction.¹⁵¹

Furthermore, the stated aim of the GPs is to ‘not only to provide guidance that is practical, but also guidance informed by actual practice’¹⁵² therefore several of the GPs’ key elements were ‘road-tested’ prior to their publication:

For example, those elaborating effectiveness criteria for non-judicial grievance mechanisms involving business enterprises and communities in which they operate were piloted in five different sectors, each in a different country. The workability of the Guiding Principles’ human rights due diligence provisions was tested internally by 10 companies, and was the subject of detailed discussions with corporate law professionals from more than 20 countries with expertise in over 40 jurisdictions.¹⁵³

In addition, ‘off-the-record, scenario-based workshops’ were held with ‘officials from a cross-section of States’ who had ‘practical experience’ in dealing with the human rights

¹⁴⁸ Guiding Principles *ibid*, Introduction at 5 para.14.

¹⁴⁹ Guiding Principles *ibid*, Introduction at 5 para.15.

¹⁵⁰ Guiding Principles *ibid*, Introduction at 5 para.14.

¹⁵¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, ‘Business and human rights: Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework’ A/HRC/14/27 9 April 2010 http://baseswiki.org/w/images/en/0/04/2010_Advance_Edited_Report.pdf [last accessed 24.10.11] at 5-6 para.19.

¹⁵² Guiding Principles note 134, Introduction at 3 para.5.

¹⁵³ Guiding Principles *ibid*, Introduction at 4 para.11.

challenges arising in conflict zones.¹⁵⁴ Such an approach is based clearly on Ruggie's long-stated desire to establish 'principled pragmatism'¹⁵⁵ in an area which he felt had long lacked an 'authoritative focal point.'¹⁵⁶

Intensely critical of the Norms project and its attempt to create a binding set of rules governing business and human rights, Ruggie has stated that he views it as 'inconceivable that any meaningful instrument encompassing all these features could be negotiated and adopted in the foreseeable future'¹⁵⁷ which appears to contradict his earlier position where he refused to exclude international legislation as a possible future outcome.¹⁵⁸ Indeed, he concluded in his 2006 Report that 'normative undertakings and advocacy are essential ingredients for the continued development of the human rights regime in relation to business.'¹⁵⁹ Nevertheless, he describes his current 'principled pragmatism' in these terms:

The first and most critical step in any such endeavour is to set a clear strategic objective. I set mine as achieving the maximum reduction in corporate-related human rights harm in the shortest possible period of time.¹⁶⁰

As stated, this is to be achieved 'by establishing a common platform for action' which ostensibly does not not preclude normative developments but given the opposition to an international treaty, it seems an unlikely prospect.¹⁶¹ Ruggie's 'common platform' is of course founded upon the Protect, Respect and Remedy principles and envisions a clearly defined world where States have the obligation to protect human rights, business actors are encouraged to respect human rights and any human rights violations by business actors

¹⁵⁴ Ibid.

¹⁵⁵ J. Ruggie, The Construction of the UN 'Protect, Respect and Remedy' Framework for Business and Human Rights: The True Confessions of a Principled Pragmatist' *European Human Rights Law Review* 127 (2011) (hereinafter 'Ruggie (2011)') at 132.

¹⁵⁶ Guiding Principles note 134, Introduction at 3 para. 5. This is a restatement of the argument made in 'Protect, Respect and Remedy: a Framework for Business and Human Rights,' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie A/HRC/8/5 7 April 2008 <http://198.170.85.29/Ruggie-report-7-Apr-2008.pdf> [last accessed 24.10.11] at 4 para. 5.

¹⁵⁷ Ruggie (2011) note 155 at 128. See also the criticisms referred to in notes 72, 98 and 116.

¹⁵⁸ Interim Report (2006) note 118 at 17 para. 69. See also Simons note 136 at 9 [online SSRN].

¹⁵⁹ Interim Report (2006) *ibid.*

¹⁶⁰ Ibid at 128.

¹⁶¹ Guiding Principles note 134 at 5 para. 13; see also Ruggie (2011) note 155 at 132.

ought to be remedied. While there is no doubt that the GPs are founded upon the Protect, Respect, Remedy framework, as will be seen, there is some debate about the extent to which they reflect the original doctrine. What is also evident is that Ruggie has actively stepped away from endorsing a binding international regulatory mechanism.¹⁶²

Following the Introduction, several ‘General Principles’ are laid out. The scope of the GPs is set out with a statement to the effect that they are applicable to all States and business actors, broadly defined i.e. ‘all business enterprises both transnational and others, regardless of their size, location, ownership and structure.’¹⁶³ This broad and inclusive definition (reiterated in GP14) is to be welcomed as it eliminates the need for complex explanations which attempt to differentiate between organisational structures as highlighted in Chapter 1¹⁶⁴ and encompasses Small and Medium Enterprises (SMEs) which are just as capable of violating human rights as larger entities.¹⁶⁵ Required responses, however, may be dependent upon the capacity of an enterprise in certain contexts,¹⁶⁶ more of which later.

Most significant, and the target for most criticism, is the fact that the GPs are explicitly non-binding in their application:

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.¹⁶⁷

Notwithstanding this limitation, the GPs are seeking to enhance ‘standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable

¹⁶² Simons note 136 at 10 [online SSRN].

¹⁶³ Guiding Principles note 134, General Principles at 6. See also GP14.

¹⁶⁴ *Infra* at 1.1.

¹⁶⁵ This broad definitional approach was advocated by e.g. P.Muchlinski, ‘Comments on the Draft Guiding Principles for Business and Human Rights,’ 24 January 2011, <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions> [last accessed 23.10.11].

¹⁶⁶ Guiding Principles note 134, GP14.

¹⁶⁷ Guiding Principles *ibid*, General Principles at 6. See Deva note XX at 103.

globalization.’¹⁶⁸ Of course, it remains to be seen whether this is achievable and will necessitate further research.

3.3.2 Substantive Guiding Principles

There are thirty-one GPs in total, divided into three sections which correspond to the PRR framework i.e. the State duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy. Each will be considered in turn.

3.3.2.1 The State duty to protect human rights

Principle 1 sets out that as a matter of international law, all States have a duty to protect against human rights violations ‘within their territory and/or jurisdiction by third parties, including business enterprises.’ The obligation requires States to take ‘appropriate steps’ to ‘prevent, investigate, punish and redress’ any such abuses by means of ‘effective policies, legislation, regulations and adjudication.’¹⁶⁹ According to the Commentary, the ‘State duty to protect is a standard of conduct’ and ‘[t]herefore, States are not *per se* responsible for human rights abuse by private actors.’¹⁷⁰ It does make clear, however, that the actions of business actors may be attributable to a State and that a State’s obligations *may* be breached if it fails to take the appropriate necessary steps.¹⁷¹

Principles 2 and 3 elaborate on a State’s duty to protect. States have a duty to make clear that there is a general expectation that business actors ‘domiciled in their territory and/or jurisdiction’ will ‘respect human rights.’¹⁷² Thus ‘laws,’ and ‘policies’ should be put in place together with ‘effective guidance’ for business actors¹⁷³ and a ‘smart mix of measures’ should be employed by States which according to Principle 8 is to be achieved by ‘policy coherence’ across different government department and State institutions. So for example, Principle 9 urges States to ensure that human rights protection is maintained

¹⁶⁸ Guiding Principles *ibid*, General Principles at 6.

¹⁶⁹ Guiding Principles *ibid*, GP1.

¹⁷⁰ Guiding Principles note 134, GP1 Commentary at 7.

¹⁷¹ *Ibid*.

¹⁷² Guiding Principles note 134, GP2.

¹⁷³ *Ibid* GP3 (a), (b) and (c).

when negotiating investment treaties. Principle 10 encourages ‘capacity building’ and ‘awareness raising’ as a means for ensuring policy coherence. Furthermore, States should ‘encourage and where appropriate, require’ business actors to communicate about how they are dealing with human rights ‘impacts.’¹⁷⁴ The Commentary to GP2 concludes that ‘[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.’ This arguably incorrect statement has caused much discontent among NGOs as will be seen later.

State-owned enterprises are covered by the GPs in Principle 4 and ‘adequate oversight’ is required in relation to State contractors and service providers. Privatisation of State functions does not mean that human rights obligations can be relinquished¹⁷⁵ and States have a duty to ‘promote’ human rights among contractors and service-providers.¹⁷⁶ Furthermore there is a specific provision relating to conflict zones and their associated ‘heightened risks’ of human rights abuses.¹⁷⁷ States should engage with¹⁷⁸ and assist¹⁷⁹ business enterprises operating in conflict zones to ensure that human rights are not being abused and to help them assess the risks. In particular States should deny ‘access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation.’¹⁸⁰ Businesses should also respect international humanitarian law.¹⁸¹

3.3.2.2 The corporate responsibility to respect human rights

Principle 11 contains the key provision that business actors ‘*should* avoid infringing on the human rights of others and should address adverse human rights impacts with which they

¹⁷⁴ Ibid GP3 (d).

¹⁷⁵ Ibid, GP5.

¹⁷⁶ Ibid, GP6.

¹⁷⁷ Ibid, GP7.

¹⁷⁸ Ibid, GP7(a).

¹⁷⁹ Ibid, GP7(b).

¹⁸⁰ Ibid, GP7(c).

¹⁸¹ Ibid, GP12 Commentary at 14.

are involved.’[emphasis added] It is a non-mandatory requirement and is merely a ‘global standard of expected conduct’ which encompasses the ‘taking of adequate measures’ to prevent, mitigate and ‘where appropriate’ remediate ‘adverse human rights impacts.’¹⁸² This includes situations where there is no direct contribution by a business actor but involves its commercial partners, other enterprises in the ‘value chain’ and other entities with links to the business.¹⁸³ The human rights ‘benchmarks’ for business actors are to be found in the International Bill of Rights and in the ‘eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.’¹⁸⁴ The GPs acknowledge in the Commentary that ‘some human rights may be at greater risk than others in particular industries or contexts’ therefore requiring particular attention e.g. the right to life in a conflict zone.¹⁸⁵ In addition, they stipulate that care should be taken to protect the rights of specific groups such as women, children, minorities.¹⁸⁶ Violations are to be judged on their severity on a case by case basis according to their ‘scale, scope and irremediable character.’¹⁸⁷

Business actors are expected to implement human rights policies stating a baseline commitment to human rights as well as putting due diligence and remediation processes into practice.¹⁸⁸ This shifts the GPs into operational matters. GP16 expects businesses to produce a human rights policy statement at the most senior level of the business. GPs 17-21 then elaborate on the practical steps that businesses ought to undertake in order to respect human rights. The important due diligence principle is set out in broad terms in GP17 whereby businesses should ‘identify, prevent, mitigate and account for how they address their adverse human rights impacts. GPs 18-21 elaborate on the ‘essential components’ of due diligence. It requires businesses to harness ‘internal and/or independent external human rights expertise’¹⁸⁹ and to engage in ‘meaningful consultation

¹⁸² Ibid, GP11 Commentary at 13.

¹⁸³ Ibid, GP13.

¹⁸⁴ Ibid, GP12 i.e. UDHR note 93, ICCPR note 35 and ICESCR note 96.

¹⁸⁵ Guiding Principles note 134, GP12 Commentary at 13.

¹⁸⁶ Ibid, GP12 Commentary at 14.

¹⁸⁷ Ibid, GP 14 Commentary at 14.

¹⁸⁸ Ibid, GP15.

¹⁸⁹ Ibid, GP18(a).

with potentially affected groups and other relevant stakeholders¹⁹⁰ as appropriate in order to ascertain ‘actual or potential adverse human rights risks.’¹⁹¹ Furthermore, businesses are expected to effectively integrate the findings of the due diligence process into their operations,¹⁹² to track the effectiveness of the response to adverse due diligence findings¹⁹³ and to communicate externally their response to such findings.¹⁹⁴ Where there is a finding of adverse impact, businesses should either create or cooperate with ‘legitimate’ remediation processes,¹⁹⁵ the first response, however, should be to mitigate the adverse impacts.¹⁹⁶

3.3.2.3 Access to remedy

Principle 25 requires States to ensure access to ‘effective remedies’ otherwise the State’s obligation to protect is rendered ‘weak or meaningless.’¹⁹⁷ An effective remedy may be achieved via judicial or non-judicial, administrative or legislative means.¹⁹⁸ States should take steps to remove barriers to access to judicial mechanisms for addressing human rights violations by business as well as ensuring their effectiveness.¹⁹⁹

In the case of non-judicial remedies, which ‘industry, multi-stakeholder and other collaborative initiatives’ are encouraged to support,²⁰⁰ a variety of mechanisms may be suitable including ‘mediation’ and ‘adjudication’ as well as other ‘culturally appropriate’ options.²⁰¹ Principle 28 encourages States to facilitate the use of and access to non-State-

¹⁹⁰ Ibid, GP18(b).

¹⁹¹ Ibid, GP18.

¹⁹² Ibid, GP19.

¹⁹³ Ibid, GP20.

¹⁹⁴ Ibid, GP21.

¹⁹⁵ Ibid, GP22.

¹⁹⁶ Ibid, GP24.

¹⁹⁷ Ibid, GP25 Commentary at 22.

¹⁹⁸ Ibid, GP25.

¹⁹⁹ Ibid, GP26.

²⁰⁰ Ibid, GP30.

²⁰¹ Ibid, GP27

based grievance mechanisms which may be created by a business actor itself, ‘industry associations’ or a ‘multistakeholder’ group. Regional and international human rights bodies also fall within this category. Furthermore, businesses themselves are encouraged to implement operational mechanisms for dealing with adverse impacts.²⁰² Finally, all non-judicial grievance mechanisms should be ‘legitimate,’ ‘accessible,’ ‘predictable,’ ‘equitable,’ ‘transparent,’ ‘rights-compatible’ and ‘a source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.’²⁰³ Mechanisms implemented at the operational level should be ‘[b]ased on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.’²⁰⁴

The following sections will address negative and positive aspects of the Guiding Principles.

3.3.3 Critiquing the Guiding Principles

The major criticisms of the GPs have come from the NGO sector as well as a few academics²⁰⁵ but given their recent publication and adoption by the Human Rights Council there is limited in-depth analysis of the GPs at present. Unsurprisingly States and business actors themselves have welcomed them.²⁰⁶ There appear to be three general flaws in the GPs and each will be addressed in turn, as well as arguments supportive of the GPs. The key problems with the GPs are that, firstly, their language results in what has been

²⁰² Ibid, GP29.

²⁰³ Ibid, GP31(a),(b),(c),(d),(e),(f) and (g).

²⁰⁴ Ibid, GP31(h).

²⁰⁵ See e.g. Simons note 136 [online SSRN]; N.Jägers & W.van Genugten, ‘Corporations and Human Rights: Moving Beyond ‘Principled Pragmatism’ to ‘Ruggie-Plus’ 1 March 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1844203 [last accessed 16.7.11] (hereinafter ‘Jägers & van Genugten’). See also Amnesty International, CIDSE, ESCR-Net, FIDH, Human Rights Watch, International Commission of Jurists and RAID, Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights, January 2011 http://www.fidh.org/IMG/pdf/Joint_CSJ_Statement_on_GPs.pdf (hereinafter ‘Joint Civil Society Statement on the Draft Guiding Principles’) [last accessed 9.7.11].

²⁰⁶ For comments from States and business actors see generally <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples> [last accessed 17.7.11]. See e.g. UK Government Comments on the Draft UN Guiding Principles for the Implementation of the ‘Protect, Respect and Remedy’ Framework <http://www.business-humanrights.org/media/documents/uk-comments-guiding-principles-2011.pdf> [last accessed 23.7.11].

perceived as a weakening of States' human rights responsibilities, secondly, no binding duties are imposed on business actors and thirdly, there is a failure to require that enforceable remedies are provided and accessible for those impacted by human rights violations by business actors.

3.3.3.1 Weakening of States' Human Rights Responsibilities

One of the most serious criticisms of the GPs relates to what is perceived as their flawed statement of current international human rights law. NGOs have condemned them for elaborating:

...a more regressive approach towards the human rights obligations of States and the responsibilities of non-state actors than authoritative interpretations of international human rights law and current practices.²⁰⁷

A joint statement on the Draft Guiding Principles by leading NGOs during an open consultation period attacks them as 'weak,' for not being 'a statement of the law'²⁰⁸ and that 'the State duty to protect' lacks 'specificity,' moreover, they 'at times depart from existing interpretations of international law provided by UN human rights treaty bodies.'²⁰⁹ NGOs are not the only critics of this aspect of the Guiding Principles. Robert McCorquodale commenting on the draft GPs states that:

the international obligations of state responsibility makes clear that states are legally responsible for all actions of all state agents and entities, and for all actions within the state by non-state actors...and human rights treaty bodies have affirmed this.²¹⁰

Jägers & van Genugten argue in a brief comment that the GP formulation 'contradicts and weakens clearly established obligations for States.'²¹¹

In particular there is concern that the State duty to protect has been watered down with Principle 2 stating that States ought to 'encourage' business enterprises to respect human

²⁰⁷ Joint Civil Society Statement on the Draft Guiding Principles note 205 at 1.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ R. McCorquodale, Submission to the Consultation on the Guiding Principles, 'Draft Guiding Principles for the Implementation of the Protect, Respect and Remedy Framework: Comments,' <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions> [last accessed 23.10.11] at 1.

²¹¹ Jägers & van Genugten note 205 at 2.

rights. It is certainly a departure from Ruggie's own report in 2008 which seemed to advocate 'regulatory action' on the part of States.²¹² Given other international developments, it is surprising that Ruggie has opted to conclude that 'at present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction'²¹³ Jägers & van Genugten argue that this is factually incorrect if one has regard to, for example, the International Covenant on Economic Social and Cultural Rights.²¹⁴

3.3.3.2 Failure to Define Business Actors as Dutyholders

The failure of the GPs to impose a duty on business actors to respect human rights and to more carefully clarify the extent of their responsibility has been the source of much criticism by civil society, unsurprisingly.²¹⁵ Human Rights Watch has described the GPs as 'minimalist' and accuses the Human Rights Council of having 'squandered an opportunity to take meaningful action to curtail business-related human rights abuses.'²¹⁶ NGOs have concluded that the GPs 'therefore risk undermining efforts to strengthen corporate responsibility and accountability for human rights.'²¹⁷ Jägers and van Genugten contend that GPs are not worded strongly enough and that by not requiring business actors to respect human rights, the GPs fail to acknowledge business actors as dutyholders.²¹⁸

²¹² Protect, Respect and Remedy (2008) note 25 at para.19.

²¹³ Note 134 Commentary to Principle 2 at 7.

²¹⁴ Jägers & van Genugten note 205 at 2. Presumably referring to IESCR note 93 Art.2.

²¹⁵ Joint Civil Society Statement on the Draft Guiding Principles note 205 at 1. See also generally Simons note 136 [online SSRN]. H.Williamson, Amnesty criticises UN framework for multinationals, Financial Times, 17 January 2011 http://infoweb.newsbank.com/iw-search/we/InfoWeb?p_product=UKNB&p_theme=aggregated5&p_action=doc&p_docid=134D4BFF6191AC78&p_docnum=18&p_queryname=1 [last accessed 9.7.11]. See also the robust exchange between Ruggie and AI's Senior Director for International Law and Policy, Widney Brown: J.G.Ruggie, Letter to the Financial Times, 'Bizarre response by human rights groups to UN framework plan,' Financial Times, 19 January 19, 2011 http://infoweb.newsbank.com/iw-search/we/InfoWeb?p_product=UKNB&p_theme=aggregated5&p_action=doc&p_docid=134DF64CF11D70C8&p_docnum=16&p_queryname=1 [last accessed 9.7.11]; W.Brown, Letter to the Financial Times, 'Stronger UN draft on human rights abuses needed,' Financial Times, 20 January 2011 http://infoweb.newsbank.com/iw-search/we/InfoWeb?p_product=UKNB&p_theme=aggregated5&p_action=doc&p_docid=134E06AFB4F86108&p_docnum=13&p_queryname=1 [last accessed 9.7.11]. See also Jägers & van Genugten note 205 at 1.

²¹⁶ Human Rights Watch (2011) note 137.

²¹⁷ Joint Civil Society Statement on the Draft Guiding Principles note 205 at 1.

²¹⁸ Jägers & van Genugten note 205 at 1.

Guiding Principle 11 does not impose any duties or obligations upon business actors stating only that:

Business enterprises *should respect* human rights. This means that they *should avoid* infringing on the human rights of others and *should address* adverse human rights impacts with which they are involved.²¹⁹ [emphasis added]

In the commentary the non-mandatory aspect of this foundational principle is further clarified being described as ‘a global standard of expected conduct.’ In Ruggie’s 2009 Report it was noted that there was ‘near-universal recognition by all stakeholders’ of the corporate social duty to respect human rights.²²⁰ If this is the case, why then do the GPs not acknowledge this by framing the obligation in mandatory terms? Ruggie’s consistent rejection of and justification for the non-mandatory approach, as already highlighted, is on the basis that he believes that any international legislative approach would be unsuccessful. It seems, however, that the GPs have missed a prime opportunity to, at the very least, enshrine and formalise an already generally accepted principle.

Ruggie himself has objected to what he describes as a ‘bizarre’ critical response by NGOs to the proposals. In a robust letter to the Financial Times in January 2011 he admonished them for attacking the GPs and asked: ‘[h]ow much longer will they [the NGOs] ask victims to wait in the name of some abstract and elusive global regulatory regime when practical results are achievable now?’²²¹ In an equally vigorous response Amnesty International replied:

We do not believe the draft guiding principles effectively protect victims' rights or ensure their access to reparations...Let's be frank - the real opposition to effective guiding principles does not come from Amnesty International but from business interests. The draft guiding principles enjoy broad support from business, precisely because they require little meaningful action by business.²²²

²¹⁹ Note 134.

²²⁰ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Business and human rights: Towards operationalizing the ‘protect, respect and remedy’ framework,’ A/HRC/11/13 22 April 2009 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf> [last accessed 25.8.11] at para. 46. See also para. 47.

²²¹ Ruggie, Letter to Financial Times, note 215.

²²² Brown, Letter to Financial Times, note 215.

The reality is that despite twenty years of voluntary CSR, many business actors continue to violate human rights. As Penelope Simons points out:

it is difficult to see how, without the complement of international legal obligations, this privatized voluntary process will be significantly more effective than other voluntary self-regulation regimes in regulating and enforcing the compliance of corporations with human rights norms.²²³

While it is true that there may be some positives achieved by employing a hybrid or smart mix of regulatory approaches, nevertheless, human rights abuses will continue unabated absent binding rules and strong enforcement mechanisms which punish wrongdoers and offer redress for victims.

3.3.3.3 Lack of Access to and Enforcement of Effective Remedies

In the following three chapters it will be demonstrated that the lack of access to and enforcement of remedies or ‘remedies deficit’²²⁴ is a fundamental problem in this field. In particular, where some form of remedial mechanism is available, such as the OECD Specific Instance Procedures, major problems arise in relation to enforcement in the absence of mandatory regulatory provisions.²²⁵ This is especially problematic with rogue business actors who have no inclination to adhere to human rights standards and do not respond to a ‘carrot’ approach. Imposing an obligation on States to ensure access to effective remedies does not necessarily enhance the impact of the GPs.

There is a real danger that implementing the GPs could become a paper exercise with business actors producing meaningless policies and statements and States creating more ineffectual non-binding mechanisms. There is also a lack of institutional involvement in the process and McCorquodale advocates the creation of ‘institutional mechanism/s’ for the purposes of ‘periodic monitoring and reporting, critical thinking and best practices, advice and support, and standard-setting for human rights impact assessments.’²²⁶ In some ways it may be difficult to distinguish the proposed processes from the discredited

²²³ Simons note 136 at 43 [online SSRN].

²²⁴ P.Muchlinski, ‘Comments on the Draft Guiding Principles for Business and Human Rights,’ 24 January 2011, <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions> [last accessed 23.10.11].

²²⁵ Chapter 6 *infra* at 6.7.

²²⁶ McCorquodale note 210 at 3.

Communications on Progress required as a prerequisite of membership of the Global Compact and discussed in Chapter 4. It will be interesting to see what the practical and concrete outcomes of the GPs will be other than to keep corporate lawyers busy for a while, as evidenced by the following section.

These flaws will be addressed throughout the rest of this dissertation generally. This is because it is the lack of a mandatory regulatory regime coupled with the likely lack of an effective remedy for those impacted by business actors' human rights violations that exposes John Ruggie's conclusions in the form of the GPs to ongoing criticism.²²⁷ Ruggie's own Protect, Respect and Remedy framework recognises the limitations of judicial mechanisms in many states and also concludes that non-judicial mechanisms must be 'credible and effective'²²⁸ i.e. legitimate, accessible, predictable, equitable, rights compatible and transparent. It is difficult to see how a non-binding remedy which otherwise meets the criteria of the PRR framework and the Guiding Principles qualifies as credible and effective. The examples discussed in Chapters 4, 5 and 6 demonstrate that while there is a place for various types of remedy, ultimately mandatory international rules are required to operate in parallel with voluntary options to act as a deterrent, to punish the wrongdoers and to provide enforceable redress for victims. Sir Geoffrey Chandler expressed it in the clearest terms in his comments on the draft GPs:

Neither voluntarism nor legislation on their own can meet the need. History demonstrates that voluntarism does not work; and the international legislation required lies years, if not decades, ahead and cannot embrace the whole of the diversity and protean nature of corporate activity. We need a wider vision from both companies and NGOs and the support of governments before it will be possible to place the last block on the foundations that the SRSG has established.²²⁹

Simons also agrees with these conclusions, stating that 'softer norms and forms of regulation' can offer a 'flexibility' which is absent in binding regulatory approaches.²³⁰ It is unlikely, however, that the new UN Working Group is going to move things forward to the satisfaction of many observers, in particular consideration of international legislation,

²²⁷ See generally Simons note 136 [online SSRN].

²²⁸ Protect, Respect and Remedy (2008) note 25 at paras 88 and 92.

²²⁹ Sir Geoffrey Chandler, Special Representative of the United Nations Secretary-General for business & human rights, Online Forum <http://www.business-humanrights.org/media/documents/ruggie/online-forum-re-guiding-principles-nov-2010-to-jan-2011.pdf> [last accessed 23.10.11] at 88.

²³⁰ Simons note 136 at 45 [online SSRN].

while in the meantime human rights violations continue with little or no negative consequences for the business actors involved.

3.3.4 Positive Aspects to the Guiding Principles

Notwithstanding the limitations of the GPs there are some positives to be gleaned from their emergence. As Ruggie hoped, there are already some tangible outcomes:

Numerous individual companies are already aligning their policies and practices with the UN Guiding Principles. And consulting firms and corporate law firms are sending out client memos offering their services to make companies ‘Ruggie proof’-- honestly, I didn't invent the term; they did.²³¹

Ruggie is himself taking up a corporate consulting role now that his mandate as SGSR has ended,²³² although it is difficult not to conclude that Ruggie-proofing commercial policies may simply involve implementation of the most basic human rights norms, or lowest common denominator, as opposed to demonstrable best practice.

The broad and inclusive reach of the GPs is also a positive step, covering all business enterprises and their supply chains. Furthermore, the emphasis on a variety of regulatory mechanisms is to be welcomed. It will be seen that in the context of the Global Compact, for example, that a new governance approach to regulation can reap some concrete results, albeit limited ones.²³³

In terms of the process of producing the GPs, the multistakeholder and inclusive approach means that there is a certain sense of ownership of the process which is to be applauded, despite many NGO's distancing themselves subsequently from the final product. In addition, Scott Jerbi points out that:

²³¹ Fletcher Forum note 140 at 122.

²³² Press release, 26 July 2011, http://www.csrwire.com/press_releases/32647-Author-of-U-N-Guiding-Principles-on-Business-and-Human-Rights-to-Join-Foley-Hoag [last accessed 30.7.11]

²³³ Chapter 4 *infra*. See also e.g. Simons note 136 at 45 [online SSRN].

this appears to have been the first time in the sixty plus year history of the UN human rights system that member states have unanimously endorsed a set of principles they themselves had not negotiated.²³⁴

It is quite clear that the GPs have been well received by States²³⁵ as well as being ‘strongly welcomed’ by the European Commission²³⁶ but this is almost certainly because they do not attempt to put in place a binding regulatory framework. Similarly, the GPs have been welcomed positively by many business actors such as Total, Coca-Cola and ING, as well as business groups like the International Chamber of Commerce.²³⁷ A cynic might argue that self-interest and the profit motive demand such approval. Nevertheless, Jerbi describes the GPs as a ‘game changer’ because within Paragraph 4 of Resolution 17/4 there is an ‘acknowledgement of a deliberate strategy of incremental progress based on evidence and the potential for future legal standards in the years ahead.’ He cites the creation of the Working Group on Business and Human Rights with its three year mandate as evidence of this strategy.

Of course it remains to be seen whether the GPs are in fact a ‘game changer’ or a ‘squandered opportunity’ but what is clear is that they are indeed flawed, especially with the omission of binding rules or any form of effective remedy, things which were highlighted by Ecuador at the Human Rights Council in June 2011²³⁸ and which continue to be highlighted by civil society. The following section explains why the failure to implement a binding duty for business actors weakens international human rights generally

²³⁴ S. Jerbi, ‘UN Adopts Guiding Principles on Business and Human Rights - What Comes Next?’ Institute for Human Rights and Business, 17 June 2011 http://www.ihrb.org/commentary/staff/un_adopts_guiding_principles_on_business_and_human_rights.html [last accessed 8.7.11]

²³⁵ USA, Japan, UK, Russia, Norway, India, Nigeria and Argentina. Council establishes Working Group on human rights and transnational corporations and other business enterprises, 16 June 2011, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11165&LangID=E> [last accessed 8.7.11].

²³⁶ European Commission, DG Enterprise, Business and Human Rights: new UN guidelines, 17 June 2011, http://ec.europa.eu/enterprise/newsroom/cf/itemlongdetail.cfm?item_id=5220&lang=en&tpa=0&displayType=news [last accessed 8.7.11]

²³⁷ See e.g. ING, ING congratulates UN Special Representative John Ruggie & his team on endorsement of Guiding Principles, 24 June 2011. See also generally <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples> [last accessed 9.7.11]

²³⁸ Council establishes Working Group on human rights and transnational corporations and other business enterprises, 16 June 2011, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11165&LangID=E> [last accessed 8.7.11]

and how extending human rights dutyholder status to business actors is entirely consistent with human rights principles.

3.4 The Failure to Recognise Business Actors as Dutyholders in Relation to Human Rights is Problematic

This chapter, of course, acknowledges that there are inevitably situations where States are unable or unwilling to meet their human rights obligations. It is *not* proposing that businesses step in to fill the gap left by bad or weak States. Rather, it argues that as members of the international community and by virtue of general legal principles, expressed in international human rights instruments, businesses are *required* to adhere to human rights standards, contrary to the GPs just discussed. Thus they ought to be held either directly responsible for human rights violations or responsible by association. Such mandatory rules ought to apply in addition to the separate human rights obligations of States. As such the subsequent section of this chapter satisfies Muchlinski's criteria for directly enforceable human rights obligations:

If MNEs are to be subject to direct and legally enforceable obligations to observe fundamental human rights, the grounds for doing so must be strong and completely unassailable.²³⁹

Furthermore, these human rights obligations apply to business activities in all States and at all times. In particular, business actors should not be permitted to take advantage of failing States, difficult economic circumstances or conflict situations. Many host States will be simply 'unable to fulfil their 'duty to protect''²⁴⁰ under the GPs, for the reasons elaborated in Chapter 1. The remainder of this chapter therefore addresses the issue of the public/private divide in human rights as well as the issue of *which* human rights standards apply or ought to apply directly to business actors. International human rights law sets out a multitude of human rights norms and clearly business enterprises are capable of violating a great many different human rights. Nevertheless, some human rights norms are more pertinent than others and it is helpful to try to identify which apply. This is of particular importance for analysing the effectiveness of the different international initiatives at holding businesses to account for human rights violations in Chapters 4, 5, 6 and 7.

²³⁹ Muchlinski (2001) note 14 at 32

²⁴⁰ Simons note 136 at 46 [online SSRN].

It is uncontroversial and clear that the primary responsibility for protecting human rights rests with States. As SRSR Ruggie has put it, '[a]ll sides agree that the state is the primary duty bearer in relation to human rights.'²⁴¹ In addition to the UN Guiding Principles it has been highlighted and adhered to in the work of the Global Compact and in the ill-fated Norms project where Norm 19 stated:

Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law...²⁴²

One might question, therefore, why international law is relevant at all in relation to business actors conducting commercial activities in States other than their own? The answer is simple. If, as argued in the previous chapter, business actors *are* subjects of international law, then international human rights standards apply either directly to a business or by association i.e. responsibility is engaged via the supply chain. Furthermore, to deny that business actors have or ought to have human rights obligations is to reject the founding precepts of international human rights law.

3.5 Recognising Business Actors as Dutyholders Would Place the Individual at the Heart of the Human Rights Paradigm

It is true that human rights principles were established originally as a response to excessive State power and its abuse, nevertheless they express agreed minimum standards of behaviour which operate to uphold the collective good and ought not to be limited to States. Rights 'skeptics' criticise the 'self-imposed limitations' which result from the acceptance of 'the public/private distinction' and which construe human rights in a narrow vertical sense:

Rights thinking has predominantly concerned the relationship between the individual and the state. As traditionally understood, the human rights project is to erect barriers between the individual and the state, so as to protect human autonomy and self-determination from being violated or crushed by governmental power.²⁴³

²⁴¹ J.G. Ruggie, 'Business and Human Rights: The Evolving International Agenda' 101 Am.J.Int'l L. 819 (2007) (hereinafter 'Ruggie (2007)' at 828.

²⁴² See the Norms note 36, heading 'General Obligations.'

²⁴³ K.Klare, 'Legal Theory and Democratic Reconstruction' 25 Univ. of Brit. Colum. L. Rev. 69 (1991) (hereinafter 'Klare') at 97.

This traditional approach ignores the truth of a globalised world. It may be true that no one envisaged that the power and influence of business actors would increase so radically and in such a short space of time, or that their activities would be capable of threatening the ‘collective good’ in the guise of individual rights and freedoms. Certainly forty years ago Detlev Vagts in his classic article *The Multinational Enterprise: A new Challenge for Transnational Law* questioned whether transnational business actors wielded significant power at all and disputed the views of those who argued otherwise, dismissing them as ‘Nationalists, Muscovites and New Leftists.’

Others draw a far more malign picture of the autonomous MNE. Essentially free of moral or legal constraints, their MNE grinds remorselessly toward its financial and technological objectives, ‘el pulpo’ (the octopus) spreading its tentacles over the world and holding other countries, in particular the less developed, to ransom. With its enormous profits, it surpasses its ancestors, the investment bankers, who bore the burden of the imperialism described by Lenin and Hobson. In this picture the MNE is no longer the arm of the state; rather, the marines are the loyal servitors of capitalist enterprise.²⁴⁴

He concludes:

After protracted contemplation of the MNE, I cannot find in it the malevolent influence, discernible by some observers, which leads us into interventions all over the world and drags down less developed countries into economic vassalage while sustaining the economic stability of Nigeria and South Africa. Its political power does not seem particularly formidable, and there is a good case for the proposition that it pays its way in host countries- to the point where one might argue that, particularly in its tendency to diffuse technology with great speed, it relatively disadvantages the home country. If the MNE in fact poses a threat to human freedom it is because of its peculiar effectiveness. Its capacity to pursue a centralized and coordinated strategy removes decision-making power far from the reach of people intimately affected by it.²⁴⁵

Events throughout the latter part of the twentieth century have proved him wrong, in relation to his analysis of political power at least, and the international community ought to have reacted to curb this power. As Karl Klare puts it:

²⁴⁴ D. Vagts, ‘The Multinational Enterprise: A new Challenge for Transnational Law’ 83 Harv. L. Rev. 739-792 (1970) at 745.

²⁴⁵ Ibid at 791.

Unquestionably, a just society requires...protections [against States], but human freedom can also be invaded or denied by nongovernmental forms of power, by domination in the so-called 'private sphere.'²⁴⁶

Andrew Clapham describes several trends which are forcing us 'to redefine the parameters of the public and private spheres' and the international community ought to acknowledge, therefore, that non-State private actors bear human rights obligations.²⁴⁷ Only two of those trends are relevant to this dissertation and Clapham's arguments are rooted in an analysis of the European Convention on Human Rights, nevertheless, they can be applied to human rights generally. Firstly, he categorises business actors (among others) as one of the emerging 'new fragmented centres of power' and concludes that their rise means that:

...the individual now perceives authority, repression, and alienation in a variety of new bodies, whereas once it was only the State which was perceived ...to exhibit these characteristics.²⁴⁸

It is certainly possible to take issue with Clapham's view of history in relation to business actors being 'emerging...centres of power' as one need only look at the extensive record of abuse of power by, for example, United Fruit Company and International Telephone and Telegraph in Latin America throughout the twentieth century.²⁴⁹ Nevertheless the salient point is that today there is definitely a broader global awareness, assisted by vastly increased access to information and technology,²⁵⁰ that business actors exert great authority, engage in repression and alienate communities than perhaps was apparent just a few decades ago. In such circumstances it makes sense to protect the individual from the abuse of power no matter the source of the abuse.

²⁴⁶ Klare note 243 at 97.

²⁴⁷ A.Clapham, *Human Rights in the Private Sphere*, (Clarendon Press: Oxford, 1993) (hereinafter 'Clapham') at 137.

²⁴⁸ Clapham *ibid*.

²⁴⁹ On the power and influence of United Fruit Company, see e.g. P.Chapman, P., *Bananas: How the United Fruit Company Shaped the World*, (Canongate, 2004); S.May & G.Plaza, *The United Fruit Company in Latin America*, (Washington: National Planning Association, 1958); L.Turner, 'Multinational Companies and the Third World' 30 *The World Today* No.9 394-402 (Sep.,1974) at 394.

²⁵⁰ See e.g. J.Bach & D.Stark, 'The Co-evolution of NGOs and Interactive Technology' 21 *Theory, Culture and Society* 101-117 (2004).

The second relevant trend, is that narrow, traditional conceptions of the ‘private sphere’ have become outdated and must be ‘re-evaluated.’²⁵¹ So the ‘classical distinction...which identifies the public with the nation-State and the private with the free market’ must be re-examined because ‘[t]he public/private distinction can quickly become a weapon utilized in order to deny or claim jurisdiction.’²⁵²

As outlined in Chapter 1 Section 1.5, this is precisely what happened with regard to the question of whether private business actors can violate human rights. Accountability and responsibility were bypassed by resorting to strict and outmoded conceptions of the private sphere. Clapham argues that:

The mistake is to jump from a concern to protect [human rights] to the belief that society can be divided into two realms: one which is inherently under the jurisdiction of the apparatus of the nation-State, and one where the State is forbidden to enter.²⁵³

It was the slavish adherence to the latter belief, motivated by profit-driven self-interest, that led to the business community, and many States, opposing the imposition of any human rights obligations upon commercial entities and the situation remains largely unchanged today. As will be demonstrated, however, the State is advancing slowly into the ‘forbidden’ private zone, albeit at the behest of NGOs and civil society.

Despite his focus on the ECHR Clapham concludes more generally, that ‘international human rights law is moving towards the recognition and prohibition of private action which violates human rights.’ Halting this advance would be an entirely objectionable course of action. Unfortunately while there has been some recognition of private actions which violate human rights at the UN, the OECD, the EU and elsewhere, States remain reluctant to impose a mandatory prohibition on business actors and persist with a non-mandatory approach to the problem. This was recently and resoundingly demonstrated by the unanimous approval of the non-mandatory Guiding Principles at the UN Human Rights Council.²⁵⁴ Clapham argues that as a matter of policy:

²⁵¹ Clapham note 247 at 137.

²⁵² Clapham *ibid*.

²⁵³ Clapham *ibid* at 138.

²⁵⁴ Human Rights Council Resolution 17/4 note 37.

...the consequences of failing to protect against private violations are undesirable; not only does such a failure leave vulnerable groups and individuals unprotected, but it also creates a false public/private dichotomy capable of functioning as a tool arbitrarily to weed out applicants and potential and deny them access to justice.²⁵⁵

Such a conclusion holds whether in the context of the ECHR or otherwise. Adherence to a rigid division between the public and private spheres flies in the face of the principles that underpin human rights, specifically, that the individual is, or ought to be, at its centre and that the individual requires protection from abuse of power. It is thus irrelevant who or what is exercising that power. In a human rights paradigm individuals are placed at the heart of the international legal system and in theory, the concerns of States and others ought to be subordinate. As Hersch Lauterpacht wrote:

The recognition of inalienable human rights and the recognition of the individual as a subject of international law are synonymous. To that vital extent they both signify the recognition of a higher, fundamental law not only on the part of States but also, through international law, on the part of the organized community itself. That fundamental law, as expressed in the acknowledgement of the ultimate reality and the independent status of the individual, constitutes both the moral limit and the justification of the international legal order.²⁵⁶

In other words, as Lauterpacht put it, individuals ‘by dint of the acknowledgement of... fundamental rights and freedoms’ became the ‘ultimate subject of international law.’²⁵⁷ As such, they ought to be protected no matter the *source* of the threat. The duty attaches when there is the *power and ability* to violate human rights. Such a theory admits that a functional approach rather than one based upon the idea of the State is more appropriate. It does not deny that human rights principles emerged as a response to the past behaviour of States but it acknowledges that for human rights to continue to be protected, their conception must move with the times. That is not to say that the rights themselves change, as will be seen later in this chapter, simply that they must operate in a changing

²⁵⁵ H.Lauterpacht, *International Law and Human Rights*, (Stevens and Sons: London, 1950) (hereinafter ‘Hersch Lauterpacht (1950)’) at 69-70.

²⁵⁶ Ibid at 61. It is generally acknowledged that Lauterpacht’s classic monograph was the first to address human rights, foreseeing the subsequent development of international human rights law as well and the UN and advocating an enforceable International Bill of Rights. See E.Lauterpacht, *The Life of Hersch Lauterpacht*, (Cambridge University Press: Cambridge, 2010) at 253.

²⁵⁷ Hersch Lauterpacht (1950) *ibid* at 61.

international environment.²⁵⁸ In this case, the notion of the State being the sole dutyholder in relation to human rights must be altered and a new paradigm developed whereby new dutyholders are acknowledged.

Social context is paramount when examining the responsibility of business actors for human rights violations. Since the 1990s, as Chapter 1 indicated, there has been a tremendous paradigm shift on the international plane and States are sharing the stage with a variety of non-State actors including business actors. States can no longer lay sole claim to the international arena. If business actors have become so big and so powerful that many of them dwarf State economies, then it is self-evident that their power should also be contained, in particular as regards the individual and in relation to human rights abuses. An insistence that human rights can only be violated by States or their agents is to ignore the purpose of international human rights law, that is, the protection of the individual. Kamenka notes that ‘behind human rights lies a proper concern for human autonomy and development’²⁵⁹ and this is what ought to be protected from the abusive activities of business actors. The ‘ultimate reality,’ as Lauterpacht would have it, is that business actors violate the fundamental law of human rights but in order to protect the individuals affected this of course means that such non-State business actors must be acknowledged as subjects of international law and human rights dutyholders. Andrew Clapham expresses it thus:

By jettisoning the State-nexus test as a jurisprudential trigger, the application of human rights in the private sphere demands a concentration on victims rather than on State actors.²⁶⁰

Currently, ‘rights charters almost invariably concern restrictions on state power and therefore leave intact many forms of ‘private’ domination...’²⁶¹ As will be demonstrated in subsequent chapters, however, this paradigm is slowly shifting with human rights doctrine

²⁵⁸ This can be witnessed in practical terms in the jurisprudence of e.g. the European Court of Human Rights. See for example the case of *Tyrer v. UK* Application no. 5856/72 [1978] ECHR 2 (25 April 1978) In its judgment at para.31 the court concluded that ‘the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.’ See also e.g. *Christine Goodwin v. UK* Application no.28957/95 [2002] ECHR 588 (11 July 2002) at para. 92: ‘In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments.’

²⁵⁹ E.Kamenka, ‘Human Rights, Peoples’ Rights’ 9 Bull. Austl. Soc. Leg. Phil. 148 (1985) at 150.

²⁶⁰ Clapham note 247 at 353.

²⁶¹ Klare note 243 at 97.

spreading into the so-called private sphere, nevertheless it is argued that the lack of binding rules means that ‘private domination’ remains intact.

Even, if international law does *not* apply directly, in any event, as stated at numerous points the *primary* responsibility for protecting human rights rests with States themselves and it would seem obvious that businesses operating transnationally would be subject to the laws and jurisdiction of a host State. Indeed, this principle is enunciated in international human rights instruments ranging from Article 56 of the UN Charter and the Preamble to the Universal Declaration of Human Rights, to paragraph I (5) of the Vienna Declaration which reiterates that ‘it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’²⁶² Of course, this is to be achieved through national measures:

The human rights obligations assumed by each government require it to use all appropriate means to ensure that actors operating within its territory or otherwise subject to its jurisdiction comply with national legislation designed to give effect to human rights.²⁶³

Furthermore it is a principle which has been elaborated in the UN Guiding Principles via the ‘Protect’ requirement, albeit in a way which appears to weaken the obligation.²⁶⁴ So it follows that where business enterprises violate the right to life, or utilise forced labour or child labour, the host State has the obligation to stop the abuses and to provide redress mechanisms for those harmed. This assumption, however, ignores the reality of the situation. All too often States themselves are unwilling or unable to uphold human rights standards for multifarious reasons. This does not mean that business enterprises ought to be allowed to violate human rights with impunity. Nor does it mean that business actors should do the job of the State. There are several separate but interrelated issues to consider: (1) the responsibility of the *host* State; (2) the responsibility of the *home* State; and (3) the responsibility of the business enterprise. This dissertation is concerned

²⁶² UDHR and UN Charter note 93; Vienna Declaration and Programme of Action, A/CONF.157/23 12 July 1993, World Conference on Human Rights, Vienna 14-25 June 1993, [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) [last accessed 22.7.11].

²⁶³ Steiner, Alston & Goodman note 3 at 1388.

²⁶⁴ See discussion *infra* at 3.3.3.

primarily with the third category, however, the first and second categories are addressed briefly in the next sections.

3.5.1 Responsibility of Host States and Home States for Human Rights Violations by Business Actors

There are various reasons why a host State is unwilling and/or unable to protect human rights. The host State itself may be complicit in the human rights violations, for example in Burma/Myanmar where the government was instrumental in the provision of forced labour for the construction of infrastructure for a gas pipeline.²⁶⁵ Or in Ecuador where oil concessions were granted to US oil companies such as Texaco which then ravaged the environment using sub-standard technology and caused untold damage to the indigenous population.²⁶⁶ In that case, the State-owned oil company took over the tainted operations and continued to exploit the natural resources, perpetuating the human rights abuses.²⁶⁷ Other States simply do not wish to implement their human rights obligations because of a general antipathy towards, what are perceived as, ‘Western’ human rights. Still others cite economic pressures as justification for failure to enforce human rights standards. It is this final reason which is perhaps the key to understanding State and business actors’ resistance to mandatory regulation. The drive for foreign direct investment and the profit margin steer them away from an expansion of the category of human rights dutyholders. It seems that current practice is not so very far removed from Friedman’s profit-making Elysium. Steiner, Alston and Goodman focus on these economic factors when offering possible reasons for the failure of States to implement human rights standards:

- (1) governments are often loathe to take the measures necessary to ensure compliance by TNCs, especially, but not only, in relation to labour matters; (2) such measures are costly and perceived to be beyond the resource capabilities of governments in developing countries; (3) in the context of increasing global mobility of capital, competition among potential host countries discourages initiatives that

²⁶⁵ See UNOCAL litigation, California, USA: *John Doe et al. v. Unocal Corp et al.* 963 F. Supp. 880 (March 25 1997); 27 F. Supp. 2d 1174 (November 18 1998); *Doe v. Unocal* 963 F.Supp. 880 (C.D. Cal. 1997) (Unocal I), 110 F.Supp. 2d 1294 (C.D. Cal 2000) (Unocal II), on appeal, 2002 WL 31063976 (9th Cir. 2002).

²⁶⁶ See S.MacLeod, ‘Maria Aguinda v. Texaco Inc.: Defining the Limits of Liability for Human Rights Violations Resulting from Environmental Degradation’ 4(2) Contemporary Issues in Law 189–209 (1999).

²⁶⁷ Ibid. For more background on the situation in Ecuador see A.Fabra, ‘Indigenous Peoples, Environmental Degradation and Human Rights: A Case Study,’ in A.Boyle & M.Anderson, (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press: Oxford, 1996) 245; For the ongoing campaign see <http://chevrontoxico.com/> [last accessed 22.7.11]; For Chevron/Texaco’s perspective see <http://www.texaco.com/sitelets/ecuador/en/> [last accessed 22.7.11].

may push up labour costs and make one country less attractive than others with lower regulatory standards (the so-called ‘race to the bottom’); (4) the transnational complexity of manufacturing and related arrangements in an era of globalization makes it increasingly difficult to identify who is responsible for what activities and where; and (5) especially in the labour area, difficult issues arise about the different levels of minimum acceptable standards from one country to another.²⁶⁸

This list is not exhaustive and arguably focuses too much on labour issues, when it is clear from the examples cited throughout this dissertation that a whole spectrum of human rights violations may occur as a consequence of business misbehaviour.

3.5.2 Conflict Zones

There are, of course, other reasons for States not adhering to their human rights obligations. For example, the issue of businesses operating in conflict zones is particularly fraught. So-called ‘failing’ States are inevitably embroiled in armed conflicts. Invariably this means that they are simply unable to perform the key functions of a State, let alone protect the population from human rights abuses perpetrated or aggravated by private business enterprises. Governments, government factions, rebels, terrorists or essentially anyone in *de jure* or *de facto* control of territory are often also complicit in the abuses. Particularly prized is the power to grant natural resource concessions either legally or on the ground. The enormous riches generated perpetuate the conflicts, whether they be the result of oil and gas exploitation in Angola,²⁶⁹ illegal logging in Liberia,²⁷⁰ or the exploitation of coltan, diamonds, copper, cobalt and gold in the Democratic Republic of Congo (DRC).²⁷¹

The DRC is a particularly pertinent and current example. NGOs such as Global Witness have long complained that the commercial activities of many business actors are

²⁶⁸Steiner, Alston & Goodman note 3 at 1388.

²⁶⁹ See e.g. <http://www.globalwitness.org/campaigns/corruption/oil-gas-and-mining/angola> [last accessed 22.7.11].

²⁷⁰ See e.g. <http://www.globalwitness.org/campaigns/environment/forests/illegal-logging> [last accessed 22.7.11].

²⁷¹ See e.g. Global Witness, ‘Faced with a gun, what can you do?’ War and the Militarisation of Mining in Eastern Congo, Report, July 2009. http://www.globalwitness.org/sites/default/files/pdfs/report_en_final_0.pdf [Last accessed 22.7.11].

supporting and financing the continuation of the conflict in the DRC and consequently fuelling human rights abuses. The natural resource sector, in particular, has been the source of countless human rights violations, specifically the use of child labour and forced labour. As far back as April 2001 the UN Security Council's Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo was describing certain mining companies and their suppliers operating in the DRC as the 'engines' of conflict.²⁷² In its first report the Panel identified general 'lawlessness and the weakness of the central authority' as central to the problem.²⁷³

Businesses have subsequently exploited these weaknesses as the Panel points out:

The role of the private sector in the exploitation of natural resources and the continuation of the war has been vital. A number of companies have been involved and have fuelled the war directly...²⁷⁴

In their 'rush to profit' it was evident that 'some foreign companies...were ready to do business regardless of elements of unlawfulness and irregularities.'²⁷⁵ The Panel expressed concern about numerous foreign companies implicated in the conflict via the supply chain. It cited companies incorporated in Belgium, Germany, Rwanda, Malaysia, Canada, Tanzania, Switzerland, the Netherlands, the UK, Kenya, India, Pakistan and the Russian Federation.²⁷⁶

The Panel's Final Report in 2002 concluded that companies continued to contribute to human rights abuses.²⁷⁷ It also identified eighty-five foreign companies which it considered to be in breach of the OECD's Guidelines on Multinational Enterprises. The list included, Afrimex Limited, a UK registered company which is discussed further in

²⁷² Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo, 12 April 2001, S/2001/357 <http://www.natural-resources.org/minerals/CD/docs/other/357e.pdf> p.42, at 42, para.215 [last accessed 5.8.09].

²⁷³ Ibid at 41 para.213.

²⁷⁴ Ibid at 42 para.215.

²⁷⁵ Ibid at 38 para.184.

²⁷⁶ Panel of Experts, Annex 1, Sample of companies importing minerals from the Democratic Republic of the Congo via Rwanda, ibid at 46.

²⁷⁷ Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo, 16 October 2002, S/2002/1146 at 32, para.175 <http://www.natural-resources.org/minerals/CD/docs/other/N0262179.pdf> [5.8.09]

Chapter 6 in the context of the OECD Guidelines on Multinational Enterprises and the UK's response to its activities.

According to NGO reports, child labour and forced labour is probably still being used in the mining process by companies which are incorporated outside of the DRC or through the supply chain. So-called 'taxes' paid to rebel forces participating in the fighting inflame the conflict further by fuelling the trade in natural resources for arms, for example, and thus perpetuating the abuses.²⁷⁸ Very few of the companies named by the Panel have been held to account for their behaviour. Afrimex is one exception as it has been the subject of a complaint to the UK's National Contact Point under the Specific Instance Procedure established under the OECD Guidelines for Multinational Enterprises.

Such experiences show that in many conflict zone situations, national law is rendered largely irrelevant when seeking remedies for human rights abuses. At first glance it would appear that the modern cross-border activities of business actors are intrinsically international and therefore engage international legal rules. Difficulties arise, however, because of the nature of foreign direct investment coupled with the peculiarities of corporate law, as highlighted in Chapter 1.²⁷⁹ Many developing countries, in response to the New International Economic Order and the doctrine of Permanent Sovereignty Over Natural Resources, started requiring corporate investors to incorporate locally. This was done as a means of protecting natural resources as well as ensuring a measure of control over corporation tax. Thus it is frequently the host State *subsidiaries* of companies registered in the home State which are legally responsible for the human rights violations. It means, therefore, that they are nationals of the host State and consequently it is the host State that has the legal obligation to uphold human rights standards. Thus, on the face of it, international law lacks jurisdiction over the abuses and invariably the host State lacks the will or capability to comply with international human rights obligations.

²⁷⁸ Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008, URN 08/1209 (Afrimex Final Statement), <http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html> See Chapter 5 *infra* for further discussion regarding the DRC.

²⁷⁹ *Infra* at Sections 1.2 and 1.5.

3.6 If Human Rights Obligations Apply to Business Actors, What is Their Form and Content?

Even if it is accepted that business actors are required to comply with international human rights standards there are certainly different views as regards the nature and extent of the obligation, ranging from a *de minimis* approach apparent in voluntary codes of conduct and arguably many of the international initiatives, to an all-encompassing ‘kitchen sink’ methodology espoused by the UN Norms.

3.6.1 Regulatory Form and Content

One of the key debates surrounding CSR has been the issue of applicable human rights obligations. If business actors *are* subjects of international law with attendant rights and duties, does this mean that *all* human rights provisions apply? If so, how should this obligation be articulated? Civil and political? Economic, social and cultural? Labour rights? Individual or collective rights? The right to a clean environment? Section 1.1.2 set out two different typologies of human rights impacted by business actors and proposed adherence to the second and broader approach advocated by Human Rights Watch.

As demonstrated by the initiatives analysed in Chapters 4, 5 and 6, there *is* now general agreement that business entities ought to adhere to human rights standards or at the very least respect them. Where existing initiatives diverge is as to the regulatory form of the obligation and as to their content. That is firstly, whether human rights standards ought to be voluntary or binding, and secondly, the substance of the rights applicable to business activities.

3.6.1.1 Regulatory Form

To the extent that this dissertation posits the view that human rights are either directly applicable or applicable by association to business actors, an examination of the traditional debate surrounding the voluntary or binding nature of such obligations is redundant at this point. As mentioned in Chapter 1, at Section 1.5.2, the case for voluntarism versus the case for binding regulation has been at the heart of the business and human rights debate since the concept of CSR emerged in the 1990s.

3.6.1.2 Content: Determining Applicable Human Rights

It is *not* actually difficult to determine *which* human rights standards ought to apply to business entities, as will be demonstrated. Yet the various international bodies seeking to implement human rights standards for business actors, lack consistency in approach and adopt one of two approaches. They either formulate a vague and generalised reference to human rights e.g. the Global Compact or they tie themselves in knots attempting to categorise and log every possible human right that may be violated by business e.g. the Norms project. Further clouding of the waters is caused by NGO or industry-led and industry-specific codes being produced. There is no coherent approach to the problem. Human Rights Watch in its 2008 report, 'On the Margins of Profit,' argues that the difficulty stems from the fact that essentially there has been 'no shared assessment of the extent of the impact business practices have on human rights.'²⁸⁰ HRW cites the extractive industries as one example:

...the frequent observation that certain industries, such as the extractive industries, have faced repeated human rights controversies, when presented without reference to examples from a range of other industries, can form an impression that human rights problems are highly segmented and limited to a few sectors. By the same token, the special attention given to particular problems that can arise in certain business contexts, such as areas of violent conflict or so-called weak governance zones, when considered in isolation can suggest that business-related abuses do not occur on a global scale. Likewise, the connection between business activity and certain sets of rights, especially labor rights, can lead to assumptions that other rights are intrinsically less affected by business.²⁸¹

This lack of a clear understanding underpins the proliferation of industry-specific voluntary codes of conduct. For diamonds, look to the Kimberley Process; for the textile industry, be NICE; for private military and security contractors turn to the International Code of Conduct for Private Security Service Providers.²⁸² As HRW states, these initiatives 'typically have limited reach and apply only to individual companies or

²⁸⁰ Center for Human Rights and Global Justice/Human Rights Watch, 'On the Margins of Profit: Rights at Risk in the Global Economy,' Volume 20, No.3(G), February 2008 (hereinafter 'On the Margins of Profit') at 5.

²⁸¹ Ibid.

²⁸² <http://www.kimberleyprocess.com/> [last accessed 20.8.11]; Nordic Initiative Clean & Ethical (NICE) <http://www.nicefashion.org/en/about/> [last accessed 25.8.11]; Swiss Government, International Code of Conduct for Private Security Service Providers, 9 November 2010 http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf [last accessed 22.7.11]. For more on the background to the ICOC see <http://www.icoc-psp.org/>.

industries or particular country contexts.²⁸³ This dissertation does not distinguish between categories of business actors as it is clear from the typologies set out in Section 1.1.2 that all business actors are capable of violating the most basic human rights.

While there is general agreement as to the pertinent standards, opinions vary and disagreements abound as to the form the obligations ought to take. Consequently, they range from the general and all-encompassing to the very specific. Historical and existing initiatives, which are examined in detail in later chapters, arguably offer limited assistance because they are couched in vague terms and are lacking in detail as a general rule. On the one hand, this could be viewed as a bland and ineffectual concession to human rights principles which are incapable of being enforced due their nebulous form. On the other hand, such an approach could be perceived as granting great flexibility in terms of potential interpretation and application of human rights standards. Irrespective of the analysis, however, these approaches tend to suggest that *all* relevant human rights are potentially applicable to business actors. While this may be true, a ‘cut and paste’ approach ought to be approached with caution with some authors such as Jägers & van Genugten arguing that they cannot be blindly applied to the ‘corporate context.’²⁸⁴

The generalised human rights provision in the UNCTC Draft Code of Conduct has already been highlighted in this chapter²⁸⁵ and likewise, more recent regulatory initiatives have adopted a broad brushstroke definition of human rights. The Global Compact (GC) in its Ten Principles initially make the following request of business actors:

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

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

²⁸³ On the Margins of Profit note 280 at 5.

²⁸⁴ Jägers & van Genugten note 205 at 2.

²⁸⁵ Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990 at para.14.

The Principles also make reference to labour and environmental rights as well as anti-corruption practices.²⁸⁶ The GC explains that these standards are based upon international norms:

The UN Global Compact's ten principles in the areas of human rights, labour, the environment and anti-corruption enjoy universal consensus and are derived from:

- The Universal Declaration of Human Rights
- The International Labour Organization's Declaration on Fundamental Principles and Rights at Work
- The Rio Declaration on Environment and Development
- The United Nations Convention Against Corruption

The Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption...²⁸⁷

Over time, however, the GC has elaborated upon the content of these principles and now sets out *why* business actors ought to adhere to human rights standards and even more importantly *how* they can go about implementing those standards. This includes encouraging businesses to look beyond the workplace and to interact with local communities²⁸⁸ and describing how a business may incorporate human rights standards into its culture and operations.²⁸⁹ The Global Compact is examined in more detail in the following chapter.

Much like the Global Compact, and despite their 2011 update, the OECD Guidelines on Multinational Enterprises require businesses based in adherent States to observe human rights standards in a very general sense. They must respect human rights, avoid infringing human rights, address adverse impacts, operate a human rights policy and exercise due diligence²⁹⁰ So again there is a broad brush approach and it is an improvement on earlier

²⁸⁶ Principles 3-6, 7-9 and 10 respectively <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> [last accessed 24.8.11]. The UN Global Compact is examined in more detail in Chapter 4.

²⁸⁷ <http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/index.html> [last accessed 24.8.11]

²⁸⁸ <http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/principle1.html> [last accessed 24.8.11]

²⁸⁹ Ibid.

²⁹⁰ OECD Guidelines 2011 note 41, Guideline IV 1.-6. Guideline II(2) in the 2000 version provided only that multinational enterprises were to '[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.' The OECD Guidelines are addressed in more detail in Chapter 6.

versions of the Guidelines.²⁹¹ Arguably this ensures that business actors cannot maintain that certain rights are inapplicable, rather it makes certain that obligations are imposed according to their ability to violate human rights. This is not to say that identifying particular rights assists in their protection to any great degree.

In contrast to the GC and the OECD, the Norms project of the UN Sub-Commission on the Promotion and Protection of Human Rights outlined general and *specific* human rights obligations incumbent upon business enterprises including reference to civil and political rights, economic, social and cultural rights as well as labour rights, environmental rights and international humanitarian law obligations.²⁹² It also set out precisely which international instruments would apply to business enterprises, listing several dozen in total and ranging from general regional instruments to specific international ones. By including rights which appeared not to apply to business, the Norms especially, were attacked by critics as ‘overly inclusive’ and in any event lacked a ‘principled basis’ for determining how, or even if, a right was applicable to business.²⁹³

As discussed in Chapter 1, recent research has concluded that a great variety of human rights can be impacted by business behaviour.²⁹⁴ SRSR Ruggie in his 2008 Survey identified numerous rights impacted by business in a study period lasting just under two years.²⁹⁵ The survey categorises the rights as ‘Labour Rights Impacted’ and ‘Non-Labour Rights Impacted’ although allegations were raised at least as frequently in both categories and it is not clear why this classification was adopted. There was, however, a suggestion that ‘labour-related abuses might be underrepresented in the sample’ because labour issues ‘may be more likely to have been taken to a formal mechanism for resolution.’²⁹⁶

²⁹¹ See Chapter 6 *infra*.

²⁹² Commentary on the Norms note 91, Norms 1,2,3,5,6,7,8,9, 11 and 12.

²⁹³ Ruggie (2007) note 241 at 825.

²⁹⁴ Section 1.3.1.

²⁹⁵ Report of the Special-Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum 2, *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*, A/HRC/8/5/ADD.2, 23 May 2008 (hereinafter ‘Ruggie Survey’) at 12-14

²⁹⁶ *Ibid* at 13 para.21.

Presumably due to the relatively high level of State and business compliance with the ILO Conventions.²⁹⁷

The labour rights identified in the Ruggie survey were based on the standards set out in the ILO's key Conventions and certain of the abuses were 'alleged at almost double the rate of others.'²⁹⁸ These included the right to work (34%), the right to just and favourable remuneration (30%), the right to a safe work environment (31%) and the right to rest and leisure (25%).²⁹⁹ It was also evident that many of the violations of labour rights 'were often not discrete.'³⁰⁰ In other words, one labour-related abuse allegation could spawn other allegations, encompassing both labour and non-labour rights. The survey gives the example of a situation where there might be a specific allegation relating to the use of child labour but 'the circumstances of the case might also give rise to alleged impacts on the right to education, freedom from torture or cruel, inhuman or degrading treatment, the right to health, and even the right to life.'³⁰¹

As regards Non-Labour Rights Impacts, eighteen different civil, political, economic, social or cultural rights were found to have formed the basis for allegations.³⁰² They ranged from the most serious and life-threatening abuses such as torture, inhuman and degrading treatment and violations of the right to life and the right to self-determination. Furthermore, numerous other classic civil and political rights were found to have been

²⁹⁷ See e.g. ILO, 'Multinationals and socially responsible labour practices: Better business - Looking back, looking forward' April 2008, http://www.ilo.org/wow/Articles/lang--en/WCMS_091639/index.htm [last accessed 25.8.11].

²⁹⁸ Ruggie Survey note 294 at 12 para.19.

²⁹⁹ Ibid at 12 para.19.

³⁰⁰ Ibid at 12 para.17.

³⁰¹ Ibid at 12 para.17.

³⁰² Ibid at 13 para.23.

impacted by the activities of business actors³⁰³ and economic social and cultural rights were also identified as having been violated.³⁰⁴

It seems clear, therefore, that attempting to delineate too narrowly all of the applicable human rights norms would be a self-defeating task, resulting in Baxi's 'dense intertextuality'³⁰⁵ and potentially permitting business actors to escape liability. A broad but inclusive approach is to be preferred. In this regard, the approach of the Guiding Principles which rest 'at minimum' upon the International Bill of Rights and the ILO core conventions as well as context-specific 'additional standards' seems to be sensible as a starting point.³⁰⁶ Given that business actors are capable of very broad human rights impacts,³⁰⁷ however, it is suggested that in order to ensure proper accountability in the longer term, the international community must be prepared to embrace a more penetrating typology of human rights impacts such as that proposed by the Center for Human Rights and Global Justice/Human Rights Watch.³⁰⁸

3.7 Conclusion

Louis Henkin writing on the 50th of the Universal Declaration on Human Rights was clear, that at the very least, the UDHR applied to business actors 'even though the companies never heard of the Universal Declaration at the time it was drafted.'³⁰⁹ He was also adamant that it was addressed to society as a whole:

The Universal Declaration is not addressed only to governments. It is a 'common standard for all peoples and all nations.' It means that 'every individual and every organ of society shall strive – by progressive measures...to secure their universal and

³⁰³ Ibid. Including: the right to a fair trial, freedom of movement, peaceful assembly, marry and found a family, freedom of thought conscience and religion, freedom of expression, political life, freedom of religion, privacy. See discussion at Section 1.3.1.

³⁰⁴ Ibid. Including: minority cultural, language and religious rights, social security, adequate living standard including the right to food, clothing and housing, physical and mental health and access to medical services, right to education, participation in cultural life, the benefits of scientific progress and protection of authorial interests. See discussion at Section 1.3.1.

³⁰⁵ Discussion *infra* at 3.3.2 and Note 101.

³⁰⁶ Note 134, GP12.

³⁰⁷ See discussion *infra* Section 1.3.1.

³⁰⁸ On the Margins of Profit note 281 at 7.

³⁰⁹ L.Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' 25 *Brook.J.Int'l L.* 17 (1999) at 24.

effective recognition and observance among the people of member states.’ *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.*³¹⁰

This chapter supports such a view and has argued for recognition of a new human rights horizontality which goes beyond the concept of ‘respect’ for human rights or due diligence and acknowledges that business actors have direct and binding human rights obligations. The failure to sanction business actors as human rights dutyholders is due to lack of political will and powerful economic forces rather than legal impediment inhibiting the application of binding rules. Furthermore, the private/public distinction in human rights is unhelpful and is, in fact, contrary to the founding precepts of international human rights law which places individuals at the heart of the international legal system.

It is time for the international community to impose mandatory rules because businesses are violating a wide variety of human rights in a number of different contexts. This is not a new phenomenon and the international community has had at least four decades to address the problem. Such rules ought to operate in parallel to the existing voluntary initiatives such as the Global Compact, discussed in the following chapter, which has been having some success in terms of dissemination and grassroots activities. This hybrid or smart mix approach to regulation will therefore not only capture business actors who are willing to adhere to human rights norms but also the rogues who will never adhere to voluntary standards of behaviour, motivated as they are solely by profit and self-interest. One need only consider the activities of businesses in conflict and weak governance zones such as DRC, Angola and Liberia, for example. The profit-motive is too powerful a force to be combatted by voluntary CSR in such contexts. What this means in practice is that business actors ought to be endorsed as human rights dutyholders, which is a more onerous obligation than the simple duty to respect human rights advocated by the UN’s General Principles. Moreover, these duties ought to be enforced via a legally-binding global enforcement mechanism. While Ruggie may be right in concluding that a ‘meaningful’ international instrument would be ‘inconceivable’ nevertheless it is contended that ‘principled pragmatism’ dictates that the creation of a legally binding mechanism is of

³¹⁰ Henkin *ibid* at 24-25.

paramount importance and ought to be attempted, difficulties notwithstanding. As Allott says:

[w]e make the human world, including human institutions, through the power of the human mind. What we have made by thinking we can make new by new thinking.³¹¹

It is time to move away from the old vertical human rights paradigm and to think about business actors as human rights dutyholders at minimum.

³¹¹ P.Allott, *Eunomia: New Order for a New World*, (Oxford: OUP, 2001) at xxvii.

Chapter 4

The UN Global Compact: A Global Network Approach to Business and Human Rights

‘...the soft power of moral suasion...’¹

4.0 Introduction

While the UN Norms project discussed in Chapter 3 did not result in any tangible regulatory outcome, it did have the effect of stirring up an energetic debate within the UN about how to address the problem of business violations of human rights. In 2000, the then UN Secretary-General, Kofi Annan, established a flagship project focusing on the social responsibility of business actors and which for a short time operated in parallel to the Norms venture. John Ruggie was also instrumental to the undertaking as an advisor to Annan² and it seems evident that his ‘principled pragmatism,’ discussed throughout this dissertation, has had a heavy influence on its development.

Annan, in a speech to the World Economic Forum in Davos in 1999, had set out his response to globalisation and his vision to ‘give a human face to the global market’³ via a so-called Global Compact. According to Ann-Marie Slaughter’s analysis, this is an example of Annan’s recognition of ‘an increasingly borderless Information Age’ where transgovernmental networks necessarily had to expand to include ‘a host of private actors.’⁴

¹ T.Sagafi-nejad, & J.H.Dunning, *The UN and Transnational Corporations*, (Indiana University Press: Bloomington, 2008) at 206 (hereinafter ‘Sagafi-nejad & Dunning’).

² See B.King, ‘UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations’ 34 Cornell Int’l L.J. 481 (2001) (hereinafter ‘King’) at 481.

³ UN Press Release SG/SM/6881, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos, Text of Speech by Kofi Annan, 1 February 1999, at 1, <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html> [last accessed 10.11.10] (hereinafter ‘Kofi Annan Speech 1999’).

⁴ A.Slaughter, ‘Global Government Networks, Global Information Agencies, and Disaggregated Democracy’ 24 Mich. J. Int’l L. 1041 (2003) (hereinafter ‘Slaughter’) at 1064. See also A.Rasche, ‘Toward a Model to Compare and Analyze Accountability Standards – The Case of the UN Global Compact’ 16 Corp. Soc. Responsib. Environ. Mgmt. 192–205 (2009) (hereinafter ‘Rasche (2009a)’)) at 200; J.G.Ruggie, ‘Reconstituting the Public Domain: Issues, Actors and Practices’ 10 Euro. J.Int’l Relations 499-531 (2004) (hereinafter ‘Ruggie 2004’).

Thus Annan had begun ‘positioning the UN as the convener of ‘global policy networks’’ with the specific aim of bringing ‘together all public and private actors on issues critical to the global public interest.’⁵ Rasche agrees:

The Global Compact reflects a Global Public Policy Network...bringing together UN agencies, corporations, NGOs, and labor representatives from all over the world. The set up of the initiative in 2000 reflects a fundamental shift in the attitude of the United Nations toward the private sector; a shift that emphasizes cooperation more than confrontation...⁶

Thus it differs substantially from the UNCTC Draft Code and Norms addressed in the previous chapter. As such, the UN Global Compact (UNGC) is an example of new or third way governance. Certainly it is an example of an initiative which emanated from ‘sustained demand for international actor accountability’ for ‘less formally institutionalised actors’ driven by certain governments, stakeholders and civil society.⁷

Surprisingly there is scant engagement by legal scholars with the Global Compact and the majority of critical analysis is being undertaken by political scientists, and academics in the environmental management, business ethics and international relations fields among others.⁸ Often reference to the UNGC in legal articles or texts is reduced to a few paragraphs or pages⁹ and only a very few have been devoted entirely to it in

⁵ Slaughter *ibid* at 1065.

⁶ Rasche (2009a) note 4 at 200.

⁷ P.Alston, ‘Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?’ 52 Harv. Int’l L.J. 561 (2011) at 605-606. For a good overview of the first decade of the UNGC see Institute for Business and Human Rights, ‘The UN Global Compact and Human Rights: Developing a Vision for 2020,’ October 2010, http://www.ihrb.org/pdf/UNGC_and_Human_Rights-18Oct2010-optimised.pdf [last accessed 27.8.11].

⁸ See generally e.g. Rasche (2009a) note 4; Ruggie 2004 note 4; O.F.Williams, ‘The United Nations Global Compact: The Challenge and The Promise’ 25 Leadership and Business Ethics 229-249 (2008); D.Cetindamar, ‘Corporate Social Responsibility Practices and Environmentally Responsible Behaviour: The Case of the United Nations Global Compact’ 76 J. of Business Ethics 163-176 (2007); J.Thérien, & V.Pouliot, ‘The Global Compact: Shifting the Politics of International Development?’ 12 Global Governance 55-75 (2006) (hereinafter ‘Thérien, & Pouliot’); J.G.Ruggie, ‘Global_governance.net: The Global Compact as Learning Network’ 7 Global Governance 371-378 (2001) (hereinafter ‘Ruggie 2001’); A.Rasche, ‘A Necessary Supplement’: What the United Nations Global Compact Is and Is Not,’ 48 Business & Society December 511-537 (2009) (hereinafter ‘Rasche (2009b)’).

⁹ See e.g. J.A.Zerk, *Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) (hereinafter ‘Zerk’) at 258-261; Sagafinejad & Dunning note 1 at 195-206; P.Muchlinski, ‘Corporate Social Responsibility and International Law: the case of human rights and multinational enterprises’ in D.McBarnet, A.Voiculescu, & T.Campbell, (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press: Cambridge, 2007) 431-458 at 434-435.

recent years.¹⁰ Presumably this is due, at least in part, to the UNGC's lack of a 'hard' normative framework which is unfortunate as there are many positive elements to the initiative, notwithstanding the lack of mandatory rules and enforcement mechanism. In particular, it has much to commend it as a multistakeholder public policy and learning network. So what specific events led to Annan establishing the UNGC?

Annan was responding to global unease at the pace and consequences of globalisation, an unease which resulted in a non-violent anti-capitalism demonstration in Seattle erupting into violent protest. Such events were viewed by UN Secretary-General Annan as both 'warning' and 'opportunity.'¹¹ A warning of increasing discontent with the process and outcomes of globalisation and an 'opportunity...to aim for a general consensus on the fundamental conditions under which all forms of global commerce might be peacefully and productively conducted.'¹² In Davos, he had referred in his speech to the 'fragility' of globalisation and concluded that the:

spread of markets outpaces the ability 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 realms can never be sustained for very long.¹³

In the Secretary-General's view, the global population did not have the 'confidence' that 'minimum standards will prevail' in a globalised world in the same way that it does in relation to national markets, because 'national markets are held together by shared values'

¹⁰ For early legal scholarship on the UNGC see the symposium papers published in Volume 34 of the Cornell International Law Journal (2001): King *ibid* note 2; W.Meyer, & B.Stefanova, 'Human Rights, the UN Global Compact and Global Governance' 34 Cornell Int'l L.J. 501 (2001) (hereinafter 'Meyer & Stefanova'); K.Basu, 'Compacts, Conventions, and Codes: Initiatives for Higher International Labor Standards' 34 Cornell Int'l L.J. 487 (2001). There has been little specific and substantial legal analysis in the intervening decade but see S.Deva, 'Global Compact: A Critique of the UN's 'Public-Private' Partnership for Promoting Corporate Citizenship,' 34 Syracuse J. Int'l. L. & Com. 107 (2006) (hereinafter 'Deva') at 108-109; J.Nolan, 'The United Nation's Compact with Business: Hindering or Helping the Protection of Human Rights?' 24 U. of Queensland L.J. 445 (2005) (hereinafter 'Nolan') at 445; and E.Oshionebo, 'The UN Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities' 19 Fla. J. Int'l L. 1-38 (2007); S.D.Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level,' 43 Columbia Journal of Transnational Law 388-433 (2005). See also L.Whitehouse, 'The Global Compact - Corporate Citizenship in Action. But Is It Enough?' in J.Eade & D.O'Byrne, (eds.), *Global Ethics and Civil Society*, (Ashgate: Aldershot, 2005) 108-120.

¹¹ Sagafi-nejad & Dunning note 1 at 195.

¹² Sagafi-nejad & Dunning *ibid*.

¹³ Kofi Annan Speech (1999) note 3 at 1.

even in times of ‘economic transition and insecurity.’¹⁴ He concluded that in the absence of such confidence:

the global economy will remain fragile and vulnerable -- vulnerable to backlash from all the ‘isms’ of our post-cold-war world: protectionism; populism; nationalism; ethnic chauvinism; fanaticism; and terrorism. What all those ‘isms’ have in common is that they exploit the insecurity and misery of people who feel threatened or victimized by the global market. The more wretched and insecure people there are, the more those ‘isms’ will continue to gain ground.¹⁵

His solution to the problem was the creation of ‘social safety nets’¹⁶ which would ‘underpin the new global economy’¹⁷ and he called upon business actors:

individually through your firms, and collectively through your business associations -- to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices.¹⁸

Increased cooperation between the UN and business actors was to be the focus of this new Global Compact, in order ‘to find a way of embedding the global market in a network of shared values’¹⁹ and which represented a significantly different approach to the previous traditional inter-State, top-down regulatory attempts undertaken at the UN. Business actors were urged firstly, to ‘encourage States to give us, the multilateral institutions of which they are all members, the resources and the authority we need to do our job.’²⁰ Secondly, and significantly, Kofi Annan acknowledged that business actors are capable of violating human rights and as such have a responsibility to work to prevent such abuses because they represent internationally agreed ‘universal values’ as enunciated by the Universal Declaration on Human Rights and the ILO Declaration on Fundamental

¹⁴ Ibid at 4.

¹⁵ Ibid at 4.

¹⁶ Ibid at 1.

¹⁷ Ibid at 2.

¹⁸ Ibid at 2.

¹⁹ Ibid at 4.

²⁰ Ibid at 2.

Principles and Rights at Work.²¹ Annan asked the business community to take direct action in the pursuit of ‘responsible global capitalism.’²²

Many of you are big investors, employers and producers in dozens of different countries across the world. That power brings with it great opportunities -- and great responsibilities. You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business.²³

Thus the UN Global Compact was born and in 2000 it joined the ‘constellation’ of actors within the ‘UN Galaxy’ of agencies with a direct interest in the activities of transnational business actors.²⁴ It was established with a ‘small staff and modest budget, to provide general information, nurture new partnerships, develop studies, and arrange dialogues throughout the world.’²⁵

This chapter analyses the Global Compact and its evolution and considers whether it is achieving its lofty objectives. There are certainly some positives to be taken from the ‘new governance’ or ‘third way’²⁶ approach of the UNGC project, which utilise non-binding norms or soft law to achieve outcomes. The Global Compact exemplifies what Scott and Trubek describe as the six ‘characteristics’ of new governance, that is (a) participation and power-sharing; (b) multi-level integration; (c) diversity and decentralisation; (d) deliberation; (e) flexibility and revisability; and (f) experimentation and knowledge creation.²⁷ Indeed, many of these new governance characteristics are also apparent in the UN Guiding Principles and the OECD Guidelines on Multinational Enterprises. Nevertheless, the inherent structural limitations of the UNGC as a vehicle for encouraging

²¹ Ibid at 2. See also E.George, ‘See No Evil? Revisiting Early Visions of the Social Responsibility of Business: Adolf A. Berle’s Contribution to Contemporary Conversations,’ 33 Seattle U. L. Rev. 965 (2010) (hereinafter ‘George’) at 992-993.

²² Sagafi-nejad & Dunning note 1 at 195.

²³ Kofi Annan Speech (1999) note 3 at 2-3.

²⁴ Sagafi-nejad & Dunning note 1 at 175. They cite some thirty UN agencies which ‘touch on the activities of TNCs,’ with twelve having an ‘intense interest in TNC and FDI matters.’

²⁵ Sagafi-nejad & Dunning ibid at 196.

²⁶ On new governance generally see J.Scott & D.Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ 8 European Law Journal 1-18 (2002) and at 2.

²⁷ Scott & Trubek ibid at 5-6.

and supporting ‘corporate citizenship’²⁸ as opposed to responsibility, accountability, redress or punishment continue to highlight the need for a binding regulatory framework to protect against violations of human rights by business actors. In other words, a hybrid approach to regulation is required which harnesses the power of both binding and non-binding norms. As it stands, there is a very real danger that the UNGC operates as a vehicle for commercial rhetoric rather than concrete achievements.

The following section 6.2 outlines briefly the objectives of the UNGC. Section 6.3 examines its structure and substantive content as well as considering the implications of the voluntary nature of the UNGC, in particular the issue of bluewashing (defined in Chapter 1 as the abuse of UN endorsement), and its participatory stakeholder approach. Section 6.4 then identifies and analyses the challenges facing the UNGC and the lack of enforcement mechanisms. Finally, the chapter ends with an analysis of the effectiveness of the UNGC and concludes that while some of its activities offer a practical and welcome response to the issue of business and human rights, it cannot of itself resolve the entire problem and needs to operate in tandem with a normative regulatory framework .

4.1 Global Compact Objectives

Andreas Rasche has argued that it is fundamentally important to understand not only what the Global Compact is but also, perhaps more crucially, what it is *not*, otherwise any criticism lacks context.²⁹ The UNGC was launched as a business leaders’ initiative, with the primary purpose of creating policy dialogues on corporate social responsibility issues and describes itself as:

both a policy platform and a practical framework for companies that are committed to sustainability and responsible business practices. As a leadership initiative endorsed by chief executives, it seeks to align business operations and strategies everywhere with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.³⁰

²⁸ http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html [last accessed 11.11.10]. For an early analysis of the Global Compact see Meyer & Stefanova note 10.

²⁹ Rasche (2009b) note 8 at 512.

³⁰ UN Global Compact, ‘Global Citizenship in the World Economy,’ (UN Global Compact: New York, 2008) at 2. See also Rasche (2009a) note 4 at 200.

Thus the UNGC's stated objective is to offer 'a unique strategic platform for participants to advance their commitments to sustainability and corporate citizenship.'³¹

With such clear, non-normative, strategic objectives, it is not surprising that the Global Compact, unlike the UNCTC and the Norms addressed in Chapter 3, has never tried to realise either a hard law approach or implement a binding enforcement mechanism and therefore sits clearly within a new governance or third way paradigm. It demonstrates a more nuanced, alternative approach to business accountability than hard regulation or even voluntarism as had been understood previously. As Rasche contends, 'the discussion about the Global Compact needs to...show more sensitivity to the underlying core idea of the initiative, which is long-term *learning* experience and not regulation' as well as an understanding of 'the constraints of the institutional framework in which the initiative is embedded.'³² That is, that the UNGC was never intended to provide, for example, remedies or sanctions for business violations of human rights. Rasche also acknowledges, however, that:

This is not to imply that binding regulations are not needed but that regulations must be complemented by a dialogue-based approach that gives reference to the fact that most companies still have a lot to learn when it comes to managing social, environmental, and governance issues.³³

This understanding has to be at the heart of any sensible debate about the UNGC, as many critics summarily dismiss the Global Compact when it does in fact offer some useful contributions to the business and human rights paradigm.³⁴

From its inception, it was made clear that the UNGC was intended to be a voluntary³⁵ public-private partnership and 'relies to a great extent on the corporate community's

³¹ <http://www.unglobalcompact.org/AboutTheGC/index.html> [last accessed 15.8.11].

³² Rasche (2009b) note 8 at 512 and 514.

³³ Rasche (2009b) *ibid* at 514-515.

³⁴ See e.g. Deva note 10 and Nolan note 10.

³⁵ See the Ten Principles at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> and About the Global Compact, 5 August 2010 <http://www.unglobalcompact.org/AboutTheGC/index.html> [last accessed 10.11.10]. See also George note 21 at 996.

collective desire for cultivating a positive image³⁶ to achieve its objectives. Georg Kell, Executive Director of the UNGC has stated that:

Public-private partnerships are necessary in today's global world where business interests increasingly overlap with development objectives. We feel that undertaking partnerships is a practical manifestation of good corporate citizenship and underscores a company's commitment to societal change.³⁷

Some commentators see this move towards public-private partnerships as a sign that the UN is trying to modernise, 'reinvent'³⁸ itself and meet new challenges by widening its sphere of influence to include non-State actors, so for example Surya Deva concludes:

This UN partnership with private non-state actors also became imperative because the UN could neither fulfill its ambitious goals under the UN Charter nor could the objective of ensuring a sustainable and inclusive globalization be achieved solely with the support of states.³⁹

Others, as will be seen, are critical of what is perceived as harmful commercial intrusion into the heart of the UN⁴⁰ as well as a legitimisation of rogue business actors 'under a protective UN umbrella.'⁴¹

4.2 UNGC Structure and Content: Voluntarism, Broad Brushstrokes and a Multistakeholder Approach

*...more like a guide dog than a watch dog.*⁴²

Business and civil society around the globe were encouraged to become participants in the UNGC but it was always made clear in UNGC literature that there would be no binding

³⁶ George *ibid* at 996.

³⁷ Business, NGOs and the UN Convene Discuss Partnership Solutions for Today's Global Challenges, 25 September 2009, http://www.unglobalcompact.org/NewsAndEvents/news_archives/2007_09_25.html [last accessed 10.11.10].

³⁸ Nolan note 10 at 445.

³⁹ Deva note 10 at 108-109.

⁴⁰ For a description of increased business involvement at the UN see Thérien & Pouliot note 8 at 58-60.

⁴¹ T. Deen, 'Q&A: 'Bluewashing Has Become a Very Risky Business,' Inter Press Service, 3 June 2010, Thalif Deen interviews Georg Kell, Head of the UN Global Compact, (hereinafter 'Interview with Georg Kell.') http://www.unglobalcompact.org/docs/news_events/in_the_media/IPS_3.6.10.pdf [last accessed 31.7.11]. See also Thérien & Pouliot *ibid* at 67.

⁴² UN Global Compact, Global Compact Network Management Toolkit (UN Global Compact: New York, 2011) at 35 http://www.unglobalcompact.org/docs/networks_around_world_doc/GCLN_ToolKit.pdf [last accessed 31.7.11]. See also Interview with Georg Kell *ibid*.

regulatory structure. This was reinforced in late 2010 by the publication of a document entitled 'The Importance of Voluntarism'⁴³ and confirms that the UNGC is:

predicated on the idea that voluntary initiatives are most effective when they play a complementary role in relation to regulation; such initiatives are, by definition, not legally binding.⁴⁴

Which may be why the substantial membership of the UNGC reflects a truly participatory stakeholder approach although its voluntary nature is often also cited as one of the initiative's greatest weakness.⁴⁵ Nevertheless, the active involvement of civil society is a key element of a new governance paradigm.

In 2011, of over 8,000 signatories to the Global Compact there are more than 6000 corporate participants from 135 States⁴⁶ of which half are small and medium-sized enterprises (SMEs). The significant remainder of 'non-business stakeholders' is composed of NGOs, UN agencies, business associations, labour organisations and academic members.⁴⁷ Thus in:

[f]ollowing the path carved out by the ILO for almost a century, the Global Compact's multistakeholder approach bespeaks a wish to go beyond the classic model of intergovernmental multilateralism.⁴⁸

Arguably this more inclusive approach to governance lends the UNGC and its processes greater legitimacy through the creation of a 'democratic surplus',⁴⁹ although as will be

⁴³ UNGC/Latham & Watkins LLP, 'The Importance of Voluntarism,' 27 October 2010 (hereinafter 'The Importance of Voluntarism') http://www.unglobalcompact.org/docs/about_the_gc/Voluntarism_Importance.pdf [last accessed 10.11.10].

⁴⁴ http://www.unglobalcompact.org/HowToParticipate/Business_Participation/the_importance_of_voluntarism.html [last accessed 26.8.11].

⁴⁵ Thérien & Pouliot note 8 at 67.

⁴⁶ UN Global Compact, Annual Review 2010 (UN Global Compact: New York, 2011) http://www.unglobalcompact.org/docs/news_events/8.1/UN_Global_Compact_Annual_Review_2010.pdf [last accessed 9.8.11] at 6 (hereinafter 'Annual Review 2010'). See also Overview of UN Global Compact Participants and Stakeholders, 28 July 2011, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> [last accessed 9.8.11].

⁴⁷ Annual Review 2010 *ibid* at 10. See also Rasche (2009b) note 8 at 517.

⁴⁸ Thérien & Pouliot note 8 at 61.

⁴⁹ Thérien & Pouliot note 8 at 65 citing S. Tesner, *The United Nations and Business: A Partnership Recovered* (New York: St Martin's Press, 2000) at 111.

seen, in practice business actors tend to dominate, for example, in the structure of the Steering Committees of Local Networks.⁵⁰

Business participants voluntarily agree to abide by the UNGC's Ten Principles (originally Nine Principles – an anti-corruption provision was added in 2004) on human rights, the environment and corruption and incorporate them into the fabric of the business, as well as adhering to the mandatory reporting requirements.⁵¹ They further agree both to support and respect human rights and also to ensure that they are not complicit in human rights abuses. As well as the general human rights principles, participants also agree to adhere to minimum labour and environmental standards. The UNGC makes clear that it is not a 'regulatory instrument' nor does it 'police, enforce or measure the behavior or actions of companies'⁵² hence the 'guide dog not watch dog' tag. Instead it focuses on:

public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.⁵³

Stress is placed on partner dialogue and Kell, explains its role thus:

The Global Compact is neither a seal of approval, nor a certification. In fact, if things go wrong and a company stands accused of violating workers rights or damaging the environment, their participation in the Global Compact puts arguably even more pressure on them. Because joining the Global Compact requires a public commitment, we don't hide it. And it requires follow-up, transparency, and disclosure.⁵⁴

It is this self-regulatory nature that has long been regarded as the Compact's greatest failing because while there are many thousands of participant companies making the 'public commitment' there is no enforcement mechanism and many observers have believed from the outset that the UNGC would be hijacked and utilised by transnational corporations as a mere marketing tool. Indeed, it has been described in the strongest terms

⁵⁰ See discussion *infra* at 6.4.

⁵¹ <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> and http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html [last accessed 10.11.10].

⁵² UN Global Compact, 'The UN Global Compact Operational Guide for Medium-Scale Enterprises,' July 2007 http://www.unglobalcompact.org/docs/news_events/8.1/Operational_guide_ME.pdf [last accessed 26.8.11] at 3.

⁵³ *Ibid.*

⁵⁴ Interview with Georg Kell note 41.

as an ‘exercise in futility’ which ‘provides a venue for opportunistic companies to make grandiose statements of corporate citizenship without worrying about being called to account for their actions.’⁵⁵ Furthermore the UN is accused of being ‘careless’ in allowing business actors to ‘wrap themselves in the flag of the United Nations without committing to actually changing their behaviour.’⁵⁶ There have been several examples of this so-called ‘bluewashing’ including a notorious abuse of the logo by Daimler-Chrysler in the earliest days of the UNGC.⁵⁷ As Thérien and Pouliot comment:

...bluewashing is considered dangerous because it allows private enterprise to dissimulate its motives but also because it tarnishes the UN’s image.⁵⁸

From the very beginning, high-profile critics such as Ralph Nader were scathing in their attacks on the Global Compact arguing that:

...with the U.N. permitting itself to become perverted with corporate sponsorships, partnerships, and other entanglements, it risks veering down the road of commercialization and marginalization.⁵⁹

Nader continued:

An effective United Nations must be free of corporate encumbrances. Its agencies should be the leading critics of the many ways that corporate globalization is functioning to undermine the U.N. missions to advance ecological sustainability, human rights, and global economic justice – not apologists and collaborators with the dominant corporate order.⁶⁰

⁵⁵ Interview with S.Prakash Sethi ‘Global Compact Is Another Exercise In Futility,’ Financial Express, 7 September 2003, <http://www.financialexpress.com/news/global-compact-is-another-exercise-in-futility/91447/0> [last accessed 15.8.2011].

⁵⁶ K.Bruno & J.Karliner, *earthsummit.biz: The Corporate Takeover of Sustainable Development*, (Institute for Food Development and Policy/CorpWatch, 2002) at 53. See also Thérien & Pouliot note 8 at 68.

⁵⁷ CorpWatch, ‘Greenwash + 10 The UN’s Global Compact, Corporate Accountability and the Johannesburg Earth Summit,’ January 2002 <http://s3.amazonaws.com/corpwatch.org/downloads/gw10.pdf> [last accessed 11.8.11] at 1. The company was accused of using the Global Compact logo or an approximation of it without UN authorisation in order to portray itself as an adherent of CSR. See also K.Bruno/J.Karliner/CorpWatch, ‘Tangled Up In Blue: Corporate Partnerships at the United Nations’ (TRAC-Transnational Resource and Action Center, September 2000) <http://www.corpwatch.org/article.php?id=996> [last accessed 11.11.10]; see also The Economist, ‘Bluewashed and Boilerplated: Taking Care of Business? A breakthrough in international corporate diplomacy,’ 19 June 2004. See also Zerk *ibid* note 9 at 260; Thérien & Pouliot *ibid* at 69. For an alternative view see D.M.Bigge, ‘Bring on the Bluewash: A social constructivist argument against using Nike v. Kasky to attack the UN global Compact’ 14 Int’l Legal Persp. 6 (2004) (hereinafter ‘Bigge’).

⁵⁸ Thérien & Pouliot *ibid* at 68.

⁵⁹ R.Nader, ‘Corporations and The UN: Nike And Others ‘Bluewash’ Their Images,’ San Francisco Bay Guardian, 18 September, 2000, available at <http://www.commondreams.org/views/091900-103.htm> [last accessed 31.7.11] (hereinafter ‘Nader’).

⁶⁰ Nader *ibid*. See also Thérien & Pouliot note 8 at 68.

While this is no doubt true, it does not mean that when addressing the issue of business and human rights that the UN should not work collaboratively with business and other stakeholders.⁶¹ What it does mean is that robust checks and balances ought to be put in place to ensure that abuse of the system does not happen.

In response to the early allegations and discussed in the following paragraph, the UNGC enhanced its integrity measures and overall, it can be said that the UNGC's wide stakeholder participation policy renders it a good example of a cooperative approach to regulation, on a surface level at least.⁶² Furthermore, as Rasche reiterates, 'one cannot and should not criticize the Compact for something it has never pretended or intended to be: a compliance-based mechanism that verifies and measures corporate behavior.'⁶³

Another aspect of the multistakeholder approach can be seen in the convening, in January 2002, of a UNGC Advisory Council which comprised 'senior business executives, international labour leaders, public policy experts and the heads of civil society organizations.'⁶⁴ Notably, it was the 'first UN advisory body composed of both private and public sector leaders.'⁶⁵ While the UNGC is 'neither an instrument for monitoring companies nor a regulatory regime' the Advisory Council had a significant role to play.⁶⁶ It had four key priorities: (1) safeguarding the integrity of the UNGC; (2) serving as advocates of the UNGC; (3) providing expertise and (4) offering advice on policy and strategy.⁶⁷ Again on a positive note, and related to the accusations of bluewashing, the

⁶¹ See e.g. Bigge note 57 at 10.

⁶² See e.g. Thérien & Pouliot note 8 at 65.

⁶³ Rasche (2009b) note 8 at 524.

⁶⁴ M. Robinson, 'Beyond good intentions: corporate citizenship for a new century' RSA World Leaders Lecture, RSA Journal 3/6 34-36 (2002) also available at http://unglobalcompact.org/NewsAndEvents/speeches_and_statements/rsa_world_leaders_lecture.html [last accessed 26.8.11].

⁶⁵ Secretary-General Convenes First Meeting of Global Compact Advisory Council, 1st August 2002, http://www.unglobalcompact.org/newsandevents/news_archives/2002_01_08.html [last accessed 27.8.11]. See also G. Kell, 'The Global Compact: Report on Progress and Activities,' Global Compact Office, July 2002 (hereinafter 'Global Compact Report (2002)') http://www.unglobalcompact.org/NewsAndEvents/news_archives/2003_07_02.html [last accessed 26.8.11] at 15. See Appendix D at 60 for a list of original members.

⁶⁶ G. Kell & D. Levin, 'The Evolution of the Global Compact Network: An Historic Experiment in Learning and Action,' Paper presented at the Academy of Management Annual Conference 'Building Effective Networks' Denver, August 11-14, 2002 http://www.unglobalcompact.org/docs/news_events/9.5/denver.pdf (hereinafter 'Kell & Levin') [last accessed 27.8.11] at 17.

⁶⁷ Global Compact Report (2002) note 65 at 15.

Council issued guidelines ‘regarding the official use of the Global Compact logo’ after NGOs expressed concern about corporate abuse and exploitation.⁶⁸ Notwithstanding these guidelines, in March 2005, the Global Compact Office (GCO) felt compelled to release a new, detailed policy on the use of the UNGC names and logos and it was updated again in 2010.⁶⁹ For example, the use of the UNGC name or logo is not permitted for promotional purposes, branding nor as a ‘permanent graphical element of stationery...’⁷⁰ nor may there be any suggestion or implication that the GCO ‘has endorsed or approved’ any particular activity.⁷¹ Anyone wishing to use the name or logos must first seek authorisation from the GCO and if permission is granted authorised users must then submit ‘samples of all materials that bear the Global Compact name and logos’ to the GCO.⁷² The Advisory Council was replaced by the Global Compact Board in 2005, but it has largely the same objectives and responsibilities.⁷³

Other developments, and key to meeting the Compact’s overarching learning objective, include the expansion of the UNGC Learning Forum to encompass a global academic network which engages in relevant research and analysis.⁷⁴ There also seems to be a genuine desire to foster stakeholder participation in the process and recognition of the importance of high-level advocacy.⁷⁵ Furthermore, SGS Ruggie was obliged to engage

⁶⁸ Guidance Issued on Use of Global Compact Image, 19 March 2002, http://www.unglobalcompact.org/NewsAndEvents/news_archives/2002_04_19.html [last accessed 27.8.11]. See Alliance for a Corporate-Free UN, Letter to Kofi Annan Recommending Redesign of the Global Compact, 29th January 2002, <http://www.corpwatch.org/article.php?id=1428> [last accessed 26.8.11]. Daimler Chrysler was accused of appropriating the GC logo in its corporate literature.

⁶⁹ UN Global Compact, ‘Policy on the use of the Global Compact name and logos,’ 9 March 2005: http://www.unglobalcompact.org/content/NewsDocs/gc_logo_pol.pdf [last accessed 22.3.07]; UN Global Compact ‘Policy on the Use of the Global Compact Name and Logos,’ 15 January 2010: http://www.unglobalcompact.org/docs/about_the_gc/logo_policy/Logo_Policy_EN.pdf [last accessed 26.8.11].

⁷⁰ Policy on the Use of the Global Compact Name and logos (2010), *ibid* at 3.

⁷¹ *Ibid* at 3.

⁷² *Ibid* at 2 and 4 respectively.

⁷³ The Global Compact’s Next Phase, 6 September 2005, paras 4.5-4.9, http://www.unglobalcompact.org/docs/about_the_gc/2.3/gc_gov_framew.pdf [last accessed 22.3.07]. For the work of the Global Compact Board see e.g. Annual Review 2010 note 44 at 43.

⁷⁴ Global Compact Report 2002 note 65 at 35. The UNGC is being taught increasingly on MBA and management courses. See http://www.unglobalcompact.org/HowToParticipate/academic_network/index.html [last accessed 26.8.11].

⁷⁵ See e.g. Kell & Levin note 66 at 7. See also e.g. the ‘Global Policy Dialogue on the Role of Business in Zones of Conflict 2001’ cited at 13. See also http://www.unglobalcompact.org/Issues/conflict_prevention/index.html [last accessed 26.8.11].

with it under his 2008 Mandate, specifically through the UNGC's Human Rights Working Group.⁷⁶

While the UNGC does not impose binding standards upon private business actors, it *does* recognise that the values it champions among participants have their roots in existing international legal principles:

The Global Compact is an ambitious and unprecedented experiment to fill a void between regulatory regimes, at one end of the spectrum, and voluntary codes of industry conduct, at the other. It is a cooperative framework based on internationally established rights and principles.⁷⁷

This is not insignificant given that other international initiatives site themselves squarely in the voluntary camp and appear not to acknowledge other regulatory possibilities in any meaningful sense. Zerk rather states the obvious by concluding that it is the 'non-prescriptive nature of the Global Compact standards' which has resulted in its 'appeal to companies and governments from developing as well as industrialised states.'⁷⁸

In terms of content, the Ten Principles relating to human rights, labour standards, the environment and corruption were laid down by the UNGC and corporations are asked voluntarily to 'embrace, support and enact' internationally recognised standards in these four areas.⁷⁹ These core values are derived from the Universal Declaration of Human Rights⁸⁰, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work,⁸¹ the Rio Declaration on the Environment⁸² and the UN Convention

⁷⁶ Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Human Rights Council Resolution 8/7, 18th June 2008 http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf [last accessed 22.8.11] 4(e). See Chapter 1 *infra* note 214.

⁷⁷ Global Compact Report (2002) note 65 at 4.

⁷⁸ Zerk note 9 at 260.

⁷⁹ United Nations Global Compact, 'The Ten Principles' at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> [last accessed 26.8.11].

⁸⁰ UN Doc.A/811 10th December 1948.

⁸¹ 37 ILM 1233 (1998); http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT [last accessed 3.3.07].

⁸² Rio Declaration on Environment and Development, 31 ILM 874 (1992).

against Corruption.⁸³ A great deal of emphasis is placed upon the benefits of ‘socially responsible business’ such as the ‘advantages of a good social reputation,’ ‘reduction of damaging criticism’ as well as ‘being more in touch with markets, customers and consumers.’⁸⁴ Companies committed to the UNGC further undertake to promote the Compact via corporate documentation, e.g. annual reports, mission statements, training programmes and press releases. Importantly, the UNGC harnesses UN ‘inter-agency cooperation,’ bringing together the ILO, UNEP, UNHCR and UNDP.⁸⁵

By 2008, however, there had been a subtle but important change of emphasis, with the UNGC describing the initiative as ‘global and local; private and public; *voluntary yet accountable*’ [emphasis added].⁸⁶ The ‘collaborative solutions’ to the ‘challenges facing business and society’ are to be achieved by harnessing the ‘moral authority and convening power’ of the UN and the diverse problem-solving expertise of the private sector and civil society. In addition to signing the Compact, participants are invited to enrol in one of almost one hundred Local Networks established under the UNGC⁸⁷ and which are ‘established and sustained by local interest and enthusiasm.’⁸⁸ This ‘bottom up’ grassroots approach of these Local Networks aims to ensure that ‘local priorities and needs’⁸⁹ are addressed but it is impossible to measure the success or otherwise of the networks. The UNGC itself States that the:

networks provide opportunities for participants to improve understanding and share experiences on the Ten Principles and partnerships, as well as how to report on progress in these areas. Collective action campaigns and government policy dialogues are also increasingly organised through the Local Networks.⁹⁰

⁸³ 43 ILM 37 (2007).

⁸⁴ ‘The Global Compact and Human Rights’ http://www.unglobalcompact.org/Issues/human_rights/index.html [last accessed 27.8.11].

⁸⁵ Global Compact Report (2002) note 65 at 41.

⁸⁶ Overview of the UNGC at <http://www.unglobalcompact.org/AboutTheGC/> [last accessed 26.8.11].

⁸⁷ UN Global Compact, Global Compact Local Network Report 2011, May 2011 (UN Global Compact Office, New York) http://www.unglobalcompact.org/docs/networks_around_world_doc/Annual_Report_2011/Annual_Local_Network_Report_2011.pdf [last accessed 9.8.11] at 6 (hereinafter ‘Local Network Annual Report (2011)’).

⁸⁸ Annual Review (2010) note 46 at 37.

⁸⁹ Ibid.

⁹⁰ UN Global Compact, ‘Annual Review 2008’ (UN Global Compact Office, New York, March 2009), http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2009_04_08/GC_2008AR_FINAL.pdf (hereinafter ‘Annual Review (2008)’ [last accessed at 19.8.11] at 18.

It also points to the fact that the current UN Secretary-General has had meetings with several of the Local Networks and concludes that this is indicative of their growing importance.⁹¹ Likewise numerous examples of meetings, workshops, roundtables and conferences are held up as examples of the success of the networks and it does seem that there is a significant amount of education, training and dissemination of information taking place all of which should contribute to preventing human rights abuses.⁹² Nonetheless, there is little evidence of how or even if these activities are succeeding.

Overall 60% of active participating companies are part of a local network which is useful in terms of disseminating information to the 'converted' but it seems as if the networks could be doing more in terms of outreach in relation to non-participating companies. Certainly there is nothing to indicate that concrete developments have taken place such as involving new participants in the UNGC or indeed that corporate misbehaviour has been averted as a result of the efforts of the networks. It would be useful to have this information. For example, only one instance of tangible action on the ground is cited in the 2008 Annual Review, a Mexican initiative.

The Mexican Local Network, along with Mexican businesses, a US NGO and sporting and entertainment celebrities was involved in the creation of an emergency hotline for the anonymous reporting of child sexual exploitation.⁹³ An advertising campaign was also undertaken. While this campaign is admirable, and necessary, particularly in the context of a burgeoning Mexican tourist industry, the businesses involved are adopting a more traditional philanthropic role, historically adopted by a variety of industries over the years. There are no illustrations of situations where a Local Network has addressed the specific issue of human rights violations by business itself. The Annual Reviews are silent on this point and it appears that the preventative role of the UNGC is restricted to the promulgation of information.

⁹¹ Ibid.

⁹² Local Network Annual Report (2011) note 87 at 38.

⁹³ Annual Review (2008) note 90 at 21. For more information about the Mexican Local Network see <http://www.pactomundial.org.mx/home/> [last accessed 26.8.11].

Notwithstanding its voluntary nature and its current limited modes of activity, as an organisation the UNGC has introduced some novel approaches to preventing business violations of agreed standards in the areas of human rights as well as the environment and anti-corruption in addition to seeking a measure of accountability where breaches do occur. The fact that more businesses than ever are actively participating in the UNGC and are submitting mandatory Communications on Progress (COP), illustrating their compliance with the principles, is to be applauded and may very well be as a result of the activities of the Local Networks. Without concrete details it is impossible to determine this, however.

Furthermore the UNGC has adopted a truly effective stakeholder approach by involving NGOs, trade unions, academics and other elements of civil society in all aspects of its operations. The Mexican child safety hotline demonstrates this well but it can also be seen in the reports and documents being produced which are clearly harnessing cross-sector expertise.⁹⁴ Many of those documents also rely on the work of SGSR Ruggie⁹⁵ and it is significant to note this move towards a more 'joined up' approach by international organisations to the problem of business and human rights, which can only increase now that the Human Rights Council has approved the Guiding Principles. So, for example, within the context of the UNGC, the Global Compact Netherlands Network has produced guidance for business participants to help them be compliant with the Protect, Respect and Remedy framework.⁹⁶ This multistakeholder involvement and structure is one of the great strengths of the UNGC:

...the Global Compact follows a rather inclusive, as well as communicative, approach and also profits from the perceived high legitimacy of the conventions/declarations

⁹⁴ See for example Castan Centre for Human Rights Law at Monash University/Office of the High Commissioner for Human Rights/ International Business Leaders Forum/UN Global Compact, 'Human Rights Translated: A Business Reference Guide 2008' http://human-rights.unglobalcompact.org/doc/human_rights_translated.pdf [last accessed 19.8.11] (hereinafter 'Human Rights Translated') at xiii. The publication aims to explain the content of international human rights and to act as 'a tool for companies wanting to engage in activities in support of human rights.'

⁹⁵ UN Global Compact Note, 'The UN Protect, Respect and Remedy Framework for Business and Human rights: Relationship to UN Global Compact Commitments,' May 2010 http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/UNGC_SRSGBHR_Note.pdf [last accessed 26.8.11]. See also http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html [last accessed 26.8.11] and http://www.unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html [last accessed 26.8.11].

⁹⁶ Local Network Annual Report 2011 note 87 at 26 citing the Business & Human Rights Initiative, 'How to Do Business with Respect for Human Rights: A Guidance Tool for Companies,' (The Hague: Global Compact Network Netherlands, 2010) http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/how_to_business_with_respect_for_human_rights_gcn_netherlands_june2010.pdf [last accessed 19.8.11].

issued by the UN. Brinkmann-Braun and Pies...encapsulate this by arguing that among the key assets of the initiative are its credibility and perceived legitimacy.⁹⁷

These are strong reasons for supposing that the dissemination programme will be successful in ensuring greater respect for human rights standards, at least where businesses *want* to be involved. To that end it will be interesting to see if new developments such as the ‘Global Compact Network Management Toolkit’ published in 2011 will be successful in increasing the concrete usefulness of the networks.⁹⁸

4.3 Regulatory Challenges for the UNGC

Despite the progress, the UNGC, now in its eleventh year of operation continues to face many of the regulatory and procedural challenges it encountered at its outset and throughout its existence. In particular, it faces serious issues relating to non-compliance with its reporting elements.

Although the UNGC is a voluntary initiative, it differs from other business and human projects in several ways. Business actors participating in the Compact are required, as a mandatory condition of their participation, to submit on an annual basis concrete examples of measures taken to comply with the Ten Principles.⁹⁹ These are to be published in the annual company report to ensure that there is an element of transparency in the process. During the initial 2001 pilot phase, of the 30 corporate submissions none were deemed ‘worthy of publication.’¹⁰⁰ Several problems were identified ranging from ‘substantial degrees of organizational change’ to ‘difficulties assessing the priority of corporate citizenship relative to profit-generating business activities.’¹⁰¹ In an attempt to resolve some of these problems, companies are now required to formulate their public submissions

⁹⁷ Rasche (2009a) note 4 at 201.

⁹⁸ Global Compact Network Management Toolkit note 42.

⁹⁹ The Global Compact Policy on Communicating Progress, 25 February 2011 http://www.unglobalcompact.org/COP/communicating_progress/cop_policy.html [last accessed 26.8.11].

¹⁰⁰ Global Compact Report (2002) note 65 at 18-19: ‘According to a review conducted by an independent team of academics, none of the company submissions conformed to the guidelines suggested by the Global Compact Office, and 15 of the submissions did not directly address the implementation of the nine principles.’ See also NGO Letter to Kofi Annan Recommending Redesign of Global Compact note 66.

¹⁰¹ Global Compact Report (2002) note 65.

in accordance with a ‘concise template’ drafted by the UNGC in order to focus on the ‘strictly factual elements of company experience.’¹⁰²

After these early teething problems, in 2007 the UNGC registered its most successful quarterly reporting period with 428 companies submitting a Communication on Progress (COPs), representing a 41% increase on 2005.¹⁰³ This figure has increased consistently with 2,834 COPs submitted in 2010, representing a 13% increase on 2009.¹⁰⁴ In total 69% of business enterprises participating in the UNGC for longer than one year are ‘active,’ that is they are ‘in compliance with the Global Compact COP policy.’¹⁰⁵ Notwithstanding these ostensibly positive developments, the increasing number of non-compliant participant companies gives cause for concern, especially the disproportionately high number of SMEs.¹⁰⁶ As of January 1st 2011 ‘over 2,000 companies had been expelled from the Global Compact for failure to adhere to the COP policy, representing one-quarter of Global Compact companies.’¹⁰⁷ While the majority of expelled companies are smaller in size, nevertheless, seven companies employing over 50,000 people have also been expelled for non-compliance.¹⁰⁸ To be expelled, a company must have failed to communicate for at least one year. Nevertheless, as will be seen, the UNGC has responded positively to genuine stakeholder concerns, although, it is unclear whether or not it will have an effective impact on business behaviour. There is a risk that it will merely encourage businesses to focus on the style, rather than the substance of their submissions.

Furthermore, there is concern that the already ‘light touch’ reporting requirements ‘instead of being made stricter’ have ‘gradually been loosened.’¹⁰⁹ Thérien and Pouliot explain that

¹⁰² Annual Review (2010) note 46 at 19. For the latest The Global Compact Policy on Communicating Progress, 25 February 2011 http://www.unglobalcompact.org/COP/communicating_progress/cop_policy.html [last accessed 26.8.11].

¹⁰³ Press Release, ‘Record Quarter for Companies Communicating on Progress,’ 30th January 2007 http://www.unglobalcompact.org/NewsAndEvents/news_archives/2007_01_30.html [last accessed 19.8.11].

¹⁰⁴ Annual Review (2010) note 46 at 18.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid at 19.

¹⁰⁷ Annual Review (2010) ibid at 18. The precise figure is 2,048 at 19.

¹⁰⁸ Ibid at 19.

¹⁰⁹ Thérien & Pouliot note 8 at 67.

initially companies were asked to publish online an example of their compliance with the UNGC on an annual basis but now:

The UN subsequently lowered its requirements and is now content to ask firms to explain in their annual reports how they have applied the Compact's principles.¹¹⁰

Moreover, in its Annual Report for 2008 the recurring themes around corporate failure to meet the specific communication obligation under the Global Compact loomed large.¹¹¹ While in the decade since the UNGC's creation there *has* been a significant increase in the number of participants submitting COPs, at the same time large numbers have been delisted for failing to submit a COP at all. Excluding businesses which are insolvent and which no longer exist, it seems clear, therefore, that there are three different categories of business operating.

Firstly, there are the businesses which are *willing and able* to adhere to the UNGC principles e.g. submitting a COP and belonging to a Local Network. These tend to be the big high-profile, high-street names which respond to reputational carrots.¹¹² Next, there are those businesses which are *willing but unable* to adhere to UNGC commitments such as submitting COPs. The vast majority of delinquent participants fall within the SME sector and the 'naming and shaming' stick used hitherto to embarrass participants into meeting their obligations is less likely to have a positive effect than previously simply because they and their activities are often less visible to the public.¹¹³ 74% of UNGC participating companies which responded to a survey reported that increasing consumer trust in their business was a key reason for involvement in the initiative.¹¹⁴ SMEs generally have a lower public profile and it must therefore be assumed that they are less susceptible to bad publicity and the consumer campaigns and boycotts which often plague the larger high-profile businesses and act as a lever for better behaviour.¹¹⁵

¹¹⁰ Thérien & Pouliot note 8 at 67

¹¹¹ Annual Review (2008) note 90 at 15 and 21.

¹¹² See for example Daimler Chrysler in the earliest days of the GC note 68.

¹¹³ Only 32% of SMEs are active participants in comparison to 67% for other companies which have been participants for more than two years. The overall figure is a much higher 76% when new participants are included. Annual Review (2008) note 90 at 53.

¹¹⁴ Annual Review (2010) note 46 at 12.

¹¹⁵ See the examples cited in Chapter 1 *infra* notes 111-113.

Finally, there are businesses which are simply *unwilling* to become involved with initiatives such as the UNGC at all. It is this renegade group which presents the greatest challenge for voluntary schemes. If one of the aims of the CSR project is to convince industry that CSR is good for business then ways of reaching those businesses which ‘fly under the radar’ need to be developed over and above those which reach businesses that are responsive to the threat of losing consumer confidence or their reputation. This is the crux of the matter as the businesses currently engaged in human rights violations will never be persuaded by the reputational carrot held out by voluntary initiatives.¹¹⁶ Companies out of the public eye are far less susceptible to the notion of the ‘price of getting it wrong’ and this is why it is necessary to establish a parallel ‘top-down’ *international* regulatory architecture which will apply to all business.¹¹⁷ As Rasche comments, this is why the UNGC’s ‘learning based approach’ can only be a ‘supplement to regulation’ rather than a replacement.¹¹⁸

In light of these ongoing difficulties, the UNGC will have to work hard to address the problem of non-communicating participants and inactive/delisted companies. This is being addressed partly through the implementation of a quality reporting programme which is designed to help businesses draft their COPs, encourage ‘greater transparency’ among existing participants and standardise the COPs.¹¹⁹ Such a scheme will be of unquestionable value for SMEs who struggle with the administrative burden of institutional paperwork and red tape at the best of times. The introduction of a COP template in 2010 will go some way to achieve this although the ‘differentiation

¹¹⁶ See Human Rights Translated *ibid* note 92 at vii-viii: ‘Good human rights practice may bring commercial rewards...Companies implicated in human rights scandals often see their reputations and brand images suffer, resulting in the loss of share value, and face increased security and insurance costs, as well as expensive lawsuits such as those pursued under the Alien Tort Claims Act, and consumer boycotts. The price of getting it wrong cannot be underestimated.’

¹¹⁷ *Ibid.* See also H.Koh, ‘Separating Myth from Reality About Corporate Responsibility Litigation’ 7 J. of Int’l Economic L. 263-274 (2004) at 273; J.Zerk, *Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 310.

¹¹⁸ Rasche (2009b) note 8 at 528.

¹¹⁹ UN Global Compact, Practical Guide to the Communication on Progress, ‘Human Rights – A Call to Action’, September 2008. See also: ‘The Practical Guide to the United Nations Global Compact, Communication on Progress (COP): Creating, Sharing and Posting a COP’ (UN Global Compact Office, 2009) http://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/Practical_Guide_2008.pdf [last accessed 19.8.11] (hereinafter ‘Policy on Communicating Progress’).

programme' launched in 2011 may be more controversial because while it aims to help SMEs it introduces variable standards of implementation:

It is a framework for companies to differentiate themselves based on the extent to which their COP describes implementation of the Ten Principles and related areas based on clear criteria. It also aims to facilitate a more thorough assessment of sustainability performance and disclosure by stakeholders, while recognizing each company's unique operational context such as size, industry and geography.¹²⁰

Furthermore, the UNGC will also have to demonstrate that it is more than a mere 'talking shop' or opportunity for charitable works and move towards helping to materially prevent human rights violations by business. There is no question that the dissemination of information and education about human rights standards (and the rest) is valuable in terms of ensuring respect for principles but there are ongoing breaches which require urgent attention and the UNGC remains unable to tackle them.

There are also concerns about the multistakeholder nature of the UNGC. For example, disquiet has been expressed by the UNGC itself regarding the predominance of business actors in the Local Networks because 70% of Steering Committees are driven by the business actors themselves.¹²¹ This figure rises to 80% in European Local Networks and raises questions as to whether other stakeholders in the process are effectively involved and included on the ground.¹²² Such statistics dispute the UNGC's claims to legitimacy by challenging its democratic credentials.¹²³ As Thérien and Pouliot put it:

Although the Compact does give more voice to nonstate actors on the international stage, clearly the language of 'partnership,' 'networking,' and 'policy dialogue' cannot by itself erase the inequalities that cause some groups to be 'in' while others are left 'out.'¹²⁴

The UNGC will have to work hard to ensure two things. Firstly, that a balance is struck between the competing interests of the stakeholders and that the more powerful business actors do not harness the Local Networks for their own agendas and interests. Secondly,

¹²⁰ Annual Review (2010) note 46 at 19. See, Policy on Communicating Progress note 97.

¹²¹ Local Network Annual Report (2011) note 87 at 29.

¹²² Ibid.

¹²³ Thérien & Pouliot note 8 at 68.

¹²⁴ Thérien & Pouliot note 8 at 70.

that NGOs and others are given access to Local Network Steering Committees on an equal basis to business actors.

While the UNGC is an important tool in relation to encouraging adherence to some aspects of CSR, nevertheless, the current institutional arrangements are simply not capable of addressing ongoing violations of human rights (it was never an objective) and certainly do not fully meet Ruggie's requirements for an 'effective remedy.'¹²⁵ The UNGC was never designed with any sort of enforcement mechanism or punishment in mind for active human rights breaches and while the 'bottom up' reporting approach and dissemination activities are commendable in terms of preventing business misbehaviour, huge cracks appear in the system when businesses simply refuse to meet their reporting obligations and the system itself cannot remedy *ex post facto* situations of human rights abuse.

Special Representative Ruggie during his mandate wanted to identify examples of existing good practice in relation to business and human rights. There is no doubt that the UNGC has much to offer in this regard via the COPs and Local Networks in particular. The UNGC is doing good work in the promotion of human rights standards, and consequently protection, but it is simply not in a position to offer any kind of *remedy* or redress for human rights violations by business unless its terms of reference change.

4.4 Conclusion

The general impact of the UNGC remains to be seen. For the purpose of this dissertation, however, what the UNGC experience demonstrates is that it is possible for private business actors to work with the UN on the international plane. Again, no objection in principle from international law has impeded the work of the UNGC. Moreover, some business actors at least seem willing to comply with human rights obligations emanating from international treaties. This is especially true when the content of internal codes of conduct

¹²⁵ Protect, Respect and Remedy: a Framework for Business and Human Rights,' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie A/HRC/8/5 7 April 2008 at 24 para 92. See also Chapter 1 *infra* at Section 1.6.2.

is examined. These include many references to the key international human rights instruments referred to in the UNGC.¹²⁶

The UNGC represents a different approach to the issue of business and human rights and as such it has some notable strengths. Firstly, the Global Compact adopts a top-down – bottom-up approach, whereby it relies upon the top-down application of general international human rights standards as well as bottom-up implementation of those standards at the national level. The Global Compact does this through its Local Networks which promote the UNGC as a policy initiative and disseminate information about human rights.

The second strength of the UNGC is that it is multistakeholder in nature. That is, it actively involves relevant actors in the CSR process, that is, States, business actors, NGOs, trade unions, industry bodies and other members of civil society such as academics. It has become generally accepted that a multistakeholder mechanism which engages all relevant parties is to be preferred.¹²⁷ Witness the substantial criticism that the European Union attracted when it abandoned its multistakeholder approach to CSR and chose to engage only with representatives of business discussed in Chapter 5.¹²⁸

A fourth strength of the UNGC project is that business accountability is a key factor, in this case a self-imposed and public obligation to account. Accountability mechanisms are a crucial element of any business and human rights initiative for holding business enterprises responsible for violations of human rights standards in order to hold them to their obligations. So for example, the UNGC utilises ‘naming and shaming’ techniques to

¹²⁶ For examples of codes of conduct see e.g. <http://www.business-humanrights.org/Categories/Company policysteps/Policies/Codesofconductcorporate> [last accessed 12.8.11]; R.Blainpain, (ed.), *Multinational Enterprises and the Social Challenges of the XXIst Century (The ILO Declaration on Fundamental Principles at Work. Public and Private Corporate Codes of Conduct.)* 37 Bulletin of Comparative Labour Relations 2000, (London: Kluwer Law International, 2000).

¹²⁷ See e.g. Human Rights Council Resolution 8/7, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 18th June 2008, para. 4 (e), (f) and (g). The SGSR is required to engage with a variety of stakeholders: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf [last accessed 14.1.10].

¹²⁸ See infra Chapter 5. For an overview of the NGO position, see the European Coalition for Corporate Justice Advocacy Briefing, ‘Corporate Social Responsibility at EU Level: Proposals and recommendations to the European Commission and the European Parliament’ November 2006: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/eccadvocacybriefing112006/_eccadvocacybriefing112006_en.pdf [last accessed 14.1.10].

highlight members who fail to report as required.¹²⁹ Companies can be permanently expelled for failure to adhere to the UNGC principles and this information is published on the UNGC website.¹³⁰

Fifthly, the UNGC attempts to operate in a transparent manner. So for example, participant companies voluntarily include a statement in their annual reports indicating their compliance with the human rights, environmental and anti-corruption principles,¹³¹

The increasing use of domestic and regional mechanisms by business and human rights initiatives has enabled the enhanced promotion and dissemination of information regarding human rights standards and so yields a final strength. A large part of the Global Compact's work involves disseminating information to and educating businesses about human rights standards. This is done by the UNGC itself and increasingly by the domestic and regional Local Networks.¹³²

Undoubtedly the use of alternative methods utilised by the UNGC and discussed in this chapter has made *some* business actors respect human rights and consider and uphold their social responsibilities. Thus it is argued that the UNGC is contributing to CSR norm internalisation but, notwithstanding the positive elements, there are also major hurdles to be overcome. Significantly, the UNGC suffers from a serious image problem and recurring accusations of bluewashing threaten to overshadow the positive achievements of the UNGC and its networks.

Moreover, the UNGC must do more to address the large number of business actors who fail to meet the mandatory requirement to communicate their progress. Without a significant reduction in this figure, the UNGC remains vulnerable to extensive criticism from civil society. It is clear that the threat of expelling or delisting is an inadequate

¹²⁹ http://www.unglobalcompact.org/NewsAndEvents/news_archives/2009_10_07.html [last accessed 26.8.11]].

¹³⁰ The list of companies delisted includes several household names e.g. Avon Brazil, Addecco Australia and Radisson SAS Hotels Bulgaria: http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2009_10_07/Delisted_List_10_07_2009.pdf [last accessed 26.8.11].

¹³¹ Policy on Communicating Progress note 99.

¹³² Annual Review (2008) note 90 at 18-22.

response to business actors who fail to meet their participation commitments. What is also clear is that Ruggie's concept of 'principled pragmatism' which pervades the UNGC has limits. The UNGC, like the other examples of the OECD and EU discussed in Chapters 5 and 6, demonstrates that in the absence of a hard legal regulatory framework some businesses will continue to ignore evolving standards and will violate human rights.

Chapter 5

THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: A TOP-DOWN - BOTTOM-UP APPROACH TO REGULATING BUSINESS BEHAVIOUR

“[T]he only comprehensive, multilaterally endorsed code of conduct for multinational enterprises.”¹

5.0 Introduction

In some respects the OECD adopts a truly cooperative approach to business and human rights and one which operates at the international and national levels. Through the implementation of the Guidelines for Multinational Enterprises,² (‘the Guidelines’), the OECD harnesses the consensual authority of an international multilateral instrument coupled with institutional clout and national mechanisms to bring a degree of accountability to the behaviour of business actors. Hence the ‘top-down - bottom-up’ description of the chapter title. In this sense, the OECD system represents, an example of new governance where there is a ‘diffusion of rights and responsibilities among governments, private companies, NGOs and other interested parties.’³ As will be seen, however, this diffusion has been limited in both scope and impact, notwithstanding a June 2011 revision.

The Guidelines form part of the OECD Declaration on International Investment and Multinational Enterprises, and Adhering Governments agree to promote their observance among multinational enterprises.⁴ Importantly, its Adherent Governments comprise the majority of industrialised nations as well some of the most rapidly industrialising, such as

¹ UK Department for Business Enterprise and Regulatory Reform, <http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html>. See also for example, Statement by the UK National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises: DAS Air, 17 July 2008 at para 2, <http://www.oecd.org/dataoecd/11/31/44479531.pdf> [last accessed 30.8.11].

² OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, <http://www.oecd.org/dataoecd/43/29/48004323.pdf> [last accessed 30.8.11] (hereinafter ‘OECD Guidelines 2011’).

³ J.M.Conley & C.A.Williams, ‘Engage, Embed and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement’ 31 J. Corp. L. 1-38 (2005) at 6.

⁴ OECD Declaration on International Investment and Multinational Enterprises, 27.6.2000 http://www.oecd.org/document/53/0,3343,en_2649_34887_1933109_1_1_1_1,00.html and www.oecd.org/daf/investment/declaration (permanent url) [last accessed 30.8.11] (hereinafter ‘Declaration on International Investment and Multinational Enterprises’). This chapter uses the term ‘Adherent Governments’ in line with the OECD mandate.

Brazil and are therefore home and host to significant numbers of transnational business actors.⁵ Quite clearly the OECD and governments adhering to the Guidelines are conforming to SGSR Ruggie's (and international law's) position that *States* have the primary obligation to protect individuals from human rights abuses but also recognise that business has minimum obligations and that human rights can only be protected, respected and remedied by a combined arrangement. In other words the OECD adopts a top-down – bottom-up approach, albeit a flawed one, whereby a cooperative agreement operates at the international level while also enabling and encouraging domestic solutions. As such, the OECD Guidelines are substantially different in nature and effect from the UNGC which, as discussed in the previous chapter, functions as a business leaders' policy dialogue, focuses on the voluntary participation of business actors and does not require State participation.

The Guidelines also differ substantially from the failed UNCTC Code of Conduct and the UN Norms addressed in Chapter 3, both of which sought to impose direct, legally binding obligations on business actors via international multilateral treaties. The Guidelines, conversely, are recommendatory in nature and Adherent Governments merely, 'jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines...' ⁶ thus 'observance...by enterprises is voluntary and not legally enforceable.' ⁷ While the Guidelines are addressed to business actors, it is the governments of OECD Adhering Governments which adhere to them.

Despite the fact that the Guidelines are not legally binding, emphasising instead self-regulation, capacity building and management systems,⁸ they do specifically address the

⁵ At the time of submission of this dissertation there are thirty-four governments who adhere to the Guidelines but an additional 11 non-OECD follow the Guidelines: Adhering Governments: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. The non-OECD countries are Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

⁶ Declaration on International Investment and Multinational Enterprises note 4 at I.

⁷ OECD Guidelines 2011 note 2 Guideline I (1).

⁸ OECD Guidelines 2011 *ibid* Guidelines II(3), (6) & (7).

issue of human rights,⁹ in particular labour issues,¹⁰ as well as environmental protection.¹¹ The lack of clarity and specificity of language, however, has been criticised by one commentator for failing to meet the overarching objectives of the Guidelines:

The Guidelines endeavour to achieve an atmosphere of confidence and predictability between business, labour, governments and society. Such objectives are ill-satisfied by jargon such as ‘local capacity building,’ ‘individual human development’ and good corporate governance which are evidently directed at non-participating addressees.¹²

Nils Rosemann has also criticised the human rights provisions within the 2000 version of the Guidelines for being ‘weakly phrased’ and making ‘no explicit reference to rights critical to the protection of life, liberty and security.’¹³ While the expanded 2011 human rights chapter of the Guidelines is an improvement, as will be seen in Section 5.3, the same criticisms remain.

Nevertheless, there is much to be learned from the OECD Guidelines’ experience overall, both positive and negative, and this is true particularly in relation to accountability attempts via the National Contact Point (NCPs).¹⁴ This makes the OECD’s practical experiences in attempting to regulate business behaviour different from anything undertaken at the UN and elsewhere and offers a new governance or third way approach which exhibits potential elements of SGSR Ruggie’s definition of ‘remedy’ although it fails ultimately for failing to act as a strong deterrent or to offer redress. Notwithstanding this limited positive aspect, the OECD system exhibits substantial structural difficulties which have hampered openness, transparency and the involvement of civil society as well

⁹ Ibid Chapter IV.

¹⁰ Ibid Chapter V.

¹¹ Ibid Chapter VI.

¹² S. Tully, ‘The 2000 Review of the OECD Guidelines for Multinational Enterprises’ 50 ICLQ 394-404 (2001) (hereinafter ‘Tully’) at 403.

¹³ Dialogue on Globalization/ N. Rosemann, ‘The UN Norms on Corporate Human Rights Responsibilities: An Innovating Instrument to Strengthen Business’ Human Rights Performance’ Occasional Paper N° 20 / August 2005 at 20. (Hereinafter ‘Rosemann’).

¹⁴ See e.g. OECD Watch, ‘OECD Watch’s recommendations on the “Protect, Respect and Remedy” framework proposed by the Special Representative to the United Nations Secretary-General on Business and Human Rights,’ October 2009, <http://www2.ohchr.org/english/issues/globalization/business/docs/OECDWatch.pdf> [last accessed 4.8.10].

classic problems in relation to weak enforcement and lack of fully effective remedies. It is unlikely that the revisions made in the 2011 Guidelines will solve these problems.

Given that the Guidelines ‘cover up to 85% of total foreign direct investment flows,’¹⁵ it is important that this Chapter examines the application of the current Guidelines and analyses their effectiveness at achieving the accountability of business actors in relation to human rights violations. In particular, it critiques the National Contact Point system and the implementation of Specific Instance Procedures. It concludes that while the OECD Guidelines offer a useful model for achieving business accountability, their non-binding nature, their lack of enforceability and absence of individual redress renders them deficient. Finally, the chapter outlines changes to both the Guidelines and to the NCPs which will be necessary in order to strengthen them as an accountability mechanism. In the words of OECD Watch, (an important ‘global network’ consisting of more than eighty NGOs working in the business and human rights sphere¹⁶), ‘it is imperative that there should be genuine improvements to both substance and procedure so that the Guidelines become more than a set of voluntary recommendations.’¹⁷ It is unfortunate that in updating the Guidelines in 2011, the OECD missed a crucial opportunity to rectify their weaknesses in order to ensure their efficacy in the future.

5.1 Background and History

Much like the UN, the OECD has a reasonably lengthy history in relation to CSR. Drafted in 1976, the Guidelines represented the OECD Member Governments’ response to increasing globalisation and what they described as ‘strategic challenges for enterprises and their stakeholders.’¹⁸ Peter Muchlinksi asserts that the response was a reaction to the positions of two different State groups both of which wanted some form of binding

¹⁵ Rosemann, note 13 at 19.

¹⁶ OECD Watch, ‘10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct,’ OECD Watch, June 2010 at 6 http://oecdwatch.org/publications-en/Publication_3550 [last accessed 27.7.10] (hereinafter ‘OECD Watch (2010)’).

¹⁷ OECD Watch (2010) *ibid* at 8.

¹⁸ OECD Guidelines 2011 note 2 Preface at para.5.

regulatory control over transnational business actors and which were discussed in Chapter 1 of this dissertation.¹⁹

Firstly, developing States were asserting their newly established sovereignty and ‘demanding a change in the balance of world economic power’²⁰ This was already manifesting itself in a CSR context at the UNCTC via the debates surrounding the Draft Code of Conduct,²¹ as well as on a practical level through numerous post-colonial nationalisations of foreign-owned assets in developing nations.²² As was seen in Chapter 3, the efforts of the UNCTC to create a multilateral binding Code of Conduct collapsed ultimately, while within the OECD context the non-binding Guidelines were devised and adopted. Muchlinski contends that a key aim of OECD Ministers in creating the Guidelines was to hinder the development of stronger regulation by the developing nations²³ and in this regard the OECD Ministers were successful, given the subsequent failure of the UNCTC to deliver an universally agreed Draft Code of Conduct.

Secondly, some OECD Member Governments such as Canada, the Netherlands and the Scandinavian nations, as well as the Trades Union movement, also sought greater regulation and control of transnational business activities in the form of a ‘legally binding code.’²⁴ Their concerns emanated from unease about unregulated transnational business within a context of embryonic globalisation, as opposed to protection of sovereign interests.

Muchlinski describes how the demand for regulation from both of these groups was balanced by calls from business ‘for greater emphasis on the removal of obstacles to

¹⁹ P.T., Muchlinski, *Multinational Enterprises and the Law* (2nd ed.) (Oxford: OUP, 2007) (hereinafter ‘Muchlinski (2007)’) at 578 and infra at Sections 1.2. and 1.3 in relation to the rise of globalisation.

²⁰ Muchlinski (2007) *ibid.*

²¹ See discussion Chapter 3 at 3.2.1.1.

²² For examples of these nationalisations see e.g. *Anglo-American Oil Co. Case (United Kingdom v. Iran)*, Judgment of 22 July 1952, ICJ (1952); *Liamco v. Libya* 20 ILM 1 (1981); *BP v. Libya* 53 ILR 297 (1974); *Aminoil v. Kuwait* 21 ILM 976 (1982).

²³ Muchlinski (2007) note 19 at 578.

²⁴ Muchlinski (2007) *ibid.*

foreign direct investment’²⁵ and dubs the Guidelines a ‘corporatist initiative’²⁶ drawing on Robinson’s work on political control of transnational business.²⁷ This corporatist strategy, which in recent years has buttressed the so-called business case for self-regulation, runs through the geopolitical approach of the industrialised nations during the 1970s, Muchlinksy writes:

To counter these developments the OECD ministers, urged on by the US government, decided to adopt their own policy on MNEs, which it was hoped would influence the UN’s attempts at ‘codification’ to move away from a highly regulatory position of ‘MNE control.’²⁸

The corporatist approach can also be seen in the grudging acknowledgment by the OECD Guidelines that a globalised economic environment ‘may’ have been enabling ‘some’ business actors to ignore social and environmental standards:

Today’s competitive forces are intense and multinational enterprises face a variety of legal, social and regulatory settings. In this context, some enterprises may be tempted to neglect appropriate standards and principles in an attempt to gain undue competitive advantage. Such practices by the few may call into question the reputation of the many and may give rise to public concerns.²⁹

Despite this apparent understatement of the problem of business misbehaviour, the Guidelines are deemed to represent Adherent Governments’ ‘firm expectations’ about the behaviour of multinational enterprises in the social and environmental spheres.³⁰ Four key objectives are set out in the Guidelines: ‘to ensure that the operation of these 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 investment climate and to enhance the contribution to sustainable development.’³¹ Joachim Karl, formerly of the OECD, has written that the ‘basic approach’ of the

²⁵ Ibid.

²⁶ Ibid.

²⁷ J. Robinson, *Multinationals and Political Control*, (Gower, 1983) (hereinafter ‘Robinson’).

²⁸ Muchlinksy (2007) note 19 at 578 quoting Robinson *ibid* at 113-120.

²⁹ OECD Guidelines 2011 note 2 Preface at 12 para.6.

³⁰ Working Party on the OECD Guidelines for Multinational Enterprises, OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications and Clarifications, DAFNE/IME/WPG(2000)15/FINAL, 31 October 2001, Clarifications at 9 [http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAFNE/IME/WPG\(2000\)15/FINAL&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAFNE/IME/WPG(2000)15/FINAL&doclanguage=en) [last accessed 4.8.10] (hereinafter OECD Guidelines: Text, Commentary and Clarifications’).

³¹ OECD Guidelines 2011 note 2 Preface at 11 para.1.

Guidelines ‘is that internationally agreed guidelines can help to prevent misunderstandings and build an atmosphere of confidence and predictability between business, labour and governments.’³² Their content is discussed below but as will be shown, such an approach is limited in scope and has tended to exclude other stakeholders.

Finally, as discussed in Chapter 1, the label ‘multinational enterprise’ is not defined in the Guidelines but it is to be interpreted broadly and encompasses a wide range of actors because

‘[m]ultinational enterprises...have evolved to encompass a broader range of business arrangements and organisational forms’³³ than historically existed. This includes ‘private, State’ or ‘mixed’ enterprises:³⁴

established in more than one country and so linked that they may co- ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.³⁵

Thus a very broad range of business actors fall potentially within the scope of the Guidelines, but as will be demonstrated, this has not yet translated into accountability.

5.2 Content of the Guidelines

As indicated above, in terms of content, the Guidelines contain recommendations endorsed by Adhering Governments, which are directed towards multinational enterprises (MNEs) in order to ‘provide principles and standards of good practice consistent with applicable laws and internationally recognised standards.’³⁶ Specifically, they purport to set out principles of globally acceptable behaviour for transnational business actors in the social and environmental sphere with a view to facilitating transnational business. The Guidelines also address other issues such as bribery, taxation and competition but these fall outside the scope of this dissertation. It is made clear, however, that the legal effect of the

³² J. Karl, ‘The OECD Guidelines for Multinational Enterprises’ in M.K.Addo, (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, (Kluwer: London, 1999) 89-106 (hereinafter ‘Karl’) at 90.

³³ OECD Guidelines 2011 note 2 Preface at 11 para.2.

³⁴ OECD Guidelines 2011 *ibid* Guideline I(4).

³⁵ OECD Guidelines 2011 *ibid* Guideline I(4).

³⁶ OECD Guidelines 2011 note 2 Preface at 15 para.1.

Guidelines in their entirety is limited in that that they are not intended to supplant domestic laws, but are regarded as an ‘add-on’ to national legal provisions:

...it is important to note that self-regulation and other initiatives in a similar vein, including the Guidelines, should not unlawfully restrict competition, nor should they be considered a substitute for effective law and regulation by governments.³⁷

It is this ancillary, non-binding character which ensures that when NCPs make a finding of a breach of the Guidelines, via a Specific Instance Procedure, any recommendations made cannot be enforced. The reality is that Adhering Governments simply have not implemented domestic legislative provisions which punish human rights violations by business actors which are in contravention of the Guidelines or provide any redress for those affected by the abuses. It should be noted, however, that Norway published a White Paper in 2009 outlining the case for an international CSR framework over disparate national legislation,³⁸ so change may come in the future.

Guideline II(1) sets out in general terms the behaviour expected of enterprises, encouraging them to ‘[c]ontribute to economic, environmental and social progress with a view to achieving sustainable development.’³⁹ In particular, enterprises should ‘[r]espect the internationally recognised human rights of those affected by their activities.’⁴⁰ MNEs are encouraged to cooperate closely with local communities, uphold and apply ‘good corporate governance principles’ and ‘develop and apply effective self-regulatory practices.’⁴¹ Furthermore, there are relatively detailed provisions on disclosure matters which emphasise the need for full and accurate information to be made available on business structure, activities, financial situation, performance, accounting, audit, environmental and social reporting (where they exist), plus other basic information relating to matters such as ownership, objectives, affiliates, and voting rights.⁴² Employment and

³⁷ OECD Guidelines 2011 note 2 Guideline II Commentary at 24.

³⁸ Norwegian Ministry of Foreign Affairs, ‘Corporate social responsibility in a global economy’ Report No. 10 (2008–2009) to the Storting Recommendation from the Ministry of Foreign Affairs of 23 January 2009, approved by the Council of State on the same day. (The Stoltenberg II Government) at 93. http://www.regjeringen.no/pages/2203320/PDFS/STM200820090010000EN_PDFS.pdf [last accessed 5.11.10]

³⁹ OECD Guidelines 2011 note 2 Guideline II(A)(1).

⁴⁰ OECD Guidelines 2011 *ibid* Guideline II(A)(2).

⁴¹ OECD Guidelines 2011 *ibid* Guideline II(3), (6) & (7).

⁴² OECD Guidelines 2011 *ibid* Guideline III(1), (2), (3) & (4).

environmental matters are dealt with in separate provisions.⁴³ In relation to labour issues, the Guidelines concentrate on trade union rights, child labour, forced labour, discrimination, collective bargaining and health and safety. The environmental provisions address environmental management systems, disclosure of information, health and safety, technology, and training. Finally the Guidelines deal with bribery, consumers, science and technology, competition and taxation.⁴⁴ A Report on their operation is published annually.

The Guidelines were revised substantially in 2000, when National Contact Points were introduced.⁴⁵ Some seventy-five NGOs⁴⁶ described the outcome of the 2000 review and the creation of the NCPs as ‘the worst of both worlds’ that is, ‘a combination of voluntary low level standards with a weak implementation mechanism’⁴⁷ and it was hoped that Adhering Governments would learn from this previous review and address the inherent weaknesses of the system in the 2011 Review, especially with regard to NCPs, but this is not the case. Since 2000, there has been substantial systemic criticism of the NCPs and the Specific Instance Procedures, as will be seen below, but structural and institutional matters relating to the NCPs were not considered as part of the 2010/11 review. At the time of submission of this dissertation, the 2010/11 review had just taken place, focusing on several key areas, namely, supply chains, human rights, environment and climate change and resulting in the 2011 Guidelines. One key issue that *was* open for consideration in the review, was the formal incorporation of SGSR Ruggie’s due diligence principle and this

⁴³ OECD Guidelines 2011 *ibid* Guidelines Chapters V and VI respectively.

⁴⁴ OECD Guidelines 2011 *ibid* Guidelines VII, VIII, IX, X and XI respectively.

⁴⁵ The OECD Guidelines for Multinational Enterprises, Revision 2000 <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [last accessed 30.8.11] at 30. See Tully note 12 for a general overview of the 2000 review.

⁴⁶ OECD Guidelines for Multinational Enterprises: Statements made on the adoption of the Review 2000, 27 June 2000, ‘Statement to Governments Adhering to the OECD Guidelines for Multinational Enterprises from interested NGOs,’ 6 June 2000 <http://www.oecd.org/dataoecd/38/38/2070763.pdf> [last accessed 30.8.11] at 23-25. Signatories include national branches of Amnesty International, Oxfam, Save the Children as well as Sierra Club International and Friends of the Earth.

⁴⁷ *Ibid* at 22.

has taken place.⁴⁸ Much of the impetus for the 2010/11 review came from SGS Ruggie's condemnation of the OECD system⁴⁹ as well as that of NGOs.⁵⁰

Chapter 4 of the 2011 Guidelines expands on the previous meagre human rights provision and this is an important step. Firstly, it implements the provisions of the UN Guiding Principles on Business and Human Rights in relation to Protect, Respect and Remedy framework⁵¹ and secondly, it 'clearly and unambiguously establishes that enterprises should respect human rights wherever they operate.'⁵² Thirdly, a clear due diligence provision requires that enterprises and their supply chain identify, prevent and mitigate human rights risks.⁵³ Thus 'States have the duty to protect human rights' and enterprises 'should respect human rights' within 'the framework of internationally recognised human rights' and the domestic laws of host nations.⁵⁴ The Commentary to Chapter 4 describes 'respect for human rights' as the 'global standard of expected conduct for enterprises' while reinforcing states' human rights obligations.⁵⁵ Furthermore, enterprises should 'avoid causing or contributing to adverse human rights impacts' either directly or

⁴⁸ Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010 (Paris: OECD, 2010) <http://www.oecd.org/dataoecd/61/41/45124171.pdf> at 3 [last accessed 9.11.10] (hereinafter 'Terms of Reference 2010').

⁴⁹ Protect, Respect and Remedy: a Framework for Business and Human Rights,' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie A/HRC/8/5 7 April 2008 (hereinafter 'Protect, Respect and Remedy') at para.98. See the OECD Guidelines 2011 note 2 Guideline IV Commentary at 29.

⁵⁰ See generally e.g. OECD Watch 2010 note 16; RAID/CORE/TUC, 'Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises 2008,' a report by Rights and Accountability in Development (RAID) in association with The Corporate Responsibility (CORE) Coalition and The Trades Union Congress (TUC) November 2008, http://www.corporatejustice.org/IMG/pdf/NCP_report_2008.pdf [last accessed 30.8.11] (hereinafter 'Fit for Purpose? A Review of the UK National Contact Point').

⁵¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework,' A/HRC/17/31, 21 March 2011, Introduction to the Guiding Principles at 5 para.13, <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [last accessed 16.7.11] (hereinafter 'Guiding Principles').

⁵² Amnesty International, 'The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn to effective implementation,' Public Statement 23 May 2011, AI Index: IOR 30/001/2011 <http://www.amnesty.org/en/library/asset/IO30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf> [last accessed 30.8.11] (hereinafter 'Amnesty International Public Statement') at 1.

⁵³ OECD Guidelines 2011 note 2 Guideline IV(5).

⁵⁴ OECD Guidelines 2011 *ibid* Guideline IV(1).

⁵⁵ OECD Guidelines 2011 *ibid* Guideline IV Commentary at 30.

indirectly through ‘business relationships’⁵⁶ and via acts or omissions.⁵⁷ Thus, even where an enterprise has not caused or contributed to an adverse impact, those of any other ‘directly linked’ business will nevertheless engage the Guidelines where there is a ‘business relationship’⁵⁸ i.e. partners, suppliers and ‘any other non-State or State entity.’⁵⁹ Any adverse human rights impacts should be remediated through ‘legitimate processes’⁶⁰ which means that they ought to be accessible, predictable, equitable, compatible with the Guidelines, transparent and ‘based on dialogue and engagement with a view to seeking agreed solutions.’⁶¹ The International Bill of Rights is the applicable benchmark human rights standard although ‘additional standards’ may have to be considered in relation to ‘specific groups or populations’ or particular contexts, such as situations involving armed conflict.⁶² Addressing adverse impacts involves identifying, preventing and mitigating them where possible as well as the previously mentioned ‘remediation’ and ‘accounting for how the adverse human rights impacts are addressed.’⁶³

The 2010/11 review process has been described as a ‘make or break moment’ which provided:

a golden opportunity to ensure that the...Guidelines are given the necessary institutional authority to make them an effective corporate accountability tool.⁶⁴

Certainly it seems that the opportunity was not seized, largely because Adherent Governments are unwilling to address the fundamental flaws of the system which as will be demonstrated are becoming increasingly apparent. In particular, the 2010/11 review did not consider the deficiencies of the NCPs in failing to prevent human rights abuses or to

⁵⁶ OECD Guidelines 2011 *ibid* Guideline IV(2) and (3).

⁵⁷ OECD Guidelines 2011 *ibid* Guideline IV Commentary at 31.

⁵⁸ OECD Guidelines 2011 *ibid* Guideline IV Commentary at 31.

⁵⁹ OECD Guidelines 2011 *ibid* Guideline IV(3) and Commentary at 31.

⁶⁰ OECD Guidelines 2011 *ibid* Guideline IV(6).

⁶¹ OECD Guidelines 2011 *ibid* Guideline IV(6) and Commentary at 32.

⁶² OECD Guidelines 2011 *ibid* Guideline IV(3) and Commentary at 31.

⁶³ OECD Guidelines 2011 *ibid* Guideline IV(2) and Commentary at 30-31.

⁶⁴ OECD Watch (2010) note 16 at 5.

properly hold business actors to account in any meaningful way. Amnesty International is extremely critical of the review in this regard

Despite strong encouragement by NGOs, neither mandatory oversight nor peer review mechanisms are expressly required. There is no clarification about the role of NCPs in making recommendations on observance of the Guidelines or on monitoring and following up on agreements and recommendations.⁶⁵

Furthermore:

No consequences for companies who fail to comply with the Guidelines or refuse to engage in mediation are specified. The absence of minimum standards to ensure the effectiveness of the implementation procedures and their coherent application across adhering States, risk undermining the value and meaning of the substantive improvements made elsewhere in the Guidelines and with it, the effectiveness and credibility of the instrument as a whole.⁶⁶

Lack of redress, deterrent effect and punishment are key failings of the OECD system. The next few sections examine the strengths and weaknesses of the Guidelines in their current form, while the concluding section of this chapter considers the options for ensuring greater future effectiveness of the Guidelines.

5.3 A Multistakeholder Approach

From their earliest beginnings, the Guidelines adopted a relatively open, multistakeholder approach at the highest level of the OECD in relation to business and human rights, an approach which should be regarded as positive. As the Guidelines fall within the remit of the Investment Committee (formerly the Committee on International Investment and Multinational Enterprises (CIME)), it is this committee which is required to coordinate ‘exchanges of views’ with stakeholders on relevant matters.⁶⁷ This process has caused some difficulties in the past, however, because of the apparent exclusion of NGOs, in particular from participation in National Contact Points. As will be seen, such exclusion

⁶⁵ Amnesty International Public Statement note 52 at 2.

⁶⁶ Ibid.

⁶⁷ Council Decision, June 2000, C(2000)96/FINAL, at para. II(1) Decision of the OECD Council on the Guidelines on Multinational Enterprises, June 2000 in the OECD Guidelines on Multinational Enterprises, Review 2000 (Paris: OECD, 2000) [http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=C\(2000\)96/FINAL&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=C(2000)96/FINAL&doclanguage=en) [last accessed 3.8.10].

leaves the system open to criticisms that there has been a shift away from stakeholder involvement and consequently a lack of transparency in the processes.

Under the OECD Council Decision of June 2000, stakeholders to be consulted include the Business Industry Advisory Council (BIAC), the Trades Union Advisory Council (TUAC),⁶⁸ as well as ‘other non-governmental organisations.’⁶⁹ BIAC consists of representatives from both industry and employers’ associations within OECD member governments while TUAC is composed of national trade union organisations from all OECD members. Both TUAC and BIAC have secretariats based in Paris and engage in formal and informal contact with the OECD. From the classification of stakeholders it is evident that a clear distinction was drawn, at least initially, between the various stakeholders as regards their involvement. TUAC and BIAC are officially regarded as regarded as operating on an equal footing, with an emphasis being placed on ‘strict parallelism of treatment’⁷⁰ although some question this equality.⁷¹

Conversely, although NGOs *may* be consulted by the Investment Committee as relevant stakeholders,⁷² in practice they have been formally excluded from the Guidelines’ international implementation process and this has caused great frustration within the NGO community historically.⁷³ In the Annual Report 2001, NGOs voiced their discontent, stating that, ‘[t]he unconvincing explanation given is that the NGOs are not organised in a similar fashion as BIAC and TUAC.’ Certainly NGO participation is not formalised to the same extent as the trade unions and business actors. It is reasonable to infer that given the large numbers of interested NGOs the absence of a coordinated agenda might make engagement problematic for the OECD but that does not justify their exclusion.

⁶⁸ See OECD document ‘Relations with BIAC and TUAC’ 7 June 2001.

⁶⁹ OECD Council Decision 2000 note 67 II(1) and (2).

⁷⁰ Ibid.

⁷¹ G.C.Shaffer & M.A.Pollack, ‘Hard vs Soft Law: Alternatives, Complements and Antagonism in International Governance,’ 94 Minn.L.Rev. 706 (2010) at 797.

⁷² See Tully note 12 at 402.

⁷³ ‘NGO Statement on the OECD Guidelines for Multinational Enterprises’ in *OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility*, Annual Report 2001 (OECD, 2001) at 46.

More recently, however, NGOs have become actively involved in the ‘monitoring and reviewing’ efforts of the Investment Committee and although their participation has not become formalised it certainly demonstrates a desire on the part of the OECD to increase and augment the involvement of civil society within the overarching framework of the Guidelines. As will be demonstrated, however, in the years since the 2000 Revision NGOs have been playing an increasingly important role in the operation of some of the NCPs and their Specific Instance Procedures.

The formal exclusion of NGOs conflicts with a wider participatory approach to regulation of business actors, however, an OECD Council Decision of June 2000 requires that NGOs be permitted to make their views known. In this respect, civil society stakeholders are certainly a better position under the OECD mechanisms than, for example, within the EU CSR model addressed in the following chapter.⁷⁴ Moreover, the OECD has publicly stated its support for a full participation model:

Each of the main actors involved in corporate responsibility programmes – business, trade unions, NGOs, governments and international organisations – offers a distinctive perspective and body of knowledge and expertise. The challenge is to bring these distinctive competencies together and to incorporate them into a shared way of seeing things and a common blueprint for action.⁷⁵

The OECD thus promotes a theoretical model based on formal and informal stakeholder participation in terms of its general approach to the regulation of business and human rights, even if this does not always translate into reality within the NCPs. At the national level, in the best NCP models, such as Finland, all relevant stakeholders are formally involved in implementation of the Guidelines via the NCP. Notwithstanding this evidently inclusive, multistakeholder inclination, there is much support for the assertion that the Guidelines are not being applied universally or effectively⁷⁶ and this is largely to do with the structure of the NCPs, including the exclusion of NGO stakeholders. The next section will examine these structural and systemic failings.

⁷⁴ Chapter 6 *infra*.

⁷⁵ See e.g. the OECD Response to the EU Green Paper at http://europa.eu.int/comm/employment_social/social/csr/csr_responses.htm [last accessed 21.7.08].

⁷⁶ See e.g. TUAC Working Group on Trade and Investment, The OECD Guidelines for Multinational Enterprises Update of the OECD Guidelines for Multinational Enterprises, Background Paper, Paris 16 February 2010, http://www.tuac.org/en/public/e-docs/00/00/06/F5/document_doc.phtml [last accessed 30.8.11].

5.4 Compliance with the Guidelines

Despite the 2011 Revision, there is no overarching institutional mechanism for ensuring compliance with the Guidelines. Nor indeed is there any other form of compliance procedure in place, such as naming and shaming, self-reporting or identifying best practice, as seen in the Global Compact model. This means that, while individual business actors are permitted to make representations to the Investment Committee about Guideline matters relating to their own interests, ‘the Committee shall not reach conclusions on the conduct of individual enterprises.’⁷⁷ Moreover, similar to discussions within the EU, the formally recognised representatives of business and trade unions at the OECD remain locked in a voluntarism versus normative rules debate about CSR.⁷⁸ Clearly and unsurprisingly BIAC vehemently supports the voluntary nature of the Guidelines and its stance on the Guidelines has remained unequivocal over the years, concluding in its 2001 Report that:

The Guidelines must remain voluntary – not legally binding. They are not designed to replace national or international legislation or individual company or sectoral codes of conduct.⁷⁹

In 2009 in response to the consultation about a possible further update of the Guidelines, BIAC restated its position:

Presenting to the OECD Investment Committee during consultations in October and early-December, BIAC reiterated its support for the OECD Guidelines as voluntary recommendations on responsible business conduct.⁸⁰

⁷⁷ OECD Council Decision 2000 note 67 II(4).

⁷⁸ This position is reflected in the comments of the OECD Secretary-General, Speech at the Global Corporate Social Responsibility Forum, Beijing, China 22 February 2006 <http://www.oecd.org/dataoecd/38/55/36196777.pdf> [last accessed 30.8.11].

⁷⁹ ‘Business Industry Advisory Council (BIAC) Statement’ in *OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility*, Annual Report 2001 (OECD: Paris, 2001) (hereinafter ‘BIAC Statement’) 31-35 at at 35 This position is also reflected in the Annual Report, 2006, see Annex 6, at 78 et seq.

⁸⁰ BIAC Newsletter, December 2009 at 8, <http://www.biac.org/comms/newsletter/BIACNewsDec09.pdf> [last accessed 4.8.10].

Indeed BIAC has even condemned a past Dutch government proposal to oblige MNEs to adhere to the Guidelines as a prerequisite for obtaining export credit coverage and government subsidies:⁸¹

The Guidelines and their related implementation procedures are unequivocal in underscoring their voluntary nature with regard to MNEs. To render an essential element of international financial competitiveness conditional upon ‘acceptance’ and to pursue such acceptance with tools of ‘enforcement’ – or in other words, negative ‘sanctions’ – are abridgements of the terms and spirit of the Guidelines and of the premise upon which BIAC leadership submitted the Guidelines to members for their consideration.

BIAC continues, ‘such an action would set a very negative precedent that should be avoided and in no way should be followed by other countries.’⁸² The opposition of BIAC to formal regulation could not be made clearer. Indeed, it seems that for BIAC, the Guidelines represent a corporate marketing opportunity rather than an authentic opportunity to moderate corporate misbehaviour:

For companies, the wide coverage of the Guidelines represents a blueprint for management systems and practice in today’s world where companies are subject to wider scrutiny than ever before. Used positively, the Guidelines are a helpful tool for companies positioning themselves in the global economy.⁸³

While there is a need to promote socially responsible business behaviour as being good for business and a marketable concept, there is a very real danger that the human rights objectives become lost in a blizzard of public relations rhetoric. On a slightly more positive note, BIAC has also set out some persuasive reasons why observance of the Guidelines makes good business sense, over and above any ethical considerations.

Companies are engaging in voluntary CR [Corporate Responsibility] initiatives for a variety of reasons. These may include the following: set a positive example; anticipate new regulatory developments; help improve reputation and customer satisfaction; attract new investors; increase staff integrity, motivation and productivity; induce better supply chain management; reduce risks and cost associated with doing business.⁸⁴

While this approach may be anathema to NGOs, trade unions and some commentators, if it succeeds in convincing business actors to respect the Guidelines then it is to be

⁸¹ BIAC Statement note 79 at 34.

⁸² BIAC Statement *ibid* at 34.

⁸³ BIAC Statement note at 35.

⁸⁴ http://www.biac.org/pubs/mne_guidelines/09-02_BIAC_Guide_to_Guidelines.pdf [last accessed 4.8.10].

commended. Of course, it requires the willing participation of business in the process, as well as effective monitoring, and as demonstrated in Section 5.5.2 there is both a low rate of business implementation of the Guidelines and little or no monitoring of their execution. The fact that BIAC makes reference only to ‘corporate responsibility’ as opposed to ‘corporate *social* responsibility’ is an interesting and noteworthy omission which may reveal an attempt by BIAC to limit the scope of the Guidelines. In any event, voluntary principles have little or no impact on the rogue businesses which have no interest in better management or reputational repercussions.

Predictably, BIAC focuses on and prioritises certain aspects of the Guidelines; that being the improvement of the climate for foreign direct investment⁸⁵ and the business case for supporting voluntarism. TUAC on the other hand has consistently focused on the need for enforceable rules that are binding upon business.⁸⁶ This is mirrored in NGO dissatisfaction with the lack of a system for monitoring the ‘effectiveness of the ... Guidelines in achieving corporate sustainable behaviour.’⁸⁷ Over the years NGOs have been stressing the need for practical solutions to the lack of enforcement, stating that they had ‘no interest in an instrument that will not have an actual impact on the ground.’⁸⁸ To all intents and purposes so long as the mechanism operates effectively in practice this is all that matters i.e. human rights violations are prevented or remedied. Of course, because the Guidelines and the NCPs are not working effectively, as demonstrated in the following section, NGOs continue to lobby, if not for a binding regulatory framework, then at least a more potent NCP system which sets out clear consequences for breaches of the Guidelines.⁸⁹ It was thus disappointing that the terms of reference for the 2011 Review were limited in scope and did not include consideration of normative options.⁹⁰

⁸⁵ Ibid at 31.

⁸⁶ See e.g. the speech by TUAC General Secretary John Evans, 29 March 2007, <http://www.tuac.org/News/default.htm#oslo>. [last accessed 20.4.2007].

⁸⁷ Ibid at 47 para.4.

⁸⁸ Ibid at 47 para.4.

⁸⁹ OECD Watch (2010) note 16 at 55.

⁹⁰ Terms of Reference 2010 note 48 at 1.

The OECD Annual Reports highlight the continuing gulf between the business sector, TUAC and NGOs. The familiar hard regulation versus voluntarism standoff is merely reproduced without offering solutions and the 2011 Review has done little, if anything, to change this. It would appear that so long as the BIAC viewpoint carries more weight (and is supported by States) than that of the NGOs and the TUAC within the context of the OECD, the Guidelines will remain voluntary and non-binding. Given that the Guidelines have remained voluntary since their original conception in 1976 it seems clear that the business case prevails. Nevertheless, some commentators have taken the view that the Guidelines have had a very real and favourable impact on business behaviour:

...the Guidelines have...raised corporate awareness about the need to establish voluntarily codes of conduct. Another effect observed in this respect was a new wave of company codes and other corporate social responsibility initiatives in the late 1990s. The development of company codes and other corporate social responsibility initiatives in the late 1990s entailed a new surge of awareness about corporate power.⁹¹

Notwithstanding the unsatisfactory nature of the non-binding character of the Guidelines, the question remains as to whether the NCPs are in fact effective at monitoring business compliance with the Guidelines and mediating and resolving complaints under the Specific Instance Procedure. The next section of the chapter considers this and concludes that while there are some positive aspects to the NCPs, ultimately the system is failing.⁹²

5.5 National Contact Points: Monitoring and Resolution of Complaints

SGSR Ruggie has commented that the the NCPs are ‘potentially an important vehicle for providing remedy’ but they have ‘too often failed to meet this potential.’⁹³ To say that the NCPs have failed to meet their potential, however, is to suggest that they could have achieved more but it is not clear how this would be possible given the current structural limitations imposed by the Adherent Governments themselves. NCPs are only as effective as their structure allows and this is entirely the responsibility of Adherent Governments.

⁹¹ Rosemann note 13 at 19.

⁹² See the critique by J.L. Černič, ‘Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises’ 3 *Hanse Law Review* 71-101 (2008) which addresses the pre-2011 Guideline NCP arrangements. He cites the UK and The Netherlands as best practice at 99-100.

⁹³ Protect, Respect and Remedy note 49 at para. 98. See also generally Černič *ibid*.

Fault lies with the Adherent Governments, not the NCPs themselves, both in relation to the scope of the role given to NCPs under the Guidelines and in relation to the physical organisation at the national level. As already intimated, the Guidelines are non-binding in character and therefore the NCPs can have only a limited impact as an enforcement and redress mechanism. So what mechanisms are in fact in place within the OECD system and how effective are they at holding businesses to account for human rights abuses?

After the Revision of the Guidelines in 2000, each OECD Member State was required to create an NCP for the purpose of, *inter alia*, monitoring the implementation of the Guidelines, promoting the Guidelines among all MNEs operating in or from its territory and contributing to the resolution of complaints. It is important to note, however, that an NCP cannot initiate an investigation, but may only mediate a resolution in response to a complaint, and may only make recommendations. Where mediation fails, the NCP may investigate the facts presented and reach a conclusion or determination, again accompanied by recommendations as to how to resolve the problems. Nevertheless, the emphasis is always on achieving a mediated solution between the complainant and the business actor against whom the complaint is made. OECD Watch notes that while mediated settlements are ‘rare’ there have been some ‘notable agreements’⁹⁴ between complainant NGOs and business actors. Mediated agreements involving a variety of business actors and sectors including Adidas, First Quantum Mining, BHP Billiton and Accor Services are cited as examples.⁹⁵ The report asserts that a mediated agreement is the ‘ideal outcome’ even if it is the ‘exception rather than the rule.’⁹⁶

Notwithstanding the mediation ideal, OECD Watch recognises that mediated agreements have a very limited impact on human rights on the ground and few lead to ‘improved corporate behaviour.’⁹⁷ While citing the response of companies such as Bayer, GSL and Accor Services as examples of businesses which have made improvements to their behaviour subsequent to a mediated agreement, OECD Watch also acknowledges that:

⁹⁴ OECD Watch (2010) note 16 at 21.

⁹⁵ Ibid at 21-22.

⁹⁶ Ibid at 22.

⁹⁷ Ibid at 22.

The lack of systematic monitoring and follow-up by NCPs on their own statements and recommendations makes it difficult to ascertain exactly how many cases have led to actual improvements in corporate behaviour.⁹⁸

This is something that must be addressed as a matter of urgency by Adhering Governments. Not least because the same criticisms can be levelled against the the Final Statements issued by NCPs where a mediated settlement has not been possible.

On a positive note, however, the Final Statements disseminated at the end of Specific Instance Procedures are becoming increasingly detailed and are generally always published even if there has been no mediated agreement. The UK and Dutch NCP Final Statements are of particular significance. As will be seen, these Final Statements play an important role in clarifying the scope of the Guidelines and helping business actors to understand the nature of their human rights obligations, especially in relation to their supply chain.

5.5.1 Structure of the National Contact Points

Under the Guidelines, individual States are given wide latitude in relation to NCP structural arrangements and so the NCPs take a variety of forms but, disappointingly, the vast majority do not formally include NGOs, trade unions or even business within their constitution which is a major weakness because it conflicts with the evolving and arguably enlightened multistakeholder approach of the OECD itself where both trade unions and NGOs participate in the monitoring and reviewing of Adherent Governments' obligations.⁹⁹

Of the forty current NCPs, seventeen are composed of a single government department,¹⁰⁰ eleven involve multiple government departments¹⁰¹ and one is bipartite (government and

⁹⁸ Ibid at 60 note 31.

⁹⁹ OECD Report of the 2007 Annual Meeting of the National Contact Points, 19-20 June 2007 at 4.

¹⁰⁰ Argentina, Australia, Czech Republic, Egypt, Germany, Greece, Luxembourg, Ireland, Israel, Italy, Mexico, New Zealand (with a Liaison Group consisting of government, business and trade unions representatives), Poland, Slovak Republic, Spain, Switzerland and United States. See OECD, Report of the 2009 Annual Meeting of the National Contact Points, 16-17 June 2009 at 3-4 <http://www.oecd.org/dataoecd/41/25/43753441.pdf> [last accessed 27.7.10] (hereinafter '2009 NCP Report').

¹⁰¹ Brazil, Canada, Chile (under current plans), Hungary, Japan, Iceland, Korea, Slovenia, Portugal, Turkey, and United Kingdom. Ibid at 3.

business)¹⁰², nine are tripartite (government, business and trade unions).¹⁰³ Finland's NCP is the sole example of a 'quadrupartite' NCP, composed of business, trade unions, various ministries and, significantly, NGOs¹⁰⁴ while the revamped Dutch NCP operates using a 'mixed structure of independent experts and government representatives.'¹⁰⁵ Previously, the Dutch NCP had been criticised for being entirely governmental in nature, thus:

The change is intended to ensure the independence of the Dutch NCP and avoid conflicting requirements between the NCP functions and those of the responsible Minister as member of the Dutch cabinet.¹⁰⁶

In the view of OECD Watch, these 'arms length'¹⁰⁷ changes will render the Dutch NCP a 'more independent body.'¹⁰⁸ For a trial period of three years,¹⁰⁹ the chair will be independent and the NCP will include 'two or three members with voting powers and four non-voting advisory members representing the ministries of economic affairs, social affairs, development cooperation and environment' preserving 'the governmental link' as 'NCP statements will be accompanied by a ministerial position.'¹¹⁰

It is, however, recognised that characterising the NCPs in this way 'does not provide a full picture of the scope and breadth of consultation.'¹¹¹ Social partners and NGOs participate in the process formally and informally, so for example, in the USA they are consulted 'via the Advisory Council on International Economic Policy or individually on an *ad hoc*

¹⁰² Romania. Ibid at 4.

¹⁰³ Belgium, Denmark, Estonia, France, Latvia, Lithuania, Luxembourg, Norway, and Sweden. Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ 'Review of NCP Performance: Key Findings,' Background Paper to the OECD-ILO conference on corporate social responsibility Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalising Economy 23-24 June 2008, OECD Conference Centre, Paris, France at 4, <http://www.oecd.org/dataoecd/34/15/40807797.pdf> [last accessed 5.11.10] (hereinafter 'Review of NCP Performance 2008').

¹⁰⁷ Fit for Purpose? A Review of the UK National Contact Point note 50 at 20.

¹⁰⁸ OECD Watch, Newsletter, April 2007 at 7, http://oecdwatch.org/publications-en/Publication_1864/ [last accessed 5.11.10]

¹⁰⁹ Review of NCP Performance 2008 note 105 at 4.

¹¹⁰ OECD Watch Newsletter note 107 at 7.

¹¹¹ 2009 NCP Report note 99 at 4.

basis.¹¹² The UK NCP held a stakeholder consultation regarding reform of the NCP and implementation of the Guidelines in response to parliamentary¹¹³ and civil society¹¹⁴ criticism of its performance relating to allegations of human rights breaches by UK-based businesses in the Democratic Republic of Congo. The 2006 NCP report, for example, also noted that many of the NCPs regularly involve and consult civil society on both a formal and informal basis using:

other means for enhancing the inclusiveness of their activities. A number of countries reported using advisory committees or permanent consultative bodies whose members include non-government partners. Others stated that they convene regular meetings with business, trade unions and civil society. Still others state that they consult with NGOs or other partners on an informal basis or in reference to specific issues about which partners contribute their expertise.¹¹⁵

Thus, encouragingly, eleven of the forty NCPs adopt a structure whereby the government department(s) work together with business and civil society mostly in the form of trade unions although the Finnish NCP also embraces NGOs.¹¹⁶ This is a noteworthy improvement on previous years mostly as ‘a result of choices made by new Adherents’ to the Guidelines.¹¹⁷ In the 2009 Annual NCP Report a further shift in emphasis is recorded:

Compared with 2000, when the NCP mechanism under the revised Guidelines was created, the inclusion of stakeholders into NCP structures has markedly expanded. The number of NCPs with tri- or quadri-partite organisations has increased, and advisory committees or permanent consultative bodies involving non-government partners have become widespread in countries with government-based NCP structures. Meetings with business, trade unions and civil society have also become more frequent.¹¹⁸

¹¹² See *ibid* Annex 1 ‘Structure of the National Contact Points’ 20-24 at 24.

¹¹³ UK All-Party Parliamentary Group on the Great Lakes, ‘The OECD Guidelines and the DRC,’ Report February 2005, APPG-02-05 http://www.appggreatlakes.org/index.php/document-library-mainmenu-32/cat_view/39-appg-reports [last accessed 3.7.11]. See also UK House of Lords/House of Commons Joint Committee on Human Rights, ‘Any of our business? Human rights and the UK private sector,’ First Report of Session 2009–10, Volume I, Report and formal minutes, HL Paper 5-I HC 64-I Published on 16 December 2009 at para. 77. <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf> (Hereinafter ‘Joint Committee on Human Rights.’)

¹¹⁴ OECD Guidelines for MNEs: 2006 Annual Meeting of the National Contact Points, Report by the Chair, 20–21 June 2006 at 4.

¹¹⁵ *Ibid* at 4.

¹¹⁶ Belgium, Denmark, Estonia, France, Latvia, Lithuania, Luxembourg, Norway and Sweden.

¹¹⁷ Estonia, Latvia, Lithuania and Romania. Review of NCP Performance 2008 note 105 at 4.

¹¹⁸ 2009 NCP Report note 99 at 10.

It would seem that there has been a conscious effort on the part of some but not all States to do this and to restructure NCPs generally in order to step away from purely government-based institutions and to make them more transparent by opening them up to non-governmental entities.¹¹⁹ So, as mentioned above, the Netherlands NCP is now made up of independent experts appointed to work with selected government advisors as opposed to its previous inter-departmental incarnation. At the G8 Heilegendamm Summit in 2007 States made clear that they are actively seeking ‘better governance’ via the NCPs hence this restructuring, however this was not a focus of the 2011 Review which prioritised the substantive content of the Guidelines as opposed to structural issues.¹²⁰

It is undeniable that there has been a disparate response to the ‘better governance’ agenda because NCP arrangements are left to the discretion of individual Adhering Governments. Furthermore it seems to be the case that this lack of a coherent approach stems from the belief of States that ‘there is no perfect structure’ for NCPs.¹²¹ As a consequence, many Adherent Governments cling to an ‘in-house’ scheme whereby the NCP is situated entirely in one or several government departments and which seems to fly in the face of the multipartite ethos which underpins the Guidelines. The arguments in favour of such a policy are set out in a 2008 NCP Review.¹²² States point to the fact that it is governments that ‘are the primary guarantors of the Guidelines’ and which also have the requisite economic expertise to deal with the issues and thus it makes sense for the NCP to be based solely within government.¹²³ Quite clearly this does not adequately justify the apparent formal exclusion of civil society from many NCP structures and represents a retreat from a participatory approach involving civil society, contrary to a new governance or third way of regulation.

¹¹⁹ Review of NCP Performance 2008 note 105 at 4

¹²⁰ G8 Summit Declaration Heiligendamm, ‘Growth and Responsibility in the World Economy’ Germany 7 June 2007 at para 24.

¹²¹ OECD-ILO Conference on Corporate Social Responsibility, ‘Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalising Economy,’ 23-24 June 2008, OECD Conference Centre, Paris, France, ‘Review of NCP Performance: Key Findings’ at 5. <http://www.oecd.org/dataoecd/34/15/40807797.pdf> [last accessed 27.7.10].

¹²² Ibid.

¹²³ Ibid at 6.

Moreover, States point to the difficulties of reaching consensus on contentious issues when civil society is included in the process but the evidence demonstrates that such snags can be dealt with in a straightforward manner.¹²⁴ So, for example, in Sweden the chair of the NCP retains a casting vote, thus avoiding intractable stalemates. Proclamations by Adherent Governments highlighting the fact that civil society *can* be involved with the process irrespective of the structure of the NCP betray the inherent overarching multistakeholder architecture of the Guidelines. It is also difficult to see how an entirely government-based NCP ensures proper accountability. Certainly proponents of the multipartite approach argue that true ‘objectivity, transparency and accountability’ can only be realised within an inclusive, multistakeholder NCP structure which has a measure of independence from the State.¹²⁵ A coherent and consistent configuration across Adherent Governments can only add to the esteem of the NCPs, ensuring the proper application and protection of human rights standards. It was a mistake, therefore, to exclude consideration of NCP structure from the 2011 Review as the impact of any substantive changes to the Guidelines is restricted by the overarching systemic problems of the NCPs.

5.5.2 Monitoring

NCPs have failed singularly to monitor effectively the implementation of the Guidelines by business actors. Perhaps more accurately, however, Adhering Governments have failed to equip NCPs with the requisite tools and resources to carry out their monitoring functions. OECD Watch concludes that ‘the ‘voluntary’ nature of the OECD Guidelines has resulted in governments being reluctant to monitor company compliance’ which means that it is difficult to evaluate to what extent the Guidelines are being ‘fully integrated into business policies and practices’ in order ascertain whether there have been practical advances.¹²⁶ As observance of the Guidelines is not membership-based and there is no reporting requirement, measuring their actual impact is problematic although some commentators suggest that increasing requirements for ‘CSR and sustainability reporting’ in a general

¹²⁴ Ibid at 7-8.

¹²⁵ Ibid at 7.

¹²⁶ OECD Watch (2010) note 16 at 7.

sense are filling the ‘information gap.’¹²⁷ Nevertheless, a recent survey of publicly listed European companies established that only 55% of respondent companies based their CSR approach on the Guidelines, whereas the Global Compact and ILO Tripartite Declaration formed the basis of CSR for 92% and 64% companies respectively.¹²⁸ Similarly, the GC is referenced significantly more frequently than the Guidelines in annual corporate CSR reports, 87% as opposed to a mere 39%.¹²⁹

Such figures suggest that the NCPs are failing to adequately promote observance of the Guidelines among business actors although it has been suggested that this is a ‘respectable performance’ given that companies ‘are not requested to reference their use.’¹³⁰ It seems that a flagship initiative such as the Guidelines ought to have a better uptake rate, otherwise it can only lead to the conclusion that the business case for maintaining voluntary principles is simply not working. If socially responsible business is good for facilitating transnational business, then the OECD and business community ought to demonstrate their commitment to binding legal principles and an effective enforcement and redress mechanism.

5.5.3 The (Non-) Resolution of Complaints: Specific Instance Procedures (SIP)

*[t]he Guidelines’ “specific instance” grievance mechanism is where their unique added value lies and a key determinant of the positive impact they can have.*¹³¹

In addition to their monitoring function, the NCPs play a crucial role in contributing to the ‘resolution of issues that arise relating to implementation of the Guidelines in specific instances.’¹³² Since the implementation of the SIP in the 2000 Review, ‘the total number

¹²⁷ P.Hohen, ‘OECD MNE Guidelines: A responsible business choice,’ OECD Observer, http://www.oecdobserver.org/news/fullstory.php/aid/2772/OECD_MNE_Guidelines:_A_responsible_business_choice.html [last accessed 4.8.10].

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ OECD Watch (2010) note 16 at 21.

¹³² Guidelines note 2 at 68 para.1.

of requests' for consideration of complaints has 'exceeded the 200 mark.'¹³³ 'Of these, 146 have been accepted for consideration and 114 of those have been concluded or closed'¹³⁴ but according to OECD Watch, there has been a 'dramatic decrease in cases' submitted post-2004, although it is not clear why this is the case.¹³⁵ It may be simply that the large costs and exertion of submitting a complaint outweigh greatly the likelihood of success. NGOs can expect to expend upwards of €100,000 and two years working on an NCP complaint.¹³⁶ Up until June 2010, NGOs had filed 96 complaints,¹³⁷ while trade unions had submitted 117 complaints in total.¹³⁸ OECD Watch cites a 'lack of confidence' in the SIP, in particular the lack of an enforcement mechanism, as the reason for the 'relatively small number of cases' overall.¹³⁹

Nearly half of NGO complaints involve allegations of human rights violations by business actors or their suppliers, accounting for 49% of all cases submitted to NCPs, although OECD Watch also notes that 'most cases comprise multiple breaches of the Guidelines' provisions.¹⁴⁰ Seventeen NCPs have never received a complaint from an NGO, which is a noteworthy number, while the UK has received twenty-three NGO complaints, Germany fifteen NGO complaints, and the US and Belgium thirteen NGO complaints apiece.¹⁴¹ The disproportionate use of the UK SIP could be regarded as a measure of its effectiveness, at least in comparison to other Adhering Governments, or it could be simply that UK NGOs are better prepared for using the SIP.¹⁴² Significantly, 72% of NGO complaints relate to business activities in '(non-Adhering) developing' countries¹⁴³ which on the face of it

¹³³ OECD, 2009 Annual Meeting of the National Contact Points, Report by the Chair 16-17 June 2009 at 3. <http://www.oecd.org/dataoecd/41/25/43753441.pdf> [last accessed 8.11.10].

¹³⁴ OECD, 2009 Annual Meeting of the National Contact Points, Report by the Chair 16-17 June 2009 at 3.

¹³⁵ OECD Watch (2010) note 16 at 9.

¹³⁶ OECD Watch 2010 *ibid* at 11.

¹³⁷ *Ibid*.

¹³⁸ *Ibid* at 11.

¹³⁹ *Ibid* at 9.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* at 10.

¹⁴² See *infra* at 5.4 for a discussion of the UK NCP and SIP.

¹⁴³ OECD Watch (2010) note 16 at 10.

would suggest that the Guidelines are being utilised transnationally in the way they were intended.

Complaints brought under the SIPs cut across all business sectors but a significant majority relate to the extractive industry:

41 of the 96 NGO complaints have dealt with issues in the mining, oil and gas industry. A further 10 cases have involved the finance sector, predominantly through their provision of loans and financial services to the extractive sector.¹⁴⁴

The outcomes, however, are less encouraging as 31% of all NGO complaints have been rejected without consideration of the facts. Rejections tend to occur for two reasons: either parallel legal proceedings are underway or because the NCP concludes that no investment nexus exists ‘between the company against which the complaint was filed and the company or entity that actually committed the alleged violation.’¹⁴⁵

5.5.3.1 Parallel Legal Proceedings

Rejection or suspension of complaints on the grounds of parallel legal proceedings (PLP) has been the subject of much ‘heated debate’ over the years.¹⁴⁶ Part of the problem is that there is no clear definition or guidance given to NCPs of what constitutes a parallel legal proceeding and ‘no common approach.’¹⁴⁷ OECD Watch defines PLP as a situation:

when a complaint deals with business conduct that is also the subject of legal or administrative proceedings at the national or international level. There are different types of proceedings: 1) criminal, administrative or civil; 2) alternative dispute settlement proceedings (arbitration, conciliation, mediation); 3) public consultation; or 4) other enquiries such as by the UN.¹⁴⁸

Given that PLP is the most cited justification for rejecting or suspending complaints, affecting more than 40% of NGO and 33% of trade union complaints,¹⁴⁹ the lack of

¹⁴⁴ Ibid at 13.

¹⁴⁵ Ibid at 11.

¹⁴⁶ Ibid at 46.

¹⁴⁷ TUAC Working Group on Trade and Investment Paris, ‘Update of the OECD Guidelines for Multinational Enterprises, Background Paper,’ Paris, 16th February 2010 at 18. (Hereinafter ‘TUAC Background Paper.’)

¹⁴⁸ OECD Watch (2010) note 16 at 46

¹⁴⁹ Ibid.

consistency of approach by NCPs is extremely problematic.¹⁵⁰ NCPs have answered critics by highlighting the need to act in conformity with domestic law and also alluding to a need to remain sensitive to the sovereign rights of non-Adhering Governments involved in complaints. Nevertheless, OECD Watch concludes that there is no reason why SIP and PLP should not operate concurrently and certainly the arguments are logical. It contends that there are three key reasons why SIP and PLP should not be mutually excluding. Firstly, the SIP is non-adversarial and is therefore substantially different from court proceedings ‘in both nature and substance.’¹⁵¹ Secondly, SIPs frequently address different aspects of a situation from parallel legal proceedings:

A closer look at the cases reveals that whilst parallel legal proceedings might deal with the same facts, often different issues and entities are involved. For example, there may be legal proceedings against suppliers or subsidiaries in the host country, while the OECD complaint may be concerned about the broader responsibility of the buyer or parent company.¹⁵²

Finally, OECD Watch highlights the very real difficulties encountered by NGOs when seeking to establish that the SIP is appropriate and ought not to be suspended on the basis that parallel legal proceedings have been set in motion. There is no guarantee that the PLP will resolve the dispute and may in some cases become a stalling mechanism to avoid settlement:

NGOs, in particular in developing countries, are faced with a lack of effective and available judicial and non-judicial grievance mechanisms to address their concerns regarding business conduct. All too often, serious questions can be raised regarding the fairness and timeliness of national judicial means. Court cases may linger for many years without progress and the judicial system may lack independence or be corrupt. As a result of a narrow approach to parallel legal proceedings, NGOs may find their access to the NCP process blocked, ruling out a possibly more efficient and non-adversarial resolution to a dispute.¹⁵³

Even in developed countries legal proceedings can take years to be resolved, witness the ongoing Chevron-Texaco class-action litigation involving the indigenous population of the Ecuadorean Oriente referred to in Chapter 1.¹⁵⁴ Furthermore, companies may still continue

¹⁵⁰ TUAC Background Paper note at 18.

¹⁵¹ OECD Watch (2010) note 16 at 47.

¹⁵² Ibid.

¹⁵³ Ibid at 46-47.

¹⁵⁴ *Infra* at Section 1.4.

to resist SIPs *after* parallel legal proceedings have ended, as Shell did in relation to a dispute regarding its Pandacan oil depot in the Philippines which was brought before the Dutch NCP.¹⁵⁵

It is crucial, therefore, that the OECD develop clear and consistent rules to determine the circumstances in which a complaint will be suspended or rejected in light of parallel legal proceedings. The Commentary to the 2011 Review does little to clarify the position unfortunately providing only that:

When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned.¹⁵⁶

A great deal of discretion therefore remains with individual NCPs and it seems unlikely to resolve the problem satisfactorily. At present the lack of a universal approach by NCPs is resulting in major inconsistencies. So for example, in the US and Japan the consequence of PLP is automatic rejection of the complaint, while in the UK and the Netherlands guidance is provided ‘so as not to prejudice parallel legal proceedings’ and suspension or rejection of a complaint is not automatic.¹⁵⁷ Both TUAC and OECD Watch wanted the 2011 Review to address these shortcomings in the NCP system and TUAC points to the guidance developed by the UK NCP as an example of best practice which ought to be adopted across the board.¹⁵⁸

In September 2009, the UK NCP announced the criteria that it would use when deciding whether to suspend or reject a complaint brought under the SIP where PLP exist.¹⁵⁹

Essentially, PLP ‘will not of itself cause a suspension’ of the NCP’s ‘investigation and/or

¹⁵⁵ OECD Watch (2010) note 16 at 46.

¹⁵⁶ Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, I. Commentary on the Procedural Guidance for NCPs, <http://www.oecd.org/dataoecd/43/29/48004323.pdf> [last accessed 4.11.11] 77 at 83 para.26.

¹⁵⁷ TUAC Background Paper note 146 at 18.

¹⁵⁸ Ibid.

¹⁵⁹ <http://www.berr.gov.uk/files/file53069.pdf>

its determination of any dispute’¹⁶⁰ and it seems that this basic approach has been adopted by the 2011 Guidelines. Furthermore the UK NCP ‘will suspend a complaint only where it is satisfied that it is necessary in order to avoid serious prejudice to a party to parallel proceedings and appropriate in all the circumstances.’¹⁶¹ The NCP emphasises the non-adversarial nature of the SIP and prior to implementing a suspension, it expects the parties to the complaint ‘to give serious consideration to the benefits of conciliation/mediation which can lead to a quicker and more cost effective solution to the issues raised.’¹⁶² Finally, and importantly, the UK NCP will ‘will progress any aspects of a complaint that it concludes are not necessary to suspend’¹⁶³ which addresses the second concern of OECD Watch discussed above. TUAC endorsed this approach and unsuccessfully urged Adhering Governments to adopt these criteria as part of the 2011 Review,¹⁶⁴ although it arguably falls short of TUAC’s own proposals:

In the past TUAC proposed a four-step approach that the NCP should take. The approach includes: alerting relevant enforcement authorities in case there are indications that criminal activities are involved; evaluating where the Guidelines and parallel proceedings converge and differ; taking account of parallel proceedings insofar as it provides for relevant sources of facts and information in considering a specific case; and facilitating dialogue and dispute resolution between parties taking due account of parallel proceedings. Where there is reasonable indication that the parallel proceeding is exposed to extensive delays in procedures, it is especially important that an NCP engages the parties in dialogue.¹⁶⁵

It seems inevitable that absent more rigorous PLP criteria, business actors may well continue to cite PLP as justification for avoiding a SIP and NCPs may continue to reject complaints on this basis.

5.5.3.2 Lack of Investment Nexus

¹⁶⁰ Ibid at para. 3.1

¹⁶¹ Ibid at para.3.2.

¹⁶² Ibid at para.5.

¹⁶³ Ibid at para.6.

¹⁶⁴ TUAC Background Paper note 146 at 18.

¹⁶⁵ TUAC, ‘Implementing the OECD GUIDELINES on Multinational Enterprises: The Trade Union Experience,’ J. Evans, General Secretary TUAC-OECD, 2008. See also OECD Watch (2010) note 16 at 47.

The 2000 Revision of the Guidelines extended their scope to the supply chain, a significant result for NGOs, which had been lobbying for this extension. Debate continued, however, around the definition of ‘supply chain’ and eventually, the Investment Committee decided that there must be an ‘investment nexus’ in order for the Guidelines to apply. This was decided on the basis that the Guidelines ‘were part of the Declaration on International Investment.’¹⁶⁶ In limiting the scope of the Guidelines to ‘investments’ or ‘investment-like relationships’ this clarification, itself, became the subject of controversy:

In tune with the spirit of deregulation of the past decade, the investment nexus came to be used by many NCPs to beat an unprecedented retreat in relation to the business activities that the Guidelines apply to. Ultimately, the investment nexus was interpreted by some NCPs as an obligation to reject all complaints related to business transactions such as trade and finance: in short, everything but direct investment.¹⁶⁷

OECD Watch contends that the deliberate narrowing of the scope of the Guidelines was due to ‘political expediency’ and that consequently some NCPs were using the investment nexus in order to avoid accepting complaints under SIPs¹⁶⁸ and ‘to try to shield their companies from scrutiny and censure.’¹⁶⁹ Over one third of NGO complaints to NCPs involve supply chains but 64% of these complaints have been rejected for lack of investment nexus.¹⁷⁰ Such an approach flies in the face of the spirit of the Guidelines and conflicts with SGSR Ruggie’s due diligence requirement¹⁷¹ and NGOs lobbied hard for the inclusion of the due diligence principle in the 2011 Review. It seems likely that the introduction of the due diligence requirement under Guideline IV and the absence of a reference to the ‘investment nexus’ in the 2011 Guidelines means that ‘NCPs are no longer

¹⁶⁶ OECD Watch (2010) *ibid* at 29.

¹⁶⁷ OECD Watch (2010) *ibid* at 29.

¹⁶⁸ OECD Watch (2010) *ibid* at 30.

¹⁶⁹ Fit for Purpose? A Review of the UK National Contact Point note 50 at 7.

¹⁷⁰ OECD Watch (2010) note 16 at 30.

¹⁷¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, ‘Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework,’ 9 April 2010, A/HRC/14/27 (9 April 2010), paragraphs 79-86, <http://198.170.85.29/Ruggie-report-2010.pdf> [last accessed 8.11.10].

authorized to limit the applicability of the OECD Guidelines to situations characterized by the presence of an ‘investment nexus’ or an ‘investment like relationship’ respectively.’¹⁷²

The UK NCP has already gone some way to dismantling the ‘artificial barrier’¹⁷³ of the OECD’s investment nexus in its decisions in relation to Afrimex (UK) Ltd¹⁷⁴ and Das Air,¹⁷⁵ where, after relying on Ruggie’s definition of due diligence, it decided that both companies were in breach of the Guidelines for failing to exercise due diligence over their supply chains in the Democratic Republic of Congo.¹⁷⁶ It seems probable that this expansive approach will be incorporated across the NCP network as a result of the new due diligence requirement. Not only would it represent a step towards a more coherent and joined-up international framework, it would also ensure that business actors cannot escape vertical accountability and would help to prevent further human rights violations. Ruggie himself sees the decisions of the UK NCP as a ‘significant development:’

reaffirming the principle that companies must respect human rights, and that doing so requires them to have adequate due diligence processes not only to ensure compliance with the law but also to manage the risk of human rights abuse with a view to avoiding it.¹⁷⁷

¹⁷² B.H.Melgar, K.Nowrot & W.Yuan, ‘The 2011 Update of the OECD Guidelines for Multinational Enterprises: Balanced Outcome or an Opportunity Missed?’ Institute of Economic Law Transnational Economic Law Research Center (TELC), School of Law Martin, Luther University Halle-Wittenberg, June 2011, http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft112_0.pdf [last accessed 4.11.11] at 29.

¹⁷³ Fit for Purpose? A Review of the UK National Contact Point note 50 at 7.

¹⁷⁴ Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008, URN 08/1209 (Afrimex Final Statement), <http://www.oecd.org/dataoecd/40/29/43750590.pdf> [last accessed 8.11.10] (hereinafter ‘Afrimex’). See also L.Catá Backer, ‘Rights and Accountability in Development (RAID) v. DAS Air and Global Witness v. Afrimex: Small Steps to an Autonomous Transnational Legal System for the Regulation of Multinational Corporations,’ 10(1) Melb.J.Int’l Law 258 (2009)

¹⁷⁵ Statement by the UK National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises: DAS Air, 17 July 2008 at para 2, <http://www.oecd.org/dataoecd/11/31/44479531.pdf> [last accessed 8.11.10].

¹⁷⁶ Afrimex note at paras 41, 51, 53-57, 62, 64, 71, 74-77; Das Air at paras 44, 50 and 53. The decision in Afrimex is addressed in more detail in Section 6.7.

¹⁷⁷ John Ruggie, Letter to the Editor of the Financial Times, 10 September 2008 <http://www.reports-and-materials.org/Ruggie-letter-to-FT-re-Afrimex-10-Sep-2008.pdf> [last accessed 9.11.10].

While the introduction of the due diligence requirement is a ‘major achievement’¹⁷⁸ its implementation will of course require close monitoring to ensure that NCPs apply the principle.

5.5.3.3 Conclusions About SIPs

*“NCP handling of specific instances has been erratic, unpredictable and largely ineffectual.”*¹⁷⁹

As with the NCPs generally, SIPs take different forms in the various OECD Member Governments and this lack of consistency in implementation further weakens the system. For example, the UK and the Netherlands have adopted a policy of naming the parties to initial assessments under SIPs and some NCPs such as the UK, Brazil and Japan publicise the acceptance of a Specific Instance complaint on their website.¹⁸⁰ Transparency is therefore achieved on at least one level.¹⁸¹ On the other hand, where a case is rejected, every NCP, with the exception of The Netherlands, keeps the parties anonymous.

Given the significant likelihood of suspension, rejection and failure of a complaint, on the basis of e.g. PLP, the risk of initiating a SIP represents a heavy burden particularly for NGOs. Furthermore, complaints take on average more than two years to reach the consideration/investigation stage and are estimated to cost NGOs approximately €100,000 per standard case.¹⁸² Taken together, these facts may help to explain both the low numbers of complaints lodged overall and the decrease in complaints submitted to NCPs in recent years. Such barriers to access further weaken NCPs as an effective mechanism for addressing human rights violations by business actors. The 2011 update did little to address the structural limitations of the NCPs. Nevertheless, some NCPs and SIPs operate more effectively than others and the following section examines the workings of the UK NCP which is regarded as having improved its performance significantly since its original

¹⁷⁸ OECD Watch, OECD Watch statement on the update of the OECD Guidelines for MNEs: Improved content and scope, but procedural shortcomings remain, 25 May 2011 http://oecdwatch.org/publications-en/Publication_3675 [last accessed 4.11.11] (hereinafter ‘OECD Watch 2011’).

¹⁷⁹ OECD Watch (2010) note 16 at 11.

¹⁸⁰ Review of NCP Performance 2008 note 105 at 11.

¹⁸¹ Ibid at 14.

¹⁸² OECD Watch (2010) note 16 at 11.

incarnation¹⁸³ and is regularly identified as one of the leading NCPs in a variety of contexts.¹⁸⁴

5.4 The UK NCP and SIP: A mixed bag of success and failure

5.4.1 Case Study: The UK National Contact Point

As highlighted in the preceding sections, the UK NCP is generally regarded as one of the more effective of all the NCPs with a functioning Specific Instance Procedure which enables complaints regarding breaches of the Guidelines by business actors to be lodged, investigated and concluded within a specified time limit of twelve months.¹⁸⁵ When the NCP was first established, however, it suffered from a variety of systemic problems, ranging from chronic delays, lack of transparency and accountability, lack of independence, exclusion of supply chains, lack of due process, lack of fact-finding powers and accusations of general mismanagement.¹⁸⁶ In response to the criticisms the UK government restructured its NCP and while it is currently located within the Department for Business, Innovation and Skills (BIS), it is overseen by a multistakeholder Steering Group, involving some civil society representatives but comprising mostly civil servants from various government departments:

A Senior Civil Servant in the Department for Business Enterprise and Regulatory reform will chair the Steering Board. The Board will also include representatives from the Foreign and Commonwealth Office, Department for International Development, Department of Work and Pensions and Export Credit Guarantee Department each having an interest in the promotion and implementation of the OECD Guidelines for Multinational Enterprises. Other departments may participate in Board meeting on an *ad hoc* basis when issues of interest arise.¹⁸⁷

¹⁸³ Joint Committee on Human Rights note 112 at paras. 78 and 84.

¹⁸⁴ See e.g. TUAC Background Paper note 146 at 18 in relation to parallel legal proceedings.

¹⁸⁵ UK National Contact Point (NCP) Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises, September 2009, URN 09/1353 at para.2.2.1. <http://www.bis.gov.uk/files/file53070.pdf> [last accessed 28.7.10]. (Hereinafter 'UK NCP Procedures 2009'.)

¹⁸⁶ See e.g. Christian Aid/Amnesty International/Friends of the Earth, 'Flagship or Failure? The UK's implementation of the OECD guidelines and approach to corporate accountability' 2005 at 13-20, <http://www.christianaid.org.uk/images/F1167PDF.pdf> [last accessed 8.11.10].

¹⁸⁷ BERR/DFID, Terms of Reference and Explanation of the Role of the NCP Steering Board, December 2008, URN: 09/958 <http://www.bis.gov.uk/files/file49815.pdf> [last accessed 31.7.10].

While the restructuring was welcomed by some as having had ‘a significant and positive effect on the operation of the UK NCP’¹⁸⁸ numerous concerns remained with critics concluding that:

The NCP is a non-judicial mechanism that provides a degree of accountability for the environmental and human rights impacts of British companies operating abroad. It does not have any powers of enforceability, cannot impose penalties on companies or award compensation to victims. It has some capacity to investigate complaints brought to it by NGOs or unions directly, by seeking information from parties to the dispute and plays a mediating role in trying to bring them together to facilitate dialogue and a resolution to the case. If there is no resolution, the NCP can review the evidence, consult experts, make a determination and issue a statement on the case.¹⁸⁹

The Parliamentary Joint Committee on Human Rights noted that witnesses had:

raised concerns about its operation, including a lack of independence from Government; a lack of guidance for companies on the standards to be met; and the absence of sanctions against companies and remedies for individual victims. Insufficient information in the Guidelines about human rights obligations has also been the subject of critical comment.¹⁹⁰

In 2008, in response to these continuing criticisms¹⁹¹ it was agreed that the NCP would be reorganised further to reduce the number of civil servants sitting on the Steering Group as permanent members,¹⁹² with the government commenting that this ‘created a more proportionate balance of non-government related participants and civil servants at meetings.’¹⁹³ Note the subtle constraints imposed, however:

The Steering Board will also include four external members with business, employee, NGO or other experience selected for the competences they will bring relevant to the function and operation of the Steering Board. *External members may act as their constituency representative, but will endeavour to be collegiate in their approach to decision-making.* [emphasis added]

¹⁸⁸ Joint Committee on Human Rights note 112 at para.78.

¹⁸⁹ Fit for Purpose? A Review of the UK National Contact Point note 50 at ii.

¹⁹⁰ Joint Committee on Human Rights note 112 at para.78.

¹⁹¹ See e.g. Joint Committee on Human Rights note 112 at paras 83-85; Review of NCP Performance 2008 note 105 at 7 and 13; BERR/DFID Initial Review of the Operation of the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises, URN 09/588, January 2009, at para.2, <http://www.bis.gov.uk/files/file49811.pdf> [last accessed 8.11.10].

¹⁹² Minutes of the 7th NCP Steering Board Meeting, 10 December 2008, available at <http://www.berr.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/steering-board> [last accessed 28.7.10].

¹⁹³ UK NCP <http://www.berr.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/steering-board> [last accessed 28.7.10].

External members are still outnumbered by government representatives and are, it seems, encouraged to be as anodyne as possible, which appears to be an attempt to neutralise their impact and defeats the purposes of a transparent, multistakeholder approach. It certainly raises questions about the independence of the NCP, which is a concern of both the UK Parliamentary Joint Committee on Human Rights and numerous NGOs.¹⁹⁴ Indeed the Joint Committee has explicitly recommended that ‘the Government consider options for increasing the independence of the UK NCP from Government.’¹⁹⁵

Notwithstanding the latest restructuring of the NCP, criticisms continue to be expressed by stakeholders generally. Irrespective of the recent changes, trade unions and NGOs are firmly of the view that the UK NCP procedure is no substitute for judicial proceedings, particularly in light of the lack of enforcement measures and penalties.¹⁹⁶ Improvements to the NCP and SIP, while welcome, will never ensure the accountability of business actors for violations of the Guidelines, nor act as a deterrent. Even more importantly they will never offer an effective remedy for those affected by human rights violations.

In a further UK government consultation which was undertaken at the end of 2009, as a precursor to the 2011 Revision of the Guidelines, many of the respondents proposed the inclusion of a follow-up procedure within the revised Guidelines to ensure that any recommendations made as a result of a SIP are implemented.¹⁹⁷ This reflects the current practice of the UK NCP,¹⁹⁸ although, as will be seen with the Afrimex example, the follow-up procedure is very limited in its impact, particularly when the business actor in question is uncooperative. Nevertheless, the UK government was supportive of ‘the inclusion of more detailed guidance on the follow up to final statements by NCPs’ in the

¹⁹⁴ Joint Committee on Human Rights note 112 at paras.78 and 85.

¹⁹⁵ Ibid at para.85

¹⁹⁶ Fit for Purpose? A Review of the UK National Contact Point note 50 at 5. See also Joint Human Rights Committee note 112.

¹⁹⁷ Government Response to the UK Consultation on the Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, March 2010, URN 10/802 at para. 60 <http://www.berr.gov.uk/assets/biscore/business-sectors/docs/10-802-government-response-to-consultation-oecd-guidelines.pdf> [last accessed 28.7.10] (hereinafter UK Government Consultation Response 2010’).

¹⁹⁸ UK NCP Procedures 2009 note 184 at para.5.4.

revised Guidelines.¹⁹⁹ Yet, without ensuring ‘that there are clear consequences following a negative final statement and failure by the company concerned to implement the NCP’s recommendations,’²⁰⁰ such an approach is unlikely to make certain that business actors are accountable for their actions or to act as a deterrent. In any event, the 2011 update remains ‘ambiguous’ with regard to the follow up role of NCPs.²⁰¹ Among the 2009 Consultation responses were suggestions for consequences which attach to a negative NCP outcome:

Some respondents suggested linking the complaint process with an enforcement mechanism (e.g. reviewing/withdrawing government financial or export credit support).²⁰²

In its response, the UK government was silent on the question of this type of linkage and it is therefore logical to conclude that it has no interest in fortifying the current SIP. Without deterrent or punishment elements, SGSR Ruggie’s requirements for an effective remedy are not present. As highlighted in Chapter 1, Ruggie asserts that an effective remedy ought to be “legitimate,” “accessible,” “predictable,” “equitable,” “rights-compatible” and “transparent”, as well as dispensing punishment to the wrongdoer and providing redress for the victim of the human rights violation. While there have been some strides to improve accessibility to and transparency of the UK NCP, the SIP simply does not act as a deterrent to bad business behaviour, nor does it offer redress to those businesses which abuse human rights either directly or through the supply chain.

It is bleak to note, therefore, that the UK NCP is still regarded as one of the more effective NCPs among Adhering Governments. Given that the 2011 Revision focused on substantive changes to the content of the Guidelines, it seems unlikely that anything will be done to rectify these flaws in the NCP system in the near future and indeed OECD Watch has concluded that the OECD:

¹⁹⁹ UK Government Consultation Response 2010 note 196 at para.62.

²⁰⁰ Ibid at para.61.

²⁰¹ OECD Watch (2011) note 176.

²⁰² Ibid at para.61.

missed a once-in-a-decade opportunity to provide for a system capable of ensuring observance through investigative powers and the ability to impose some kind of sanction when the Guidelines are breached.²⁰³

The inadequacy of the UK SIP, as well as a few strengths, can be seen clearly when examining the outcome of the complaint against Afrimex (UK) Ltd.²⁰⁴

5.5 Why Binding Regulatory Rules are Necessary: Afrimex (UK) Ltd

The determination by the UK NCP under its Specific Instance Procedure in relation to Afrimex (UK) Ltd is significant for several reasons. Firstly, it is one of a very small number of complaints upheld against a business actor for violation of the Guidelines, specifically the human rights provisions. Secondly, the breach of the Guidelines was due to the failure of Afrimex to keep adequate check on its supply chain. Thirdly, as highlighted previously, SGSR Ruggie's due diligence principle is applied by the UK NCP. Finally, it demonstrates clearly the limitations of a non-binding regulatory system.

The issue of business actors operating in conflict zones is of particular and increasing concern to the various bodies seeking to regulate business behaviour. This was seen, for example, in relation to the UN Guiding Principles²⁰⁵ and the OECD itself has created a Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, which defines Weak Governance Zones as:

investment environments in which governments cannot or will not assume their roles in protecting rights (including property rights), providing basic public services (e.g. social programmes, infrastructure development, law enforcement and prudential surveillance) and ensuring that public sector management is efficient and effective.¹ These “government failures” lead to broader failures in political, economic and civic institutions that are referred to as weak governance.²⁰⁶

Clearly, conflict and post-conflict situations fall within this definition and raise distinct questions about the role of business in such circumstances, because as OECD Watch states:

²⁰³ OECD Watch (2011) note 176.

²⁰⁴ Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008, URN 08/1209 (Afrimex Final Statement), <http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html>.

²⁰⁵ *Infra* at Section 3.3.1.

²⁰⁶ <http://www.oecd.org/dataoecd/26/21/36885821.pdf> [last accessed 8.11.10].

Doing business in conflict and post-conflict zones significantly increases the likelihood of real or complicit violation of human rights. This is further exacerbated by the presence of heavy-handed security personnel and militia.²⁰⁷

The mining-related activities of Afrimex (UK) Ltd and its suppliers in the Democratic Republic of Congo (DRC) demonstrates this point well.

5.5.1 Background to the Complaint

In February 2007, the NGO Global Witness lodged a complaint against Afrimex (UK) Ltd with the UK NCP on the basis of its investigations into the British registered company's activities in the conflict-ridden DRC.²⁰⁸ Afrimex was already on a list of eighty-five transnational companies whose activities were giving cause for concern to the UN Security Council's Panel of Experts on the Illegal Exploitation of Natural Resources in the DRC²⁰⁹ and had also come to the attention of a UK All-Party Parliamentary Group which was scrutinising the alleged involvement of British companies in the DRC conflict.²¹⁰ The company had been engaged in commercial undertakings around the mining of coltan and cassiterite in the Democratic Republic of Congo over a number of years and as such, its alleged activities and British nationality brought it squarely within the scope of the OECD Guidelines and the remit of the UK NCP.

Specific allegations were made in the complaint regarding the use of child labour and forced labour in mines within a conflict zone which supplied minerals to companies linked to Afrimex. Furthermore there were allegations that Afrimex itself had paid 'taxes' to rebel forces in Congo which contributed to the ongoing conflict. An initial attempt at mediation

²⁰⁷ OECD Watch (2010) note 16 at 13.

²⁰⁸ For an overview of the exploitation of natural resources in the DRC see generally: Global Witness, "'Faced with a gun, what can you do?'" War and the Militarisation of Mining in Eastern Congo,' Report, July 2009. For the background to the Afrimex complaint see 68 et seq. http://www.globalwitness.org/sites/default/files/pdfs/report_en_final_0.pdf [Last accessed 9.11.10].

²⁰⁹ Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo S/2001/357 Annex I <http://www.globalsecurity.org/military/library/report/2001/357e.pdf> [last accessed 17.8.10]; Afrimex was then listed in Annex III of the October 2002 Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo S/2002/1146, as it was considered to be in violation of the OECD Guidelines.

²¹⁰ All Parliamentary Group on the Great Lakes Region of Africa, 'The OECD Guidelines and the DRC,' May 2005 <http://www.appggreatlakes.org/index.php/appg-reports-mainmenu-35/26--the-oecd-guidelines-and-the-drc> [last accessed 17.8.10]

between the parties failed because Afrimex disputed the allegations on the basis that there was no link between it and the alleged human rights violations because it was removed from the mining process and it had never paid ‘taxes’ to rebel forces.²¹¹ The existence of a conflict was significant to the outcome of the procedure not least because the UN Security Council’s Panel of Experts had previously stated that companies such as Afrimex were the ‘engines’ of conflict in the DRC.²¹² After the unsuccessful attempt at mediation, the NCP investigated the situation and made a final determination.

5.6.2. The Afrimex Determination

Significantly the NCP’s determination is rooted in Ruggie’s notion of due diligence, that is, the practical implementation of the obligation to protect human rights: ‘the steps a company must take to become aware of, prevent and address adverse human rights impacts.’²¹³ The NCP concluded that Afrimex had failed to exercise due diligence in relation to its supply chain and was in breach of a multitude of provisions of the Guidelines.²¹⁴ In particular, the NCP stated that it was ‘unacceptable’ for Afrimex to fail to impose conditions on its suppliers ‘given the context of conflict and human rights abuses taking place.’²¹⁵

The NCP specifically upheld the complaints regarding the use of child labour and forced labour in mines within a conflict zone which supplied minerals to companies linked to Afrimex, rather than to Afrimex itself. It concluded in a strongly worded Final Statement that Afrimex had failed to meet the requirements of a multitude of provisions of the OECD Guidelines 2000, in particular Guidelines II and IV:

...Afrimex applied insufficient due diligence on the supply chain and this remains the case. The UK NCP expects UK business to respect human rights and to take steps to ensure it does not contribute to human rights abuses. Afrimex did not take steps to influence the supply chain and to explore options with its suppliers exploring methods to ascertain how minerals could be sourced from mines that do not use child

²¹¹ Afrimex Final Statement note 203 at para. 5.

²¹² Afrimex Final Statement *ibid* at para.9 quoting the UN Security Council Panel of Experts.

²¹³ Protect, Respect and Remedy note 49 at 17 para 56.

²¹⁴ Guidelines 2000 II(1), II(2), II(10), IV(1)(b), IV(1)(c) and IV(4)(b).

²¹⁵ Afrimex Final Statement note 203 at para 47.

or forced labour or with better health and safety. The assurances that Afrimex gained from their suppliers were too weak to fulfil the requirements of the Guidelines.²¹⁶

It went on to declare in no uncertain terms that the activities of Afrimex had funded a conflict which ‘prevented the economic, social and environmental progress key to achieving sustainable development and contributed to human rights abuses.’²¹⁷

The NCP made several recommendations, at the heart of which was the practical and effective integration of a CSR policy. It proposed that the policy document should make explicit reference to international human rights instruments and sought assurances that the document would change corporate culture and not be a ‘worthless piece of paper.’²¹⁸ In making its recommendations the NCP explicitly refers to the Ruggie UN framework by advising Afrimex to adopt the due diligence standard and to require that its suppliers ‘do no harm’²¹⁹ and:

to take credible steps to ensure that military forces do not extract rents along the supply chain; to require a commitment that adequate steps are taken to ensure that minerals are not sourced from mines using forced and child labour, and are not from the most dangerous mines.²²⁰

It recommended that Afrimex monitor its suppliers to ensure compliance with the due diligence principles as well as referring the company to a number of tools to assist with the development and application of its policy.²²¹ Despite the non-binding nature of the recommendations the NCP’s determination was initially welcomed. Global Witness stated in a Press Release that it sent the ‘right message’ to business and that the ‘British government’s ruling provides positive guidance to help...change...practices.’²²²

²¹⁶ Afrimex Final Statement note 203 at para.62

²¹⁷ Afrimex Final Statement *ibid* at para.51

²¹⁸ Afrimex Final Statement *ibid* at para 66.

²¹⁹ Afrimex Final Statement *ibid* at paras 64,65 and 66.

²²⁰ Afrimex Final Statement *ibid* at para.66.

²²¹ E.g. the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones; the Sanctions Unit at the UK Foreign and Commonwealth Office.

²²² Global Witness, ‘UK company Afrimex broke international guidelines, says British government,’ Press Release 28 August 2008, http://www.globalwitness.org/media_library_detail.php/661/en/uk_company_afrimex [last accessed 17.8.10].

The message *is* unequivocal: ‘The UK government expects British companies to exercise the highest levels of due diligence in situations of widespread violence and systematic human rights abuses.’²²³ There is no doubt that the new enhanced SIP offers a measure of accountability and is helping to clarify the scope of the Guidelines, the question is whether it can also offer realistic protection against human rights abuses in the absence of a binding mechanism or an effective remedy. The NGO and trades union community, as well as experience, say that it does not and a new body with the power of sanctions and remedies for individuals is recommended.²²⁴ SGSR Ruggie too, emphasises that an effective remedy is one which will ‘investigate, punish, and redress abuse’²²⁵ and it is clear that while the UK Specific Instance Procedure involves an investigation of business behaviour, and an outcome which *may* act as a deterrent, it neither punishes nor provides redress for human rights abuses. Nevertheless, as a result of the SIP, Afrimex was now firmly on the human rights ‘radar’ and even absent any punishment or redress it was hoped that the inevitable monitoring of its future activities might be a sufficient deterrent to breaches of the Guidelines. Unfortunately, subsequent events serves to highlight the ultimate inherent weakness in the NCP system, that is, lack of enforcement. Indeed the Afrimex experience demonstrates in the clearest terms the need for binding regulation of business actors.

5.5.3 The Limitations of the UK NCP Afrimex Determination

While Global Witness welcomed the publication of the strongly worded Final Statement,²²⁶ the NGO has since expressed considerable concern about Afrimex and its ongoing activities in the DRC, requesting that Afrimex indicate how it has complied with the NCP’s recommendations. In March 2009, the company intimated to the UK NCP that there was no need for it to implement the recommendations because it was no longer operating in the DRC stating that, ‘it had stopped trading in minerals and that its last shipment of minerals left the DRC in around the first week of September 2008.’²²⁷ Global Witness subsequently asked the ‘UK government to carry out an independent verification of Afrimex’s claim that

²²³ Afrimex Final Statement note 203 at 16, para 75.

²²⁴ Fit for Purpose? A Review of the UK National Contact Point note 50 at iv.

²²⁵ Protect, Respect and Remedy note 49 at para.82.

²²⁶ Global Witness Report 2009 note 207 at 69; see also Press Release 28 August 2008 note 221.

²²⁷ Global Witness Report 2009 *ibid* at 69

it has ceased trading in minerals' on the basis that its investigations support the contention that Afrimex has not suspended its Guidelines-breaching activities in DRC.²²⁸

Furthermore, the NGO has encouraged the government to utilise the provisions of UN Security Council Resolutions 1856²²⁹ and 1857²³⁰ and report Afrimex to the UN Sanctions Committee. As this has not been forthcoming, in July 2010 the NGO reluctantly sought judicial review of the UK government's failure to refer the case to the Sanctions Committee stating that the British government had left it 'no choice.'²³¹ In the meantime, Afrimex, and dozens of other companies, continue to act with impunity in the DRC while the international community is unable and seemingly unwilling to act to stop it. As Global Witness concludes:

at the international level, bolder action is needed to translate the discourse of concern into reality. This will require a willingness on the part of governments to broach these issues explicitly with government and military authorities in the Great Lakes region, at the highest levels, and for home states to exercise their responsibility over companies which continue to ignore the human rights impact of their trade. If eastern DRC's natural resources are to turn into a source of wealth and development for the population, governments will have to have the courage to confront those on all sides who have been plundering the country and hold them to account.²³²

In broader terms, if the so-called leading NCP cannot effectively implement the Guidelines so as to stop human rights abuses, hold businesses to account for their actions and deter offending business actors then clearly something is wrong. Afrimex is not the only company to ignore the recommendations of the UK NCP which further suggests that the NCP system is inadequate. For example, Vedanta Resources PLC has simply refused to engage with or accept the determination of the NCP²³³ that it breached the Guidelines by

²²⁸ Global Witness Report 2009 *ibid* at 69

²²⁹ UN Security Council Resolution 1856(2008) The Situation Concerning the Democratic Republic of Congo, S/RES/1856 (2008), 22 December 2008, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/666/94/PDF/N0866694.pdf?OpenElement> [last accessed 17.8.10]

²³⁰ UN Security Council Resolution 1857(2008) The Situation Concerning the Democratic Republic of Congo, S/RES/1857 (2008), 22 December 2008, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/666/43/PDF/N0866643.pdf?OpenElement> [last accessed 17.8.10]

²³¹ Global Witness, 'Global Witness takes UK government to court for failing to list UK companies trading Congo conflict minerals for UN sanctions' Press Release, 26.07.2010 <http://www.globalwitness.org/library/global-witness-takes-uk-government-court-failing-list-uk-companies-trading-congo-conflict> [last accessed 9.11.10].

²³² Global Witness Report 2009 note 207 at 88.

²³³ Joint Committee on Human Rights note 112 at para.80.

failing to consult with the Dongria Kondh indigenous population in the Niyamgiri Hills, Orissa, India about the impact of a bauxite mine on culturally sensitive land:²³⁴

The UK NCP reported that Vedanta did not participate in mediation, even after an offer of independent professional mediation, external to the NCP. Other than providing submissions that the NCP should not accept the case and a copy of its own sustainable development report, the company did not engage with the examination and did not submit any evidence in response to that provided by Survival International. The NCP had no powers to compel Vedanta to participate and expressed disappointment at the decision of Vedanta Plc not to ‘engage fully’ with their work.²³⁵

Vedanta has stated that it ‘refutes the conclusions [of the report] and has complied in all respects with Indian regulations including consultations with the local community.’²³⁶ Furthermore, the company has informed the NCP that its activities are in line with the recommendations despite NGO submissions to the contrary.²³⁷ Thus the UK follow-up procedure whereby both the complainant and the business actor are ‘asked to provide the NCP with an update on the company’s progress towards meeting’ the recommendations made in the final statement has been ineffective.²³⁸ While the situation may be “embarrassing and potentially costly”²³⁹ for Vedanta, in the absence of binding rules, the UK NCP is powerless to do anything further in relation to Vedanta’s activities in India.

It would be easy to conclude that the NCP is failing but as stated earlier in this chapter, the fault lies with Adhering Governments which will not extend the reach of NCPs. So an unsatisfactory state of affairs remains:

As a non-judicial mechanism for satisfying individuals who may have a complaint against a UK company, [the NCP] falls far short of the necessary criteria and powers needed by an effective remedial body, including the need for independence from

²³⁴ UK NCP, ‘Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from Survival International against Vedanta Resources plc,’ 25 September 2009, URN: 09/1373 <http://www.oecd.org/dataoecd/49/16/43884129.pdf> [last accessed 18.8.10].

²³⁵ Joint Committee on Human Rights note 112 at para.79.

²³⁶ T. Macalister, ‘Treasury taken to court for RBS loans to Vedanta resources,’ The Guardian, 18 October 2009 <http://www.guardian.co.uk/business/2009/oct/18/rbs-vedanta-loan-court-case> [last accessed 18.8.10].

²³⁷ UK NCP, ‘Follow up to Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from Survival International against Vedanta Resources plc,’ 12 March 2010, URN 10/778 paras 16-21, <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/10-778-survival-international-against-vedanta-resources.pdf> [last accessed 18.8.10].

²³⁸ UK NCP Procedures 2009 note 184 at para.5.4.

²³⁹ S.A.Altschuller, A.Lehr & S.A.Spears, ‘Corporate Social Responsibility,’ 44 Int’l Lawyer 213 (2010) at 215.

Government and the power to provide an effective remedy. There is little incentive for individuals to use a complaints mechanism which offers no prospect of any sanction against a company, compensation or any guarantee that action will be taken to make the company change its behaviour.²⁴⁰

In these circumstances, it seems that the only possible solution is to create a mechanism whereby binding sanctions can be imposed on business actors in breach of the Guidelines and which offers redress to those affected. Given the lack of procedural or systemic changes made by the 2011 update, such a development is unlikely.

5.6 Summary of the Strengths and Weaknesses of the OECD Approach to Business and Human Rights

5.6.1 Strengths

The OECD system adopt a top-down – bottom-up approach, whereby the initiative relies upon the top-down application of general international human rights standards as well as bottom-up implementation of those standards at the national level. Adherent Governments are required to implement the Guidelines via National Contact Points using a Specific Instance Procedure. Under the OECD Guidelines any ‘interested party’²⁴¹ may lodge a complaint, via the SIP, alleging extraterritorial wrongdoing by a business operating from an OECD Adherent State. In the same way that ‘multinational enterprise’ is not defined in the Guidelines, neither is ‘interested party’ although it seems to be interpreted widely and at minimum includes the business community, labour representatives and NGOs.

Procedural guidance given to NCPs permits their ‘making an initial assessment of whether the issue raised merits further examination’ and allows them ‘to determine whether the issue is bona fide and relevant to the implementation of the Guidelines.’²⁴² Consequently, NCPs ‘will take into account...the identity of the party concerned and its interest in the matter.’

²⁴⁰ Joint Committee on Human Rights note 112 at para. 84.

²⁴¹ OECD Council Decision 2000 note 67 para.1 and Procedural Guidance.

²⁴² OECD Guidelines on Multinational Enterprises, (OECD, 2008) at 58 <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [last accessed 8.11.10].

The UK NCP administers one of the better examples of a SIP with several cases resulting in complaints against transnational business actors being upheld. Importantly, several NGOs and trade unions have lodged successful complaints.²⁴³

According to SGSR Ruggie, an effective business and human rights mechanism ‘must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.’²⁴⁴ While not every NCP can meet the transparency requirement because the majority of them remain entirely governmental in structure,²⁴⁵ the UK NCP, in particular, is an example of how a measure of transparency can be achieved. It publishes its determinations and recommendations regarding business violations of human rights on the Department for Business, Innovation and Skills (BIS) website, its terms of reference and procedures are available publicly and its new structure ensures a limited multistakeholder approach.

In terms of accountability, the OECD Guidelines entail a relatively formal accountability mechanism because they impose obligations upon Adherent Governments to establish an NCP to implement and promote the Guidelines and also to create a SIP.²⁴⁶ As indicated above, the SIP may investigate complaints against businesses incorporated in the Adhering State in relation to human rights violations and offers some accountability. NGOs have highlighted that ‘the importance of an NCP publicly finding companies to have been in breach of the Guidelines should not be underestimated.’²⁴⁷ Public acknowledgment of a complaint is powerful in itself and if the complaint is upheld by the State-backed NCP, it *may* be vested with a great deal of authority as well as ensuring dissemination of the Guidelines, which is key to ensuring that the human rights are respected and protected in future.

²⁴³ e.g. in the UK context Global Witness, Survival International and RAID.

²⁴⁴ Protect, Respect and Remedy note 49 at para.92(f)

²⁴⁵ See discussion *infra* at section 6.6.1.

²⁴⁶ OECD Council Decision 2000 note 67 at 31-32.

²⁴⁷ OECD Watch 2010 (note) 16 at 22.

Furthermore, as mentioned above, the NCPs are required to promote the standards established in the Guidelines.²⁴⁸ Statements by NCPs serve to clarify the scope of the Guidelines as well as helping to establish expected standards of business behaviour in relation to human rights. For example, in 2005 the Norwegian NCP issued clear guidance to a Norwegian-based company Aker Kværner regarding its wholly-owned US subsidiary KPSI.²⁴⁹ It found that both parent and subsidiary had provided maintenance services at the prison at Guantanamo Bay and that these services ‘at least in part can be considered to have affected the inmates.’²⁵⁰ In its conclusion, the NCP:

...emphasized the importance of continuous assessments by Norwegian companies of their activities in relation to human rights in general, adding that the provision of goods or services in situations like Guantanamo Bay require “particular vigilance.”²⁵¹

The NCP also criticised Aker Kværner for failing to undertake ‘a thorough and documented assessment of the ethical issues in connection with its tender for the renewal of the contract in 2005’ and recommended that the company establish and apply a clear CSR policy across its operations. NCPs can therefore proffer strong and clear guidance about appropriate standards which business actors are expected to implement.

A final strength of the OECD system is that, although the existing international system of business and human rights initiatives is chaotic and disparate resulting from too many different isolated projects, in recent years there has been improved cooperation and cross-fertilisation of ideas, principles and standards²⁵² and this can clearly be seen in relation to the 2011 Review. Attempts at integration have gathered momentum as a direct result of SGSR Ruggie’s involvement. As highlighted earlier in this chapter, the Ruggie due diligence approach has been implemented by the UK NCP in relation to the supply chain in making its determination and recommendations in relation to Afrimex and Das Air in 2008,

²⁴⁸ Council Decision 2000 note 67.

²⁴⁹ OECD NCP (Norway), *Forum for Environment and Development vs. Aker Kværner ASA, Cuba 2005*, [http://baseswiki.org/en/OECD_NCP_\(Norway\)_Forum_for_Environment_and_Development_vs._Aker_Kv%C3%A6rner_ASA,_Cuba_2005](http://baseswiki.org/en/OECD_NCP_(Norway)_Forum_for_Environment_and_Development_vs._Aker_Kv%C3%A6rner_ASA,_Cuba_2005) [last accessed 28.6.10].

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Protect, Respect and Remedy note 49 at para.105.

which in turn has influenced the substantive content of the 2011 Guidelines.²⁵³

Consequently, there is an increasingly coherent approach to bad business practices and this means that growing numbers of businesses are falling within the business and human rights framework as the regulatory net widens.

Notwithstanding these strengths in the OECD system, there are also significant weaknesses which negate the positive elements.

5.6.2 Weaknesses

Firstly, notwithstanding the 2011 revision, the Guidelines lack specificity in their references to human rights standards which has implications for any realistic attempt at enforcement. Victims of human rights abuses perpetrated by business actors need an *effective* remedy and clearly enunciated rights upon which to base a claim. SGSR Ruggie's recommendation of a separate human rights chapter²⁵⁴ within the 2011 Guidelines was included but it does not adequately set out the specific behaviour expected of business actors. While the human rights chapter may be a positive step and assist those seeking to make a complaint as well as business actors, nevertheless, without a binding enforcement mechanism such changes will be pointless.

Secondly, in light of the lack of binding enforcement mechanisms there is no effective deterrent to business misbehaviour. Reputational carrots and the elaboration of applicable rights will always help to ensure that high street names adhere to nominal CSR standards but the bigger problem lies with those numerous rogue businesses which are unwilling to behave and are immune to reputational stimuli. Even where a complaint against a company has been upheld, as in the Afrimex and Vedanta cases, the lack of effective follow up and monitoring procedures limits severely the impact of a negative determination.²⁵⁵

The Guidelines can do little to change human rights conditions on the ground.

²⁵³ See also: Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010 (Paris: OECD, 2010) <http://www.oecd.org/dataoecd/61/41/45124171.pdf> at 3 [last accessed 18.6.10].

²⁵⁴ J.Ruggie, 'Updating the Guidelines for Multinational Enterprises,' Discussion Paper, 2010 OECD Corporate Responsibility Roundtable's session on human rights, presented 30 June 2010, OECD Conference Centre, Paris, at para.4 <http://www.oecd.org/dataoecd/17/35/45545887.pdf> [last accessed 18.8.10]. (Hereinafter 'Ruggie OECD Discussion Paper 2010.')

²⁵⁵ OECD Watch (2010) note 16 at 48-51; See also http://oecdwatch.org/cases/Case_114/?searchterm=afrimex [last accessed 1.7.10].

It is this lack of enforcement mechanism and deterrent factor that renders the Guidelines weak and arguably ineffectual. The Protect, Respect, Remedy framework requires punishment, deterrent and redress for those affected by human rights violations and NCPs do not provide this. This is a fundamental flaw and must be rectified if they are to meet Ruggie's criteria for an effective remedy.

Thirdly, the chronic lack of consistency of approach among NCPs weakens the entire system substantially, especially in relation to the rejection of complaints on the grounds of parallel legal proceedings and lack of investment nexus although it seems that the latter issue has been addressed by the adoption of the due diligence standard. Irrespective of the type of enforcement mechanism adopted, it is crucial that the issue of consistency is addressed to ensure a coherent approach across all Adherent Governments. This can only enhance the Guidelines's claim to multilateralism and open up their scope in accordance with their spirit and intent. Adoption of the UK NCP's approach to parallel legal proceedings may help in this regard.

Finally, while implementing the principle of due diligence formally within the Guidelines is a positive step, again, it will be limited by the lack of binding enforcement measures. Rogue businesses, in particular, do not and will not monitor their supply chains unless there is an effective carrot or stick to make them do it. It is clear that such business actors are not adhering voluntarily to the Guidelines and the lack of a monitoring mechanism ensures that it is difficult to ascertain the precise uptake of the Guidelines because there is no requirement to report their use. Figures discussed in this chapter, however,²⁵⁶ demonstrate that uptake is low at best and certainly worse than the Global Compact or ILO Tripartite Agreement. For a due diligence standard across the supply chain to operate successfully, some form of monitoring must be introduced. Ruggie's due diligence proposals seek to establish a shift from 'naming and shaming' to 'knowing and showing':

naming and shaming is a response by external stakeholders to the failure of enterprises to respect human rights. Knowing and showing is the internalization of that respect by enterprises themselves through human rights due diligence.²⁵⁷

²⁵⁶ *Infra* at Section 5.5.2.

²⁵⁷ Ruggie OECD Discussion Paper 2010 note 253 at para.12.

Without binding obligations, however, such ‘internalization’ is going to be slow and painful. Norm-internalization is always to be welcomed but in Harold Koh’s analysis, discussed in Chapter 1, such development *follows* external sanctions, which do not exist here. The current system is ineffective in the face of resistant and recalcitrant business actors and without the requisite stick it is difficult to imagine an Afrimex, Das Air or Vedanta voluntarily demonstrating their adherence to the due diligence standard or indeed any non-legally binding human rights standard.

5.8 Conclusion

The 2011 Revision presented Adhering Governments with a significant opportunity to shape the Guidelines in a way that is both workable and effective. Unfortunately, it seems that the opportunity has been wasted and while there has been some tinkering around the edges of the Guidelines there is no substantive move towards an effective and enforceable OECD regime. On a positive note, however, the Guidelines have elaborated on the specific human rights obligations of business actors as well as incorporating a clear due diligence requirement in relation to the supply chain, which extends rather than limits the scope of the Guidelines.²⁵⁸ Furthermore, the problem of too many NCPs rejecting trade and finance-related complaints on the grounds that they do not fall within a strict category of direct investment has potentially been addressed but it remains to be seen how far Adherent Governments will move towards effective implementation of the Guidelines. Adherent Governments should have used the 2011 Revision to put in place provision for an effective enforcement mechanism within NCPs which will act as a deterrent to bad business behaviour and provide a remedy for those impacted by human rights violations. Furthermore, the structural weaknesses of the NCPs ought to have been addressed. In particular, the lack of consistency in relation to the narrow interpretation of ‘parallel legal proceedings’ which leads to the rejection of complaints, the lack of independence from Adhering Governments and the lack of transparency.

Ultimately, the OECD experience represents perhaps the strongest evidence of the need for binding regulation because its experimental hybrid of a top-down - bottom-up approach

²⁵⁸ Terms of Reference note 48 at 3 and 4.

has had limited impact on the ground. While business actors cling to the freedom to invest afforded by the OECD, human rights violations continue to occur and the Guidelines do not prevent, punish or provide redress for them. Nevertheless, when compared to the attempts of the European Union discussed in the next chapter, the OECD system *does* provide a measure of public accountability and the Specific Instance Procedure has a role to play in acting as a deterrent, for businesses which value their reputation at least. Like the Global Compact, it demonstrates that a new governance or third way approach has something to offer in this field, albeit a nominal offering. The EU on the other hand has refused steadfastly to establish *any* regulatory mechanism addressing the issue of what it continues to call Corporate Social Responsibility and chooses to respect only the business case for voluntarism. SGSR Ruggie is right when he criticises the OECD system for failing to reach its potential but at least there *is* potential, unlike the EU setup which ostensibly appears to reject the new governance paradigm outright.

Chapter 6

Business, Human Rights and the European Union (Or, a Manual on How to Champion the Business Case, Exclude Civil Society and Avoid Implementing Normative Rules)

‘while CSR [in the EU] may have been initially an idea about the scope of the responsibility of businesses towards its environment, it ended up becoming a process in which the representatives of the business community have come to occupy the central role, and from which politics essentially retreated.’¹

6.0 Introduction

As described in Chapter 1, Section 1.5.2, the ‘business case’ has come to dominate in business and human rights theory and practice, and is promulgated vociferously by industry groups and representatives in a variety of fora. To reiterate, the business case supports the proposition that ‘the market’ will regulate commercial behaviour and therefore there is no need for mandatory regulation.² Furthermore, the ‘business case’ defines CSR³ as a purely optional concept, whereby transnational enterprises undertake to adhere to certain standards of behaviour on a voluntary basis, driven by market forces and profitability.⁴

According to the ‘business case’ on CSR, responsible business behavior is also good economic behavior, since it leads to an increase in profitability. Thus responsible corporate behavior within a voluntary framework is argued to be a win-win situation for business and society, while regulatory interference would put unnecessary burdens on business without providing any additional benefit.⁵

¹ O.C.De Schutter, ‘Corporate Social Responsibility European Style’ 14 European Law Journal, 203–236 (2008) (hereinafter ‘De Schutter’) at 205.

² For a critique see e.g. T.McInerney, ‘Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility’ 40 Cornell Int’l L.J. 171–200 (2007) at 184.

³ Contrary to previous chapters, the term CSR is used throughout this chapter as it is the specific term used consistently by the EU. See e.g. Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366 final (July 18, 2001): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0366:FIN:EN:PDF> [last accessed 27.8.11] (hereinafter ‘Green Paper’).

⁴ For a discussion of the various possible meanings of CSR see De Schutter note 1 at 203–206.

⁵ J.Wouters & L.Chanet, ‘Corporate Human Rights Responsibilities: A European Perspective’ 6 Nw U. J. Int’l Hum. Rts 262 (2008) (hereinafter ‘Wouters & Chanet’) at para.9. See also paras 12–24.

It is this approach which has been adopted by the EU and nowhere has the business case been embraced so wholeheartedly as at the European Commission.⁶ Obviously, this has had a major impact on the approach of the EU to the business and human rights issue:⁷

The main features of the EU's CSR policy as they appeared over time are...its fundamentally business-driven, voluntary and process-oriented character.⁸

This chapter will identify the weaknesses with, and problems of, adopting such a restrictive strategy. The EU approach has two distinct aspects, firstly the policies aimed directly at business actors and secondly, policies applicable to States e.g. in relation to external relations. While the EU has not been especially active in pursuing either policy, the former policy in relation to business actors has been criticised heavily, in particular by civil society, and is the main focus of this chapter.

As a report by Jan Wouters and Nicholas Hachez for the European Parliament states, '[t]he EU strategy is not centred on imposing hard obligations on enterprises, but rather on building processes for exchanging best practices, for mutual learning and raising awareness.'⁹ This may involve a European firm creating a corporate code of conduct, or participating in initiatives such as the UN Global Compact or the European Union's Multistakeholder Forum, both of which are positive responses of course.¹⁰ It contrasts most obviously with the hybrid top-down - bottom-up or 'third way' approach of the OECD which, as discussed in the previous chapter, requires Adherent States to ensure that

⁶ Wouters & Chanet *ibid* at paras 26 and 27.

⁷ See generally: S.MacLeod, 'Reconciling Regulatory Approaches to Corporate Social Responsibility: The European Union, OECD and United Nations Compared' 13 *European Public Law* 671-702 (2007); S.MacLeod, 'Corporate Social Responsibility within the European Union Framework,' 23 *Wisconsin International Law Journal* 541 (2005).

⁸ J.Wouters & N.Hachez, European Parliament Study, 'Business and Human Rights in EU External Relations: Making the EU a Leader at Home and Internationally' EXPO/B/DROI/2009/2 PE407.014, April 2009 http://ghumweb2.ghum.kuleuven.ac.be/ggs/publications/study_ep.pdf [last accessed 27.8.11] (hereinafter 'European Parliament Study') at para.61.

⁹ European Parliament Study *ibid* at para.61. For an overview of European Commission CSR involvement and initiatives see European Commission, European Multistakeholder Forum, 29-30 November 2010, 'European Commission Activities to promote CSR 2009 - 2010' http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/compendium_com_csr_activities_final_20101124_en.pdf [last accessed 27.8.11].

¹⁰ Communication from the Commission to the European Parliament, The Council and the European Economic and Social Committee, Implementing the Partnership for Growth and Jobs: Making Europe A Pole of Excellence on Corporate Responsibility. COM(2006) 136 Final, 22.3.2006 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0136:FIN:en:PDF> [last accessed 27.8.11] (hereinafter 'Pole of Excellence Communication') at 3. The EU Multistakeholder Forum (EMS) is addressed in more detail at 6.1.2.2 and 6.3.

business actors comply with the Guidelines on Multinational Enterprises by establishing National Contact Points for the purpose of monitoring performance and receiving complaints. Arguably, it also contrasts with the UNGC approach which, as seen in Chapter 4, invokes naming and shaming techniques and reporting mechanisms in a bid to ensure good business behaviour, albeit on a voluntary basis. No such techniques or mechanisms are employed in the EU context and there is no oversight or monitoring of business actors by the EU. Voluntarism and self-regulation have been adopted without exception and there are no consequences at the EU level for business actors which choose not to adhere to CSR standards. While these issues were revisited by the EU Multistakeholder Forum in November 2010¹¹ and the European Commission publicly welcomed the UN Guiding Principles on Business and Human Rights (GPs),¹² nevertheless, it is difficult to believe that EU policy will change substantially in the future notwithstanding the apparent desire for a ‘new modern EU CSR policy framework.’¹³

As has been shown throughout this dissertation, NGOs and labour organisations have consistently opposed undiluted voluntarism. They seek the establishment of complementary enforceable regulatory regimes which will ensure accountability for human rights violations in addition to softer mechanisms.¹⁴ The prevailing view among most

¹¹ Sustainable and responsible business, European Multistakeholder Forum on CSR, Plenary Meeting 2010 http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/multi-stakeholder-forum/2010-meetings/index_en.htm [last accessed 27.8.11]. Discussed further infra at 6.3.

¹² European Union Comments on the draft Guiding Principles for the implementation of the UN ‘Protect, Respect and Remedy’ framework, 31 January 2011, D(2011) 700 246 http://ec.europa.eu/enterprise/policies/sustainable-business/files/eu_statement_final_en.pdf [last accessed 29.8.11]; European Commission, DG Enterprise, Business and Human Rights: new UN guidelines, 17 June 2011, http://ec.europa.eu/enterprise/newsroom/cf/itemlongdetail.cfm?item_id=5220&lang=en&tpa=0&displayType=news [last accessed 8.7.11]; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations’ “Protect, Respect and Remedy” Framework,’ A/HRC/17/31, 21 March 2011 (hereinafter ‘Guiding Principles’) <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [last accessed 20.8.11]. See Chapter 3 infra at 3.3.

¹³ Speech by Lázló Andor, Commissioner for Employment and Social Affairs, ‘Sustainable and responsible business,’ European Multistakeholder Forum on CSR, Plenary Meeting 2010 http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/speech_andor_en.pdf [last accessed 28.8.11] at 4.

¹⁴ In the EU Context see e.g. Amnesty International European Institutions Office, ‘A regulatory framework on corporate accountability,’ Submission in preparation of the Corporate Social Responsibility Forum in November 2010, 15 November 2010 http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/amnesty_international_en.pdf [last accessed 27.8.11] at 3; European Coalition for Corporate Justice (ECCJ), Submission for the 2010 EU Multistakeholder Forum on CSR Review and recommendations, http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/eccj_en.pdf [last accessed 2.11.11].

business actors, however, as well as their representative organisations such as the International Chamber of Commerce, is that there is no need for any regulatory mechanism which goes beyond voluntarism. It is this view which has been incorporated wholesale into the EU's CSR policy and maintained, despite the European Parliament's support for a 'mandatory regime.'¹⁵ While 2010 witnessed an apparent shift by the European Commission towards a regulatory 'smart mix'¹⁶ it remains to be seen whether this will be implemented at the EU level.

There is comparatively little academic literature on the topic of CSR in the EU context,¹⁷ which is surprising, given the significance of the EU as the largest economy in the world¹⁸ and of its Member States as home to a majority of the largest transnational business actors:¹⁹

¹⁵ J. Lux, S. Skadegard Thorsen & A. Meisling, 'The European Initiatives' in R. Mullerat & D. Brennan, (eds), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer, 2005) 279 at 280. (hereinafter 'Mullerat & Brennan.') See also: European Parliament Resolution of 14 April 1999 on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, A4-0508/98, 15 January 1999, OJ C 104, at 180; European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: A new partnership, Final edition, P6_TA(2007)0062 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0062&language=EN> [last accessed 27.8.11] (hereinafter 'European Parliament Resolution 2007').

¹⁶ Guiding Principles note 12 at 8, Principle 3 commentary.

¹⁷ In addition to the works by the present author, cited by De Schutter note 1 and Wouters & Chanet note 5, there are very few publications focused solely on European CSR. See A.Voiculescu, 'The Other European Framework for Corporate Social Responsibility: From the 'Green Paper to New Uses of Human Rights Instruments,' in D.McBarnet, A.Voiculescu, & T.Campbell, (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 365-396; K.K. Hermann, 'Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study,' 11 Ind. J. Global Legal Stud. 205 (2004) (Student author.); P.A.Davidsson, 'Legal Enforcement of Corporate Social Responsibility Within the European Union' 8 Colum. J. Eur. L. 529 (2002) (Student author. hereinafter 'Davidsson.'). L.F.H.Enneking, 'Crossing the Atlantic: The Political and Legal Feasibility of European Foreign Direct Liability Cases' 40 Geo. Wash. Int'l Law Rev. 903 (2009). Even where the EU dimension is addressed in the literature the discussion is often reduced to a few paragraphs and descriptive in nature. See e.g. I. Bantekas, 'Corporate Social Responsibility in International Law' 22 B.U. Int'l L.J. 309 (2004) at 6; I.D.Bunn, 'Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community' 19 Am. U. Int'l L. Rev. 1265 (2004); C.A.Williams & J.M.Conley, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' 38 Cornell Int'l L.J. 493 (2005) (hereinafter 'Williams & Conley.'). C.Marks & N.B.Rapoport, 'The Corporate Lawyer's Role in a Contemporary Democracy' 77 Fordham L.Rev. 1268 (2009); J.W.Pitts III, 'Corporate Social Responsibility: Current Status and Future Evolution' 6 Rutgers J.L. & Pub. Pol'y 334 (2009).

¹⁸ CIA World Factbook, EU Economy <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> [last accessed 27.8.11] <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html?countryName=European%20Union&countryCode=ee®ionCode=eur&rank=1#ee> [last accessed 27.8.11].

¹⁹ European Parliament, 'Report on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct,' Committee on Development and Cooperation, Rapporteur: Richard Howitt, 17 December 1998, A4-0508/98, PE 228.198/fin. at 14.

Due to its ambition to become a “pole of excellence” for CSR, to its human rights tradition and commitment, its economic and moral influence, and its large network of external relations, the EU is certainly one of the best positioned actors to make a true difference in the field of business and human rights.²⁰

There is no question that the EU ought to be in a strong position to influence the business and human rights agenda but over the past decade it has used its clout to further the business case rather than the cause of human rights.

This chapter analyses the key EU documents to determine the limitations of this pivotal economic actor’s policy for ensuring the accountability of business actors for human rights violations. Secondly, it criticises the EU Commission’s lack of response to this important issue, in particular the fact that it has offered little resistance to the mainstreaming of the business case and has retreated from possible binding regulatory options. Finally, it considers how the EU can lead the way in establishing enforceable business and human rights standards and become the global ‘pole of excellence’ in CSR that it aspires to be. This dissertation disagrees fundamentally with the proposition that ‘Europe has been one of the pioneer regions’²¹ in relation to CSR or that EU CSR initiatives are ‘highly positive,’²² rather the opposite is true.

6.1 Background to Business and Human Rights in the European Union

6.1.1 Developments Throughout the 1990s

In comparison to the UN and OECD, the EU has been slow to embrace the concept of CSR in any meaningful manner, despite its public pronouncements about the long European tradition of ‘socially responsible initiatives by entrepreneurs’²³ and its claim that it wants to be a ‘pole of excellence’²⁴ in CSR, leading the global way. Wouters and Chanet assert

²⁰ European Parliament Study note 8 at para.44.

²¹ R.Mullerat, ‘The Global Responsibility of Business,’ in Mullerat & Brennan note 15, 3-30 at 17.

²² Davidsson note 17 at 554.

²³ Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, at 5, COM (2002) 347 final (July 2, 2002): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:EN:PDF> [last accessed 29.10.11] (hereinafter ‘Commission Communication 2002’).

²⁴ Pole of Excellence Communication note 10.

that the EU has “an important role to play in ensuring that its corporations respect and protect human rights wherever they operate.”²⁵ They argue that because human rights are “core principles” of the organisation, the EU has a “special responsibility” for ensuring their protection.²⁶ Despite this, throughout the latter part of the 20th century, when business and human rights issues gained increasing attention, the EU lacked a coherent and effective CSR policy, a state of affairs which continues today. This is due largely to the determination of the business community and the EU Commission, in particular, to restrict CSR to voluntary measures.

There were, however, several isolated sporadic EU initiatives over the years which attempted to regulate business actors in the social sphere, both within the EU and externally, but no overarching policy or regulatory mechanism was established comparable to the OECD Guidelines or the Global Compact. It is only the recent work of SRSG Ruggie which has apparently reinvigorated EU Member States, and the question of the social responsibilities of business at the EU level is being revisited after a long hiatus. Jan Wouters and Nicolas Hachez, in their recent report for the European Parliament, say that the EU ‘has always been a strong proponent of the Special Representative’s [Ruggie’s] mandate’²⁷ and it is noteworthy that during the handover of the EU Presidency from Sweden to Spain in 2010, the following Declaration was issued:

The European Union and its Member States should take a global lead and serve as a good example on CSR when building markets, combating corruption, safe- guarding the environment and ensuring human dignity and human rights in the workplace. The European Union is the largest economy in the world and the largest development cooperation partner. Europe hosts many of the multinational enterprises in the world. We welcome that European employers consider it an important task to promote and take a global lead on CSR.²⁸

The EU has been stating its desire to be a world leader in this regard for the best part of a decade but with little to show for its grand pronouncements. In relation to the ‘Protect,

²⁵ Wouters & Chanet, note 5 at para.5.

²⁶ Ibid. See also Davidsson note 17 at 530.

²⁷ European Parliament Study note 8 at para.43.

²⁸ Swedish Presidency of the European Union, ‘Protect, Respect, Remedy – Making the European Union take a lead in promoting Corporate Social Responsibility,’ Declaration, November 2009, http://ec.europa.eu/enterprise/policies/sustainable-business/files/deklaration_engelska_en.pdf [last accessed 27.8.11] (hereinafter ‘Swedish Presidency CSR Declaration’).

Respect and Remedy' framework it continues to support the *status quo* and has demonstrated 'no fundamental shift'²⁹ from the existing conservative international law position discussed in Chapters 1, 2 and 3 that the obligation to protect against human rights abuses rests solely with States and that business actors cannot be human rights dutyholders. Moreover, there has been no coherent EU CSR policy or regulation.

Early EU initiatives were meagre and piecemeal and there was no overarching CSR strategy at all. So for example, the European Employment Strategy, EU-Ecolabels, and the Eco-Management and Audit Scheme (EMAS) all attempted in different and isolated ways to promote socially responsible business within the EU.

Briefly, the European Employment Strategy (EES) was established to set up a dialogue and exchange of best practice in the labour realm, such as diversity, equality and poverty.³⁰ The EU-Ecolabel is a voluntary initiative designed to encourage the production and consumption of more environmentally friendly goods and services across Europe. It also strives to ensure transparency for consumers by virtue of the Ecolabel Flower logo.³¹ EMAS 'promotes continuous improvements in the environmental performance of industrial activities by committing firms to evaluate and improve their own performance.'³² All three of these examples encourage socially responsible business among European enterprises on a purely voluntary basis and only the EES addresses rights.

In the context of external affairs, fragmented developments also took place, although their value is doubtful as 'corporate social responsibility is not always given a real role in the various EU external relations policies.'³³ For example, in relation to the EU's external relations policy, the Cotonou Agreement with African, Caribbean, and Pacific (ACP)

²⁹ European Parliament Study note 8 at para.43.

³⁰ See generally: <http://ec.europa.eu/social/main.jsp?catId=101&langId=en> [last accessed 22.8.10].

³¹ Commission Communication 2002 note 22 at 15. For more information, see European Union, Eco-label Homepage, <http://ec.europa.eu/environment/ecolabel/> [last accessed 18.8.10]. See also, Green Paper note 3 at 19-20.

³² Commission Communication 2002 note 22 at 20. For more on EMAS see De Schutter note 1 at 219 et seq.

³³ European Parliament Study note 8 at para.61. See also O. Martin-Ortega & M. Eroglu, 'The European corporate social responsibility strategy – A pole of excellence?' in J. Orbie & L. Tortell, (eds.), *The European Union and the Social Dimension of Globalisation – How the EU Influences the World*, (Routledge: London, 2009) at 177-178.

nations constitutes a more concrete attempt to promote human rights norms. The original Agreement ‘incorporated a clause defining human rights as a fundamental element of the agreement which serves as the basis for dialogue with a third country government on human rights.’³⁴ Specifically:

respect for a comprehensive list of human rights - bearing down on a comprehensive list of stakeholders, including business partners - became essential parts of any project of development cooperation and investment between the EU and the ACPs.³⁵

Voiculescu explains the importance of the clause:

ACP countries that failed to fulfil their human rights obligations risked having their allocated grants withdrawn and the direct investment projects supported by the European Union under the development cooperation umbrella stopped.³⁶

Thus the clause arguably represents a move away from voluntarism, because it imposes human rights obligations, albeit upon states rather than on corporate entities themselves. CSR principles have since been incorporated within the Cotonou processes in a broad sense.³⁷

Furthermore, as regards its CSR policy in relation to third party States, two important Communications were published and the EU’s ‘external relations framework is presented as an avenue for CSR, as it is supposed to foster and reward core labour standards-compliant corporate behaviour.’³⁸ Firstly, the ‘Communication on the EU role in promoting human rights and democratisation in third countries;’³⁹ and secondly, the ‘Communication on Promoting Core Labour Standards and Improving Social Governance

³⁴ Commission Communication 2002 note 23 at 22. See Voiculescu note 17 at 386-394 for a clear exposition of the development of the human rights clause and the Cotonou Agreement generally.

³⁵ Voiculescu *ibid* at 387-388.

³⁶ *Ibid* at 388.

³⁷ *Ibid* at 388-389. See Second Revision of the Cotonou Agreement - Consolidated Agreed Texts, 11th March 2010 http://ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf [last accessed 28.8.11].

³⁸ J. Wouters & N. Hachez, ‘The EU’s international corporate social responsibility strategy: a business-driven, voluntary and process-oriented policy,’ (JESP Symposium: The European Union’s global social role) 19 *Journal of European Social Policy* 2009 110-113 at 110. (hereinafter ‘Wouters & Hachez, (2009)’)

³⁹ European Commission, ‘The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries,’ COM (2001) 252 final (8.5.2001).

in the context of Globalisation.⁴⁰ The first Communication provides that human rights principles should filter across all EU external policies⁴¹ but a 2009 European Parliament Study concludes that the ‘business and human rights issue does not seem to be a priority.’⁴² On a practical level, the Communications provide incentives in the form of trade liberalization ‘under the EU’s Generalised System of Preferences (GSP) where countries comply and apply minimum social and environmental standards.’⁴³ The GSP ensures compliance by imposing sanctions, in the form of preference withdrawal, when countries ‘commit serious and systematic violations’ of International Labour Organisation (ILO) core labour standards.⁴⁴ The GSP applies to the Least Developed Countries and additional preferences are immediately granted to developing countries that have ratified and effectively implemented the sixteen core conventions on human and labour rights and seven (out of eleven) of the conventions related to good governance and the protection of the environment. At the same time beneficiary countries must commit themselves to ratifying and effectively implementing the international conventions which they have not yet ratified.

The EU has thus sought to advance human rights by encouraging EU-based businesses operating in developing states to promote human rights values in relation to, *inter alia*, workers’ rights and ethical standards, ‘particularly where their operations have an influential role in countries with a poor record in this area.’⁴⁵ Of course, this may be

⁴⁰ European Commission, ‘Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation,’ COM (2001) 416 final (18.7.2001).

⁴¹ European Commission, ‘The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries,’ COM (2001) 252 final (8.5.2001) at 4. See also European Parliament Study note 8 at para. 45.

⁴² European Parliament Study note 8 at para.46.

⁴³ Commission Communication 2002 note 23 at 22.

⁴⁴ Ibid. For more information on the GSP see: <http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/>; Press Release, European Commission, Generalised System of Preferences (1.3.2001), <http://europa.eu.int/comm/trade/issues/global/gsp/eba4.htm> European Commission, Generalised System of Preferences, http://europa.eu.int/comm/trade/issues/global/gsp/memo201004_en.htm (last accessed on 11.10.2005). The core human rights conventions include inter alia Universal Declaration on Human Rights UN Doc.A/811 10.12.1948; International Covenant on Civil and Political Rights 1966, 999 UNTS 171; Genocide Convention 1948, 78 UNTS 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; International Convention on the Elimination of All Forms of Racial Discrimination 1966, 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13; Convention on Biological Diversity 1992, 1760 UNTS 142.

⁴⁵ Commission Communication 2002 note 23 at 23.

precisely why some corporations choose to locate in such countries: to engage in so-called bottom-feeding. In any event, there is no evidence to suggest that the EU's external relations policy has progressed human rights protection in relation to business actors⁴⁶ although the European Parliament Resolution of November 2010 offers some hope.⁴⁷ The resolution called for CSR provisions to be included the GSP and in all EU trade agreements as well as the general promotion of CSR, among other provisions, but the Commission has been slow to act upon this.⁴⁸

Notwithstanding these external initiatives, it was not until the turn of the millennium that the EU began to develop and clarify its specific views and policies on CSR, most significantly with the publication of the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility.⁴⁹

6.1.2 Developments Post-2000: The Commission Green Paper

Publication of the 'European Declaration of Enterprises against Social Exclusion,' which resulted in the creation of the European Business Network in 1995, was the initial starting point for distinct EU development of the concept of CSR.⁵⁰ The Declaration advocated an open dialogue between the relevant stakeholders and the exchange of best practice on CSR.⁵¹ By 2000, the year of the Lisbon Summit of the European Council, CSR was ostensibly 'put at the top of the political agenda' within the framework and context of sustainable development albeit with a clear nod to voluntarism:

⁴⁶ Wouters & Hachez (2009) note 38 at 113.

⁴⁷ European Parliament resolution of 25 November 2010 on corporate social responsibility in international trade agreements (2009/2201(INI)) P7_TA(2010)0446 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0446&language=EN> [last accessed 31.8.12].

⁴⁸ Ibid, Articles 20-24, 25-30 and 31-32 respectively.

⁴⁹ Green Paper note 3.

⁵⁰ <http://www.csreurope.org/pages/en/declaration.html> [accessed 25.10.10]. This document is cited frequently as the 'Manifesto of Enterprises against Social Exclusion.' See e.g. J. Lux, S. Skadegard Thorsen & A. Meisling, 'The European Initiatives' in Mullerat & Brennan note 15, 279-298 at 280. Also in the same volume J. Goldsmith, 'Lawyers' Responsibility for Advising on Corporate Social Responsibility,' 417-432 at 417.

⁵¹ European Declaration of Enterprises against Social Exclusion *ibid*.

The European Council makes a special appeal to companies' corporate sense of social responsibility regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development.⁵²

The Göteborg Summit in June 2001 specifically considered the role of companies within society and within the context of a 'sustainable development strategy' for Europe.⁵³

Sustainable development represented a widening of the existing targets of 'economic growth and social cohesion' as 'strategic goals to be pursued in the framework of what came to be called the Lisbon strategy'⁵⁴ and thus a step towards a social role for business.

6.1.2.1 The Commission Green Paper

As a consequence of discussions at the Göteborg summit, the European Commission published its 'Green Paper on Corporate Social Responsibility'⁵⁵ followed up in 2002 by the 'Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development.'⁵⁶ It is clear that the Commission's position on CSR has not changed since the publication of these documents, notwithstanding recent developments in relation to the UN Guiding Principles discussed at 6.4.⁵⁷

The stated (and arguably successful⁵⁸) aim of the Green Paper was to stimulate debate about the social responsibility of business within the European context rather than 'making concrete proposals for action.'⁵⁹ In other words, the European Commission was not prepared to adopt even a soft law approach. From the outset, the Green Paper constricted any debate by relying on a very limited, and business-oriented, definition of CSR,

⁵² Lisbon European Council 23 and 24 March 2000, Presidency Conclusions: http://www.europarl.europa.eu/summits/lis1_en.htm [last accessed 23.8.10]. See also De Schutter note 1 at 206.

⁵³ European Multistakeholder Forum on CSR, Final Results & Recommendations, 29 June 2004 at 2 http://circa.europa.eu/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/csr%20forum%20final%20report.pdf [last accessed 1.11.11] (hereinafter 'EMS Forum Report 2004').

⁵⁴ De Schutter note 1 at 206 Note 8.

⁵⁵ Green Paper note 3. Responses were invited from interested parties and submitted by 31 December 2001.

⁵⁶ Commission Communication 2002 note 22.

⁵⁷ Wouters & Chanet note 5 at para.30.

⁵⁸ Wouters & Chanet *ibid* at para.29.

⁵⁹ Green Paper note 3 at para.93 at 23 .

describing it 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.’⁶⁰ The Commission has continued to maintain this approach,⁶¹ although Wouters and Chanet, as well as De Schutter, have questioned whether this in fact was the Commission’s original intention.⁶² Wouters & Chanet make reference to the Commission’s ‘early ambitions to put a basic enabling regulatory framework in place’⁶³ while De Schutter highlights the fact that the Green Paper does not view an EU policy in isolation⁶⁴ rather it makes clear that any policy should:

...not be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation. In countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed.⁶⁵

Such an approach mirrors that of the hybrid OECD Guidelines, and the current view of the European Parliament,⁶⁶ by encouraging the creation of domestic regulation in tandem with overarching international rules. De Schutter, therefore, takes the view that the Commission’s position of approving of the regulatory involvement of public authorities in a formal CSR policy is at odds with the business case for voluntarism:

By confirming its view that CSR tools would only function effectively if they are transparent and based on clear and verifiable criteria and benchmarks, implying that a public policy was required to lend credibility to such voluntary initiatives, the Commission was in fact stating its disagreement with the position of employers’ organisations...⁶⁷

⁶⁰ Green Paper *ibid* at 6.

⁶¹ See the Commission’s CSR homepage: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm [last accessed 19.8.10].

⁶² De Schutter note 1 at 207.

⁶³ Wouters & Chanet note 5 at para. 26.

⁶⁴ De Schutter note 1 at 207.

⁶⁵ Green Paper note 3 at para.22.

⁶⁶ European Parliament Resolution 2007 note 15; European Parliament, Committee on Employment and Social Affairs, Report on corporate social responsibility: a new partnership (2006/2133(INI)) A6-0471/2006 FINAL Rapporteur: Richard Howitt <http://www.europarl.europa.eu/oel/file.jsp?id=5353972> [last accessed 27.8.11].

⁶⁷ De Schutter note 1 at 208.

Wouters and Chanet agree with this analysis, observing that the ‘Commission clearly envisages an active role for public authorities’⁶⁸ but little has been done to ensure the effective involvement of public bodies. Subsequent actions by the Commission tend to mitigate against such an interpretation, as they mainstreamed voluntarism and the business case.

The Commission acknowledges in its subsequent Communication in 2002, which brings together the responses to the Green Paper, that guiding principles are important and further noted the proliferation of international ‘benchmark standards in the form of ‘guidelines, principles and codes during the last decade.’⁶⁹ It highlights the usefulness of CSR norms which can be measured and compared, stating that they can ‘provide transparency and facilitate an effective and credible benchmarking.’⁷⁰

Furthermore it recognises that the existing initiatives are disparate in nature, stating that ‘[n]ot all of these tools are comparable in scope, intent, implementation or applicability to particular businesses, sectors or industries.’⁷¹ The Commission goes on to criticise existing initiatives, citing the need for ‘convergence’ of the various schemes because separately ‘[t]hey do not answer the need for effective transparency about business social and environmental performance.’⁷² Nevertheless, it continues, essentially setting out the business case:

As expectations for CSR become more defined, there is a need for a certain convergence of concepts, instruments, practices, which would increase transparency without stifling innovation, and would offer benefits to all parties.⁷³

The emphasis changes towards protecting investment opportunities and there is no reference to remedies or redress, rather the mention of ‘transparency’ suggests that the focus is solely on reporting standards. Convergence in the Green Paper and 2002 Communication context means linking the principles elaborated in the ILO Tripartite

⁶⁸ Wouters & Chanet note 5 at para.27.

⁶⁹ Commission Communication 2002 note 23 at 13.

⁷⁰ Ibid.

⁷¹ Commission Communication 2002 note 23 at 13.

⁷² Ibid.

⁷³ Ibid.

Agreement and the OECD Guidelines as the Commission considers that ‘CSR benchmarks should build upon core values’ originating in ‘internationally agreed instruments.’⁷⁴

Moreover, the Commission also acknowledges in the Green Paper that the EU has a role to play in this convergence and development of CSR principles stating that it ‘has an obligation in the framework of its Co-operation policy to ensure the respect of labour standards, environmental protection and human rights.’⁷⁵ It continues, highlighting the ‘challenge of ensuring a full coherence’ between different EU policies, notably development, trade policy and ‘its strategy for the development of the private sector in the developing countries notably through the promotion of European investments.’⁷⁶

Given the subsequent hands-off approach by the Commission discussed below, however, it is difficult to agree with either the Commission’s apparently high-minded approach or indeed with Professor De Schutter’s analysis. In the decade since the publication of the Green Paper, the Commission has done little, if anything, to support convergence. Indeed, SRSR Ruggie’s work has been the catalyst for embryonic convergence, not any Commission initiative.⁷⁷ The Commission essentially abdicated responsibility for appraising the value of ‘codes of conduct; management standards; accounting, auditing and reporting; labels; and socially responsible investment’⁷⁸ by delegating the function to the European Multistakeholder Forum (EMS) established under the 2002 Commission Communication.⁷⁹ Even De Schutter acknowledges this:

while clearly stating its conviction that more convergence and transparency was required, the Commission shifted the burden of having to identify solutions on the EMS [European Multistakeholder] Forum on CSR.⁸⁰

As will be seen, the EMS Forum foundered quickly, as did any hope of an EU-led convergence of CSR initiatives.

⁷⁴ Ibid.

⁷⁵ Green Paper note 3 at para.52.

⁷⁶ Green Paper *ibid* at para.52.

⁷⁷ See generally e.g. Swedish Presidency CSR Declaration note 28.

⁷⁸ Commission Communication 2002 note 23 at 17; De Schutter note 1 at 210.

⁷⁹ Commission Communication 2002 note 23 at 17-18.

⁸⁰ De Schutter note 1 at 210.

6.1.2.2 Green Paper Consultation and Response

As its basis, the Green Paper drew on the hypothesis of the triple bottom line. That is, the concept of triple bottom line accounting practice whereby the traditional company reporting framework takes account of environmental and social performance in addition to the more usual financial matters.⁸¹ As part of a public consultation process, the Commission, via the Green Paper, asked several key questions relating to the role of the EU in CSR development; the role of CSR for business; the role of civil society in CSR; which CSR mechanisms were most appropriate; and how CSR could be monitored and evaluated. Member States, the business community and civil society were invited to respond.⁸²

In total there were 261 responses to the Green Paper with only nine of the then fifteen Member States responding⁸³ and this rather muted State reaction may help to explain the subsequent lack of progress. Of the forty-nine individual company responses, more than half were from UK-based corporations: twenty-seven individual UK corporations responded. It may be that at the time of the consultation, business social responsibility had a high profile in the UK in the wake of the RTZ asbestos litigation⁸⁴ and the BP Brent Spar fiasco.⁸⁵ This could also explain the relatively large number of US firms responding, such as NIKE and Levi Strauss, because US sportswear and fashion manufacturers had been subjected to intense NGO scrutiny throughout the 1990s and were thus alive to the rapidly emerging CSR debate.⁸⁶ Another thirty-two responses were received from networks representing the corporate sector, such as the International Chamber of Commerce and the Confederation of British Industry. The trade union movement, including the Trades Union

⁸¹ For more on the triple bottom line see J. Roselle, 'The Triple Bottom Line: Building Shareholder Value,' in Mullerat & Brennan note 15 at 113-140.

⁸² See the archived Responses to the Consultation on the Green Paper on CSR, <http://www.euractiv.com/en/social/europe/csr-eu-archived/article-110205> [last accessed 19.8.10] (hereinafter 'Green Paper Responses').

⁸³ Ibid. These were Belgium, Germany, Finland, France, Ireland, Netherlands, Austria, Sweden and the UK.

⁸⁴ *Connelly v. RTZ Corp plc and another* [1997] 4 All ER 335 (HL)

⁸⁵ For background and analysis see L. Bennie, 'Brent Spar, Atlantic Oil and Greenpeace' 51 *Parliam. Aff.* 397-410 (1998).

⁸⁶ See Chapter 1 *infra* Section 1.3.

Congress submitted sixteen responses, while international and domestic NGOs submitted thirty-five responses.⁸⁷ Given the robust global debate which had been taking place around voluntarism, it is not surprising to discover that the Commission's emphasis on the voluntary nature of CSR did not find favour with the NGOs or other civil society actors responding to the Green Paper.⁸⁸ Likewise the responses 'expressed from the business side were not particularly encouraging' as regards the implementation of a regulatory framework.⁸⁹ Wouters and Chanet accurately describe the two positions as 'diametrically opposed'.⁹⁰

Business and employers' organizations agree with the Commission's definition that CSR involves actions that go beyond regulatory compliance. They clearly favour a voluntary approach to CSR, which they see as a more efficient way to promote good corporate practices than prescriptive government codes and regulations.⁹¹

Furthermore, the proposition that CSR should be integrated into business operations, as opposed to being the starting platform from which business is conducted, was received negatively by civil society. At this stage, the trade unions and the NGOs advocated a 'regulatory framework' that established 'minimum standards' and ensured 'a level playing field'.⁹² So for example, Amnesty International argued that CSR should not be an 'add-on to core business activities' and stated that the assumption that CSR should be viewed as voluntary is 'flawed in that it fails to take account of the reality that voluntary approaches are generally implemented in response to consumer and community pressures, industry peer pressure, competitive pressure or the threat of new regulations or taxes',⁹³ i.e. rarely voluntarily.

⁸⁷ Green Paper Responses note 82. NGOs which responded included, at the international level, OXFAM, Amnesty International, Save the Children and WWF. UK NGOs submitting responses were Baby Milk Action IBFAN, Christian Aid, Friends of the Earth, New Economic Foundation (NEF) and the Solicitors Pro Bono Group.

⁸⁸ See, e.g., Submission from Amnesty International on The European Commission 2001 Green Paper: Promoting a European Framework for Corporate Social Responsibility, http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/091-NGOINT_Amnesty-international_int_011219_en.htm (§ 1 Definition of CSR). (hereinafter 'Amnesty Green Paper Submission').

⁸⁹ De Schutter note 1 at 207.

⁹⁰ Wouters & Chanet note 5 at para.29.

⁹¹ Wouters & Chanet *ibid* at para.29.

⁹² Commission Communication 2002 note 23 at 4.

⁹³ Amnesty Green Paper Submission note 88.

Another criticism levelled against the Green Paper concerned the intense focus on the business case, with little consideration for the interests of the wider constituency of stakeholders.⁹⁴ As highlighted at the beginning of this chapter, this is a recurring criticism of the Commission's attitude to the social responsibility of business, with frequent assertions that civil society has been marginalised at the expense of business. Such condemnation occurs with very good reason, as will be demonstrated. Olivier De Schutter asks:

whether the so-called 'business case' for CSR is strong enough, so that we may hope that the forces of market will suffice to encourage the companies to behave responsibly, over and above their obligation to comply with their legal obligations.⁹⁵

The answer is simple. No, as a general rule, market forces do not encourage business actors to behave responsibly. If it were sufficient, then human rights abuses perpetrated by business actors would no longer occur as the market would dictate that only ethically responsible businesses would prosper at the expense of irresponsible commercial entities, which would falter and fold.

Critics have also argued, correctly, that the Commission's definition of CSR is flawed notwithstanding its adherence to voluntarism.⁹⁶ In particular, it is not clear *what* the Commission is seeking to protect through the adoption of CSR. This approach was criticised by David Engel in 1975 when he warned of the

consequences of jumping into proposals of *means* to engender corporate social responsibility before addressing the question of what type of responsibility is desirable.⁹⁷

The reference in the Green Paper to a wide variety of international legal instruments, such as the Universal Declaration on Human Rights, ILO Conventions, and the UN Convention

⁹⁴ See e.g. Wouters & Chanet note 5 at para.27.

⁹⁵ De Schutter note 1 at 205.

⁹⁶ Commission Communication 2002 note 23 at 4. See also the individual responses of the NGOs and trade unions to the Green Paper.

⁹⁷ D.Engel, 'An Approach to Corporate Social Responsibility,' 32 Stanford Law Review 1-98 (1979-80) at 86.

on the Rights of the Child, has caused much confusion.⁹⁸ Consequently, such a vague and all encompassing approach is bewildering for any business seeking to understand its obligations under the EU's business and human rights policy.

In the responses to the Green Paper, there is a remarkable homogeneity between individual corporate responses and the responses of industry representatives. The business responses all emphasise self-regulation, while demonstrating strong opposition to enforcement mechanisms, including the temporisation of implementation requirements, but displaying marked enthusiasm for voluntary CSR, and the sharing of good practice. The responses also displayed a general abhorrence of a 'one-size fits all' approach to CSR.⁹⁹ Even the very title of the subsequent Commission Communication in 2002 - the 'Communication from the Commission concerning Corporate Social Responsibility: a business *contribution* to Sustainable Development' - clearly owes much to business case rhetoric.¹⁰⁰

6.1.2.3 Communication from the Commission concerning Corporate Social Responsibility: a business contribution to Sustainable Development 2002

The Communication refers to frameworks, promotion, assistance, awareness, support, and good practice, but there is no indication that formal regulation is a possibility,¹⁰¹ much less a rejection of the dichotomy between voluntarism and hard regulation.

In addition, the Commission retained its flawed definition of CSR stating¹⁰² that '[i]n principle, adopting Corporate Social Responsibility is clearly a matter for enterprises themselves. . .'¹⁰³ The Commission continues, '[n]evertheless . . . there is a role for public authorities in promoting socially and environmentally responsible practices by

⁹⁸ UN Doc.A/811 10.12.1948; Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 17 ILM 422 (1978) adopted by the Governing Body of the International Labour Office at its 204th Session, Geneva, November 1977; G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2.9.1990.

⁹⁹ Wouters & Chanet note 5 at para. 29.

¹⁰⁰ Commission Communication 2002 note 23 emphasis added.

¹⁰¹ Ibid at 7

¹⁰² Ibid at 5.

¹⁰³ Ibid at 7.

enterprises.’¹⁰⁴ Despite the vociferous civil society opposition to the optional nature of the EU’s CSR policy in response to the Green Paper, the 2002 Commission Communication is nonetheless entirely couched in terms of voluntarism. There is little sense of any recognition that the case for other regulatory measures exists, let alone any attempt to reconcile the two positions.

There was firm support in the 2002 Commission Communication for the OECD Guidelines on Multinational Enterprises, which it was hoped may affect the operation of the National Contact Points (NCP) and result in deeper cooperation¹⁰⁵ but there is no particular evidence of this happening although there are CSR links between the two organisations.¹⁰⁶ Utilising the OECD Guidelines, as well as the International Labour Organisation’s Conventions, would encourage convergence between codes of conduct emanating from different regulatory regimes, and provide ‘a common minimum standard of reference’¹⁰⁷ but as has been made clear throughout this dissertation, there has been little or no cooperation or convergence between the various regimes, hence the need for the appointment of SRSR Ruggie. The Commission Communication 2002 did, however, contain several practical proposals.

Firstly, it proposed the creation of an EU Multi-Stakeholder forum on CSR (EMS Forum), which was formally established in October 2002, and reported its conclusions in June 2004.¹⁰⁸ Some of the practical suggestions put forward for consideration by the EMS Forum included, for example, the incorporation of a framework directive harmonising the fairness of commercial practices and the production of a handbook on ‘green’ public

¹⁰⁴ Ibid at 7.

¹⁰⁵ Commission Communication 2002 note 23 at 13-14.

¹⁰⁶ See e.g. OECD Deputy Secretary-General Aart de Geus, EU Conference on Corporate Social Responsibility presentation, ‘Access to Remedies and the OECD Guidelines for Multinational Enterprises,’ Stockholm, 10 November 2009 <http://www.oecd.org/dataoecd/2/24/44037912.pdf> [last accessed 27.8.11]

¹⁰⁷ Commission Communication 2002 note 23 at 14.

¹⁰⁸ EU Multi Stakeholder Forum on CSR, ‘Objectives, Composition and Operational Aspects’ (16 October 2002) http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/forumstatute_en.pdf [last accessed 1.11.11] (hereinafter ‘EU Multi Stakeholder Forum on CSR (2002)’) and EMS Forum Report 2004 note 53.

procurement but these were never considered. This has led to it being criticised for lack of ambition.¹⁰⁹

In general, the EMS Forum had ‘the aim of promoting transparency and convergence of CSR practices and instruments’¹¹⁰ and determining the nature and shape of possible European measures, as per the original aims of the Green Paper.¹¹¹ To that end, the Forum was to be composed of representatives from states, non-governmental organisations, corporations, and wider civil society.¹¹² In this respect, the EMS Forum represented some elements of a hybrid or third way approach to CSR, in that it recognised the interests of non-business actors and sought to promote their participation in formulation of (admittedly voluntary) CSR measures. In practice, however, the voice of business prevailed.

Academics have denounced business participation in the EMS Forum pointing out that ‘business representatives dominated the debate’ effectively ‘downgrading its mandate’.¹¹³ Furthermore, ‘the new mandate of the platform, while largely espousing the wording’ of the Commission Communication 2002 it did ‘present one crucial difference.’¹¹⁴ Whereas the original mandate included ‘identifying and exploring areas where additional action is needed at European level’¹¹⁵ the new mandate ‘abandoned’ it.¹¹⁶ The amended mandate set the EMS Forum objectives as:

[I]mproving knowledge about the relationship between CSR and sustainable development (including its impact on competitiveness, social cohesion and environmental protection) by facilitating the exchange of experience and good practices and bringing together existing CSR instruments and initiatives, with a special emphasis on SME specific aspects.¹¹⁷

As well as:

¹⁰⁹ Wouters & Chanet note 5 at para.33.

¹¹⁰ Commission Communication 2002 note 23 at 17.

¹¹¹ De Schutter note 1 at 212.

¹¹² De Schutter *ibid* at 212.

¹¹³ Wouters & Chanet note 5 at para.33.

¹¹⁴ De Schutter note 1 at 213.

¹¹⁵ Commission Communication 2002 note 23 at 17.

¹¹⁶ De Schutter note 1 at 213.

¹¹⁷ EU Multi Stakeholder Forum on CSR (2002), note 108 at 1, para. 1.

[E]xploring the appropriateness of establishing common guiding principles for CSR practices and instruments, taking into account existing EU initiatives and legislation and internationally agreed instruments such as OECD Guidelines for multinational enterprises, Council of Europe Social Charter, ILO core labour conventions and the International Bill of Human Rights.¹¹⁸

There is no reference to ‘action’ and this represented a clear step back from normative and positive regulatory endeavours.

Second, the Commission Communication proposed that the EMS Forum should consider the integration of CSR into all EU policies including employment and social affairs policy, enterprise policy, environmental policy, consumer policy, and public procurement policy.¹¹⁹ It also specifically addressed external relations policies. It advocated the promotion of CSR in line with the ‘Communications on the EU role in promoting human rights standards and democratisation in third countries.’¹²⁰ This promotion of CSR includes, as discussed above in relation to Cotonou Agreement, ‘the use of bilateral dialogue with Governments’ and ‘trade incentives’ as well as ‘engaging directly with multinational enterprises.’ This approach appears to embrace at least some elements of a third way of regulation, in that it engages a wider range of stakeholders than simply business, in particular it engages the governments of third party countries.¹²¹ Very little has been done to further this agenda, however.

Likewise, at the EU internal level scant progress was being made. One of the many criticisms levelled at the Commission's Communication by the European Parliament in its Report in April 2003 was that the Parliament was ‘frozen out of the process in a way that is unacceptable, not least that the Commission Communication was effectively written before the Parliament's response to the Green Paper had been absorbed’, thus yet again appearing

¹¹⁸ Ibid at 2 para. 1.

¹¹⁹ Commission Communication 2002 note 23 at 21-22.

¹²⁰ European Commission, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, COM (2001) 252 final (8.5.2001).

¹²¹ Commission Communication 2002 note 23 at 22-23.

to reject a participatory model of CSR.¹²² Beyond this general criticism, there appeared to be some Parliamentary support for the Commission's strategy, at least in the conclusions reached by the Committee on Employment and Social Affairs.¹²³

In the years since the 2002 Communication, there has been, however, clear support among the various reporting committees for at least some mandatory rules, although some conflicting opinions surfaced. For example, the Committee on Industry, External Trade, Research, and Energy demanded a 'Global Convention on Corporate Accountability' on the basis that 'world society has a right to accountability in terms of environmental, social and human rights from transnational corporations and . . . SMEs.'¹²⁴ This framing of a 'right' to 'accountability' again conceptualises CSR in terms of voluntarism *versus* hard regulation. Confusingly, however, the committee in a later document urged the Commission to 'not undertake initiatives to establish yet another redundant regulatory framework that brings rules that do not exist in the Member States into play.'¹²⁵ It further insisted that 'the involvement of companies in CSR should always be voluntary and should take into account the current state of development of the market in all of the Member States, as well as their business culture, compliance with the social partnership principle and political aspects.'¹²⁶ This is at odds with the earlier call for a global CSR convention.

The Committee on Development and Cooperation sought to establish the extraterritorial reach of CSR by calling upon the Commission to 'create an agency which would be responsible for introducing a system for assessing and monitoring observance of

¹²² European Parliament Committee on Employment and Social Affairs, Report on the Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development (COM(2002) 347-2002/2261(INI)), 12 A5-0133/2003 final (28.4.2003), <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A5-2003-0133&language=MT#title4> [last accessed 4.11.10] (hereinafter Howitt Report').

¹²³ Ibid.

¹²⁴ Howitt Report *ibid* at para.16.

¹²⁵ European Parliament, Committee on Industry, Research and Energy, Draft Opinion of the Committee on Industry, Research and Energy for the Committee on Employment and Social Affairs on corporate social responsibility: a new partnership (2006/2133(INI)) at para.1, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pa/628/628087/628087en.pdf [last accessed 4.11.10]

¹²⁶ Ibid at para. 2.

international and national standards on CSR and the environment by EU companies operating in developing countries.’¹²⁷

Significantly, the Committee on the Environment, Public Health, and Consumer Policy went further, although its comments relate to environmental matters as opposed to human rights. It emphasised that ‘companies should be required to contribute to a cleaner environment by law rather than solely on a voluntary basis’, but it also invited the Commission to ‘explore ways of establishing a system of corporate accountability to citizens.’¹²⁸ This might be seen as a call for an exploration of alternative CSR mechanisms, and in this respect it is an unusual example in the EU context of interest in third way approaches to CSR. Nevertheless, despite the various committee reports, the Committee for Employment and Social Affairs still came to the conclusion that a voluntary, soft law system was the best model.¹²⁹

Similarly, the outcome of the original European Multi-Stakeholder Forum resulted in mixed signals. It presented its final report in June 2004,¹³⁰ but despite twenty months of consultation and consideration, the business and civil society approaches to CSR were irreconcilable and the future of any EU legislation left unclear.¹³¹ Notably, the first paragraph of the Foreword stated that:

‘[t]here are some differences and debates that remain. Members of the Forum expressed their views about the merits and limitations of this Report in their speeches and statements made on the occasion of the plenary meeting of the Forum.’¹³²

The traditional battle lines were drawn, with business on one side and NGOs, trade unions, and other stakeholders on the other. Ultimately, the Report made lengthy recommendations of a non-binding nature, expressed in terms of ‘cooperation,’ ‘promotion,’ ‘explore,’ and other general statements.¹³³ For example, there are

¹²⁷ Howitt Report note 122 at 22.

¹²⁸ Howitt Report *ibid* at 18.

¹²⁹ Howitt Report *ibid* at 8.

¹³⁰ EMS Forum Report 2004 note 53.

¹³¹ See e.g. De Schutter note 1 at 214.

¹³² *Ibid*.

¹³³ *Ibid* at 12-16.

recommendations for ‘increasing awareness’ of CSR, encouragement of ‘cooperation with stakeholders,’ support for more empirical research on CSR and stress on the diffusion of information about CSR, and emphasis on cooperation with and between companies. In other words, the business case prevailed and the EMS Forum’s final recommendations reflect voluntarism.¹³⁴

Furthermore, and disappointingly, the supposedly ‘active’ role of public authorities was ‘understood most restrictively.’¹³⁵ The report describes their function in general terms and recommends that:

...public authorities at different levels (EU, national, regional and local) recognise their contribution to driving CSR, alongside others, and in cooperation with stakeholders, assess and strengthen their role in raising awareness of, providing information on, promoting, and supporting the take-up, development and innovation of effective CSR, and the development of environmentally and socially responsible products and services¹³⁶

Although the European Parliament describes the seventh recommendation of the 2004 report as promoting the creation of a legal framework for CSR, in the context of the rest of the report, however, this could only mean a soft legal framework.¹³⁷ Wouters and Chanet describe the recommendations as ‘very weak’ generally and the specific reference to a CSR framework as ringing ‘hollow.’¹³⁸

There is no doubt that the EMS Forum failed to move the EU away from the binary approach to CSR, the idea that voluntary and other regulatory approaches are opposed and cannot be reconciled. De Schutter blames the process, arguing that where the stakeholders’ initial positions are so incompatible any attempt to reconcile them becomes virtually impossible and a stalemate inevitable:

What the experience of the Forum showed...are the limits of a method which consists in bringing together a range of stakeholders with so different views, in the hope that they will arrive at a consensus through discussions facilitated, but in no way pre-

¹³⁴ Ibid.

¹³⁵ De Schutter note 1 at 214.

¹³⁶ EMS Forum Report 2004 note 53 at 16.

¹³⁷ EMS Forum Report 2004 *ibid* at 14, Part 3, Future Initiatives, Recommendation 7: ‘Creating the right conditions for CSR,’ European Parliament Resolution 2007 note 15.

¹³⁸ Wouters & Chanet note 5 at para.35

empted or directed, by the Commission. This method, which in theory might be praised for its openness, leads in fact to a situation where any final agreement will be based, not on the outcome of a rational discussion based on the law of the best argument...but rather on the few items on which the participants can agree, without betraying the mandate of their respective constituencies. The final report of the CSR EMS Forum, in that sense, represented the lowest common denominator which could be achieved: its results were less than impressive.¹³⁹

On this analysis it seems that *any* multistakeholder approach to CSR is condemned to fail, at least from the perspective of those seeking something other than a voluntary regulatory option. From the business case perspective, however, such an outcome would be welcomed. Indeed, it appears that a multistakeholder system, rather than being predicated on equality, favours the business community:

To some, it appeared as if the Commission had put all its eggs into the basket of the multi-stakeholders platform, and now found itself tied to the willingness of the employers to cooperate fairly in the process; as to the employers, who insisted throughout on the importance of participants retaining 'ownership' of the process, they seemed to believe that CSR was too serious an issue to be left in the hands of the public servants of the Commission.¹⁴⁰

So while a multistakeholder strategy may operate effectively in a voluntary business and human rights context, as was seen within the UN Global Compact framework, for example, the possible introduction of binding regulatory options into the dialogue creates an impasse. As will be seen, in its subsequent policy debates about CSR, the European Commission took a novel approach to the problem and chose to dispense with a multistakeholder approach entirely.

6.2 The Aftermath of the Green Paper

While in the past, NGOs and trade unions wanted the EU to create a concrete legal CSR framework, with all that such a framework would entail, their current position has changed. Now these stakeholders are seeking a new governance or third way approach to

¹³⁹ De Schutter note 1 at 215.

¹⁴⁰ De Schutter *ibid* at 214.

CSR.¹⁴¹ From their standpoint, the key limitation of the EMS Forum 2004 report was the failure to recommend any form of monitoring or compliance procedure, which is linked to the changed mandate identified previously. A letter from the NGOs to the Commission and Council set out the steps necessary, in their eyes, for future progress:

Taken together, the recommendations, if they are fully implemented by the relevant actors, will help to generate a significant advance. For that to happen, it will be necessary to develop them into a proper framework that complements the voluntary commitment of a steadily growing number of companies with proactive and consistent public policies to create the right enabling environment and ultimately to ensure accountability by all companies.¹⁴²

Thus a move towards a hybrid of voluntarism and binding regulation becomes the goal. To achieve the advance, the NGOs advocated that EU institutions move away from ‘merely moderating dialogue to developing policies, setting standards and where necessary enforcing them.’¹⁴³ In a clear criticism of the EU’s role (or lack thereof) in the EMS Forum the NGOs continued:

There needs to be proactive and consistent public policies to create the right enabling environment and ultimately to ensure accountability by all companies. Concretely, this means that the Commission, Council and Parliament, which have been neutral or absent throughout the Forum, must now take the lead role in the development of an effective EU framework for CSR.¹⁴⁴

This middle way seemed an obvious solution to the tension between the proponents of regulation and those who opposed it and anticipated the ‘smart mix’ of regulation advocated by the UN Guiding Principles by seven years.¹⁴⁵ The EMS Forum, however, did not adopt this position.

Finally, after numerous delays, the Commission published a second Communication in 2006 entitled ‘Implementing the Partnership for Growth and Jobs: Making Europe a Pole

¹⁴¹ For an overview of the NGO position, see the European Coalition for Corporate Justice Advocacy Briefing, ‘Corporate Social Responsibility at EU Level: Proposals and recommendations to the European Commission and the European Parliament’ November 2006 (hereinafter ‘ECCJ Advocacy Briefing’) at 4 et seq.

¹⁴² Letter from Anne-Sophie Parent, President, Social Platform, et al., to Commissioner Liikanen, et al. (June 29, 2004), available at <http://www.foeeurope.org/corporates/NGO%20CSR%20open%20letter%20290604.pdf> [Last accessed 1.11.11].

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Guiding Principles Guiding Principles note 12 at 8, Principle 3 commentary.

of Excellence on Corporate Social Responsibility' (the Pole of Excellence Communication).¹⁴⁶ NGOs were particularly concerned by the delay in publication as it was felt that CSR was being sidelined as opposed to mainstreamed, perhaps as a response to the EU's increased emphasis on competitiveness in accordance with the Lisbon Strategy.¹⁴⁷

More significantly, NGOs were excluded from the consultation process. The Commission chose to consult with business groups alone and did not include any representatives from civil society.¹⁴⁸ This reflected the Commission's position in the Pole of Excellence Communication where it explicitly moves away from the wider participatory model of CSR by saying that it will 'work more closely with European business' through a new European Alliance on CSR, membership of which was only open to business enterprises.¹⁴⁹ Other stakeholders were acknowledged, but they were given no formal role in the CSR process, with the Commission saying that it continued 'to attach the utmost importance to dialogue between all stakeholders...' but no more. De Schutter describes this 'political message as particularly damaging'¹⁵⁰ and he cites it as an example of John Conley and Cynthia Williams's CSR 'rituals'¹⁵¹ whereby rather than enabling participation, a stakeholder model stifles dialogue and allows 'companies to control the way in which the [stakeholder] voice is exercised.'¹⁵² De Schutter writes:

One striking feature of the constitution of this [CSR] movement is the blurring of the lines between the roles of the respective participants: consensus is the rule; the 'no name, no shame' rule predominates; voices critical of the possibility of achieving agreement and overcoming differences are outcast.¹⁵³

¹⁴⁶ COM(2006) 136 final 22.3.2006.

¹⁴⁷ ECCJ Advocacy Briefing note 141 at 1.

¹⁴⁸ Ibid at 3.

¹⁴⁹ Ibid at 3-4.

¹⁵⁰ De Schutter note 1 at 216.

¹⁵¹ J.M.Conley & C.A.Williams, 'Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement' 31 J. Corp. L. 1 (2005) at 8.

¹⁵² Conley & Williams ibid at 12.

¹⁵³ De Schutter note 1 at 212 note 33.

Thus in the European context, civil society was cast out of the process. NGOs, through the European Coalition for Corporate Justice (ECCJ), expressed horror at this development,¹⁵⁴ especially in light of business sector attitudes which seemed to be that the impact of CSR ought to be minimised as much as possible.¹⁵⁵ In a November 2006 report, the ECCJ concluded firstly, that '[a] multistakeholder approach ... has been abandoned outright,' secondly, that the European Alliance on CSR is 'perfectly suited to become a major greenwash operation' and finally, that the Commission's exclusive approach 'poses a great danger to serious CSR initiatives.'¹⁵⁶ Such a conclusion is supported by Conley and Williams' empirical study¹⁵⁷

The Commission did reinstate the EMS Forum at a late stage, and only after intense civil society lobbying, via the Poles of Excellence Communication,¹⁵⁸ stating in a backpedalling press release:

The European Commission believes that while enterprises are the primary actors in CSR, credible CSR practices need to be developed with other stakeholders, such as trade unions, non-governmental organisations, public authorities and academic institutions.¹⁵⁹

EECJ, however, was skeptical about the reinstatement citing a letter written by the Union of Industrial and Employers' Confederations of Europe (UNICE) as evidence that the EMS Forum was a charade. It stated that the letter:

revealed the true face of the European business representatives drafting the Alliance with the Commission. It shows that their only political interest in CSR at EU level is to ensure that EU initiatives or policies have as little impact as possible. The UNICE letter calls the new approach by the Commission a true success for business.

¹⁵⁴ ECCJ Advocacy Briefing note 141 at 3.

¹⁵⁵ See e.g. a leaked letter from the Union of Industrial and Employers' Confederations of Europe (UNICE) cited in ECCJ Advocacy Briefing *ibid* at 4. As of 23 January 2007 UNICE became BusinessEurope, The Confederation of European Business.

¹⁵⁶ ECCJ Advocacy Briefing note 141 at 3. See also Presentation by By F.Hamdan Director, Friends of the Earth Europe, 'Give us real CSR, not just hollow Public Relations' at Corporate Social Responsibility – Promoting Innovation and Competitiveness, Conference organised by the EU Finnish Presidency, Brussels, 22 November 2006 http://www.foeeurope.org/publications/2006/FoEE_on_CSR_EU_Finish_Presidency_Conference_Brussels_22nov06.pdf [last accessed 28.8.11].

¹⁵⁷ Conley & Williams note 151 at 12.

¹⁵⁸ Pole of Excellence Communication note 10 at 4.

¹⁵⁹ See also Press Release, 'Europe sees progress on Corporate Social Responsibility,' IP/06, Brussels 8.12.2006.

Furthermore, the letter says that ‘a few passages must be interpreted as verbal concessions to other stakeholders, which will however have no real impact.’¹⁶⁰

NGOs were invited to the subsequent EMS Forum Review in December 2006 but declined to attend,¹⁶¹ however, a meeting in 2009 saw their return and a significant number participated in the last EMS Forum plenary session convened in November 2010.¹⁶² So latterly it would appear the Commission has recognised the value of a participatory CSR process but the decision to reinstate the European Multistakeholder Forum came late in the day and only after vociferous complaints from civil society actors that they were being excluded from the Commission’s CSR agenda. Nevertheless, there is no evidence to suggest that the Commission’s policy approach to CSR will change as a result of NGO participation and as will be seen NGOs remain unconvinced about the merits of the existing policy.

In terms of the regulatory model adopted in the Poles of Excellence Communication, once again the Commission adheres to voluntarism, primarily in its definition of CSR as a ‘concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis.’¹⁶³ Its rationale for focus on voluntarism is that ‘an approach involving additional obligations and administrative requirements for business risks [would be] counter-productive and would be contrary to the principles of better regulation.’¹⁶⁴ NGOs have consistently and vociferously opposed this approach since the 2004 Report of the EMS Forum.¹⁶⁵ Instead, NGOs are seeking a hybrid or third way in terms of regulation and explicitly call upon the Commission to ‘depolarise the debate on voluntary versus mandatory approaches to

¹⁶⁰ ECCJ Advocacy Briefing note 141 at 4.

¹⁶¹ Sustainable and responsible business, Forum Review Meeting, December 2006, http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/multi-stakeholder-forum/2006-meetings/index_en.htm [Last accessed 3.11.10]

¹⁶² Sustainable and responsible business, Multi-stakeholder Forum on CSR - Meeting 2009, Participant list, http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/participant_list_en.pdf [last accessed 3.11.10]; EMS Forum plenary meeting 2010, Participant list http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/participation_list_en.pdf [last accessed 28.8.11].

¹⁶³ Pole of Excellence Communication note 10 at 2.

¹⁶⁴ Pole of Excellence Communication *ibid* at 2.

¹⁶⁵ See e.g. ECCJ Advocacy Briefing note 141 and Pole of Excellence Communication note 10 at 1.

CSR.’¹⁶⁶ Rather than seeking only the imposition of strict legally binding instruments, NGOs are now calling for a new governance approach via a variety of different regulatory mechanisms. Regulatory recommendations include mandatory social and environmental reporting, redress mechanisms, extra-territorial application of human rights and labour standards and a duty of care upon companies and their directors regarding social and environmental impacts.¹⁶⁷ The rationale for this is that voluntary initiatives gain credibility when they are supported by ‘effective legal safeguards.’¹⁶⁸ In addition, the NGOs have proposed some alternative regulatory CSR mechanisms such as independent monitoring and verification, multistakeholder initiatives, and mandatory social and environmental reporting as a means of achieving transparency.¹⁶⁹

Furthermore, the European Parliament in 2007 adopted a Resolution on Corporate Social Responsibility: A New Partnership.¹⁷⁰ The Resolution is based on the Special Rapporteur’s report to the Committee on Employment and Social Affairs. In essence, the Resolution seems to chastise the Commission for its failure to engage all the relevant stakeholders in CSR regulation. It welcomes the re-establishment of the EMS Forum,¹⁷¹ and restates the importance of including non-business stakeholders in the European Alliance for CSR.¹⁷² Although the Resolution welcomes reporting by business on their CSR compliance, it notes that very few reports refer to human rights norms, or cover the entire supply chain.¹⁷³ Of course, the European Parliament has no formal role in EU CSR regulation, and the European Commission is not obliged to follow any of its recommendations.

Two criticisms have been levelled consistently against the EU’s CSR strategy. Firstly, that there has been an undue and unwarranted emphasis on voluntarism and secondly, that the interests of stakeholders have been marginalised and in some cases ignored. There are

¹⁶⁶ Poles of Excellence Communication note 10 at 4.

¹⁶⁷ Poles of Excellence Communication *ibid* at 3-4.

¹⁶⁸ Poles of Excellence Communication *ibid* at 3.

¹⁶⁹ ECCJ Advocacy Briefing note 141 at 6.

¹⁷⁰ European Parliament Resolution 2007 note 15.

¹⁷¹ *Ibid* at para 14.

¹⁷² *Ibid* at para 11.

¹⁷³ *Ibid* at para 26.

instances of the EU paying lip-service to a third way in CSR. For instance, the website of the Directorate General for External Trade describes CSR as

not a substitute, but a complement to hard law. As such it must not be detrimental to public authorities' task to establish binding rules, at domestic and/or at international level, for the respect of certain minimum social and environmental standards. The focus of the debate in this respect has now moved on from a simple dichotomy between voluntary and binding instruments, towards the overarching challenge of devising reporting tools and verification mechanisms to ensure proper compliance with CSR commitments.¹⁷⁴

The debate may have 'moved on' for the Commission and for the business community but only because civil society was excluded and they have chosen to discount options other than voluntarism. Overall, it seems that the EU, while demonstrating an initial interest in a compromise approach to CSR, in the form of the EMS Forum, now appears to have retreated to an almost exclusively voluntarist CSR model. Indeed, in as recently March 2010 the Commission reiterated its commitment to a non-regulatory policy 'to renew the EU strategy to promote Corporate Social Responsibility as a key element in ensuring long term employee and consumer trust.'¹⁷⁵

6.3 European Multistakeholder Forum 2010

*'Europe can be a leader in driving up standards and in applying them, or it can risk falling behind.'*¹⁷⁶

In 2010, as a response to the global economic crisis which left many European economies in a fragile state, the EU issued its Communication Europe 2020¹⁷⁷ setting out a decade of growth strategy for the region. It comprises target objectives in the areas of employment, research and innovation, climate change and energy, education and poverty. Significantly, Europe 2020 envisages a role for CSR, with the Commission stating its aim of creating an

¹⁷⁴ http://ec.europa.eu/trade/issues/global/csr/index_en.htm (accessed 20.4.2007).

¹⁷⁵ Communication from the Commission, 'Europe 2020 :A European strategy for smart, sustainable and inclusive growth,' Brussels, 3.3.2010 COM(2010) 2020 final, at 15, <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf> [last accessed 28.8.11] (hereinafter 'Europe 2020').

¹⁷⁶ Speech of Richard Howitt MEP, European Parliament Rapporteur on Corporate Social Responsibility, to the European Commission Multi-Stakeholder Forum on CSR, Brussels, 30 November 2010 http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/speech_howitt_en.pdf [last accessed 28.8.11].

¹⁷⁷ Europe 2020 note 175.

‘industrial policy for the globalisation era’¹⁷⁸ which includes renewing ‘the EU strategy to promote Corporate Social Responsibility as a key element in ensuring long term employee and consumer trust.’¹⁷⁹ To that end the Commission convened a plenary meeting of the EMS Forum in November 2010 with the declared purpose of exchanging ‘views about the scope and content of a new European policy initiative in the field of CSR.’¹⁸⁰ The aim was to ‘as far as possible, generate a degree of consensus around the scope and content of that policy.’¹⁸¹ Such an approach seems to indicate two things; firstly, that the Commission acknowledges that the old CSR policy was inadequate and secondly, that stakeholders were in disagreement about that policy.

On several levels this ostensibly represents a shift in gear by the Commission and was a clear response to the work of John Ruggie at the UN. The previous year the Swedish EU Presidency had concluded in a Declaration that:

The United Nations’ Protect, Respect and Remedy framework provides a key element for the global development of CSR practices. It constitutes a significant input to the CSR work of the European Union.¹⁸²

In a clear statement of intent the Declaration continues:

Now the time is ripe to take this important work further by developing common frameworks; raising awareness and improving dialogue between all stakeholders; and measuring and evaluating tangible results.¹⁸³

Viewed through this lens, the EMS Forum 2010 can be regarded as a move towards those goals. Importantly, the plenary meeting brought together ‘all major stakeholder groups, including business, trade unions, investors, non-governmental organisations, academics and national government’¹⁸⁴ in a return to a truly participatory EMS Forum. Its purpose

¹⁷⁸ Ibid at 16.

¹⁷⁹ Ibid at 17.

¹⁸⁰ European Multistakeholder Forum on CSR Plenary Meeting, 29-30 November 2010, http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/multi-stakeholder-forum/2010-meetings/index_en.htm [last accessed 28.8.11] (hereinafter EMS Forum 2010’).

¹⁸¹ European Multistakeholder Forum on CSR Plenary Meeting, 29-30 November 2010, Agenda http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/agenda_101122_en.pdf [last accessed 28.8.11] (hereinafter ‘EMS Forum 2010 Agenda’).

¹⁸² Swedish Presidency CSR Declaration note 28.

¹⁸³ Ibid.

¹⁸⁴ EMS Forum 2010 note 180.

was to consider ‘the current context of CSR, both in Europe and globally’¹⁸⁵ and to discuss the ‘different issues and initiatives that could form part of European policy on CSR’¹⁸⁶ with a view to establishing a ‘way forward.’¹⁸⁷ Six themes formed the basis for the discussions: ‘responsible consumption; responsible investment; the links between CSR and competitiveness; transparency and disclosure of non-financial information; business and human rights; and the global dimension of CSR.’¹⁸⁸

From the perspective of this dissertation, one very interesting development took place. Many participants concluded at the meeting that implementation of a regulatory ‘smart mix’ as per the UN Guiding principles renders the voluntarism versus regulation debate redundant,¹⁸⁹ with the Swedish Government representative proclaiming that ‘the era of declaratory CSR is over.’¹⁹⁰ Industry stakeholders such as BusinessEurope (formerly UNICE), take the opposite view, however, leading to the conclusion that a consensus on a new EU policy is far from achievable. BusinessEurope does not advocate a smart mix of regulation at all, rather it continues to espouse pure voluntarism commenting that CSR must ‘be integrated in strategies, systems and processes.’¹⁹¹ While this is a laudable goal and entirely in keeping with an intelligent approach to regulation, nevertheless the organisation suggests that the Commission can ‘help to increase the uptake of CSR amongst companies, by concentrating on practical activities which promote the business case of CSR’ [emphasis in original].¹⁹² This includes providing CSR ‘incentives’ and ‘helping companies’ to implement CSR, which again is in the spirit of hybrid regulation

¹⁸⁵ EMS Forum 2010 Agenda note 180.

¹⁸⁶ EMS Forum 2010 Agenda *ibid*.

¹⁸⁷ EMS Forum 2010 note 180.

¹⁸⁸ EMS Forum 2010 *ibid*.

¹⁸⁹ See e.g. Howitt Speech note; European Multistakeholder Forum on CSR Plenary Meeting, 29-30 November 2010, Report from Parallel Session 5 by John Morrison ‘Integrating the UN Framework on Business and Human Rights in the EU and globally’ 30 November 2010 http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/5_business_and_human_rights_en.pdf [last accessed 28.8.11]. See the comments by Swedish Government representative at 3 and the Legal Adviser to SGSR Ruggie at 4.

¹⁹⁰ *Ibid* at 3.

¹⁹¹ BusinessEurope Report 2010 CSR Multistakeholder Forum http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/business europe_en.pdf [last accessed 28.8.11]

¹⁹² *Ibid*.

and is to be encouraged. BusinessEurope, however, favours this soft approach at the expense of ‘strict and detailed frameworks for business’ which it describes as ‘counterproductive’ and its opinion clearly runs contrary to smart mix regulation.¹⁹³

Similarly, EuroCommerce, a group representing the retail and wholesale industry indicates a strong preference for voluntarism:

The European Commission should continue to encourage and support companies to take up voluntary CSR initiatives in close cooperation with their stakeholders and to make CSR an integrative part of their business strategy. Any legal obligation or mandatory requirement related to CSR would be counterproductive and prevent companies from getting engaged. Therefore, EuroCommerce would like to underline once more the necessity for CSR to remain a voluntary concept.¹⁹⁴

Such a hardline approach does not bode well for future consensus among stakeholders.

Civil society, of course embraces a hybrid approach, as it has done in the EU context since 2004.¹⁹⁵ Amnesty International in its submission to the meeting recommends an EU policy which implements the UN Guiding Principles,¹⁹⁶ including include ‘legal and policy measures’ requiring ‘corporate actors to conduct human rights due diligence and mandatory reporting, and impose sanctions if corporate actors fail to carry out such requirements.’¹⁹⁷ Furthermore it recommends mandatory reporting mechanisms and measures to address extraterritorial human rights violations.¹⁹⁸ Access to judicial and non-judicial remedies for the victims of corporate human rights abuses should also be ensured.¹⁹⁹ Likewise, the European Coalition for Corporate Justice (ECCJ), which represents over two-hundred and fifty NGOs from across Europe remains adamant that a

¹⁹³ Ibid.

¹⁹⁴ EuroCommerce European Multistakeholder Forum on CSR, Briefing 29/30 November 2010, http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/eurocommerce_en.pdf [last accessed 29.8.11] at 5.

¹⁹⁵ See *infra* at 6.3.

¹⁹⁶ Amnesty International European Institutions Office, ‘A regulatory framework on corporate accountability,’ Submission in preparation of the Corporate Social Responsibility Forum in November 2010 15 November 2010 http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/amnesty_international_en.pdf [last accessed 29.8.11] at 3.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid at 4.

smart regulatory mix is required, combining both legislative and voluntary measures, contending that it is ‘not an either/or question.’²⁰⁰

It is clear that the historically wide gulf between business and civil society on the strategy that ought to be adopted for a new EU CSR policy remains intact. What is also clear is that in order to implement the UNGPs the EU ought in fact put in place a *mix* of regulatory options otherwise any policy simply looks like voluntarism by another name.

Furthermore, a redress mechanism, either judicial or non-judicial, needs to be created in order for the policy to be Ruggie-compliant. It remains to be seen how the Commission will respond but reports of the demise of the ‘era of declaratory CSR’ appear to be an exaggeration. Nevertheless, the Commission announced in April 2011 that it ‘will put forward a new framework initiative later this year to tackle issues related to the societal challenges that enterprises are facing,’ and it will therefore be interesting to observe whether normative rules will form part of its configuration.²⁰¹

Thus, although it remains to be seen what will be the outcome of the resurrected EMS Forum, it may be said that currently the EU is failing almost entirely to reconcile the approaches of voluntarism and hard regulation. Indeed, the European Commission does not appear to have understood the possibility of a hybrid or third way, drawing criticism from civil society: ‘If the Commission really wants to make Europe a Pole of Excellence on CSR it should at least be on top of the debate.’²⁰² In this respect, other regional and international regulatory regimes, such as those of the UN and the OECD, may be perceived more favourably when it comes to reconciling the different approaches.

6.4 Conclusions and the Future of Business and Human Rights in the EU

²⁰⁰ ECCJ, Submission for the 2010 EU Multistakeholder Forum on CSR, Review and recommendations http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/eccj_en.pdf [last accessed 1.11.11].

²⁰¹ European Commission, Green Paper, ‘The EU corporate governance framework’ Brussels, 5.4.2011 COM (2011) 164 final, http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf [last accessed 2.11.11] (hereinafter ‘Green Paper on Corporate Governance’) at 2.

²⁰² ECCJ Advocacy Briefing note 141 at 7.

This dissertation proceeds from the position that it is in fact possible to reconcile the apparently irreconcilable regulatory stances of voluntarism and hard regulation, into a compromise ‘third way’ of CSR regulation. The apparently fixed position of the European Commission, and indeed business itself, suggests that voluntarism and hard regulation are mutually exclusive, and that voluntarism, founded on the business case for CSR, is the only appropriate basis for regulation of transnational business enterprises.

Nevertheless, as has been shown in previous chapters by the Global Compact and most notably by the OECD, so-called third way regulatory mechanisms are already in operation. In the Global Compact context, stakeholder participation and transparency are key to its operation, irrespective of its voluntary status. Failure by corporate participants to adhere to the reporting mechanisms results in public ‘naming and shaming’ via the non-compliance register on the GC website. Such measures fall directly within the ambit of the ‘third way’ mode of regulation. While ostensibly adhering stoutly to voluntarism, the OECD also embraces a stakeholder participation model with roles for business, trade unions and NGOs, the latter albeit in an informal capacity.

Even the UN’s Sub-Commission on the Protection of Human Rights’ Norms on the Responsibility of Transnational Corporations, while ostensibly advocating the creation of an international covenant, nevertheless included some elements of third way regulation. Wide stakeholder participation took place through the UN’s usual NGO channels, in addition to the specific consultation which took place as part of the UNHCHR Report into the Norms. The UN therefore is encouraging stakeholder participation across a variety of initiatives. This is in direct contrast to the European Commission which in practice has seemed intent on stifling civil society involvement in the CSR regulatory debate. The dismantling of the EMS Forum and the subsequent creation of the European Alliance on CSR which involved business alone has done immense harm to the Commission’s reputation with NGOs and its stated aim of being a global leader in CSR.²⁰³ The belated resurrection of the EMS Forum may be insufficient to bridge the gaps between the parties. The Commission has shown itself to be unwilling to reconcile voluntarism and hard regulation. It clings to a polarised voluntarism model with little regard for any possible

²⁰³ This can be seen by an examination of the ECCJ Advocacy Briefing generally note 141.

alternative third way regulatory measures, a position described as ‘unwarranted.’²⁰⁴ Unlike the NGOs, which have moved from their initial adherence to hard regulation to a compromise third way position, the Commission has adopted an entrenched voluntarism position. This also conflicts with the more enlightened positions adopted by the UN and the OECD. If it truly seeks to be a ‘Pole of Excellence’ in CSR regulation, the Commission must acknowledge that there are regulatory options beyond the confines of voluntarism with which it must engage. So far, the signs are not good. In a speech to the resurrected EMS Forum in 2009, Günter Verheugen Vice-President of the European Commission responsible for Enterprise and Industry, made clear the Commission’s position:

I believe that *CSR should remain a voluntary concept*, and I will not make any proposals that would risk undermining that principle. But this certainly does not exclude a role for the Commission in facilitating joint work between stakeholders in the field of CSR, whenever it can add value. And let me be clear – defining CSR as a voluntary concept does not mean that its boundaries are fixed once and for all – *regulation and CSR while being mutually exclusive* are dynamic and evolving. CSR in twenty years will certainly encompass some other commitments than it does today.²⁰⁵ [Emphasis added]

The Commission has retreated from any form of regulation and continues to ignore calls from both civil society and the European Parliament to consider alternatives to voluntarism. For example, the European Parliament suggested in its 2007 Resolution that the Commission step back from pure voluntarism and adopt a hybrid or third way approach.²⁰⁶ Wouters and Hachez in their Study for the European Parliament view the Parliament’s proposals as a ‘mixed approach’ which ‘would encourage corporations to take voluntary CSR initiatives, but which would also comprise binding rules allowing for holding corporations accountable in diverse ways.’²⁰⁷

²⁰⁴ European Parliament Study note 8 at para.63.

²⁰⁵ Speech by Günter Verheugen, Vice-President of the European Commission responsible for Enterprise and Industry, ‘Corporate Social Responsibility Essential for Public Trust in Business,’ Speech 09/53, 10th February 2009, http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/csrforumspeech_onlineversion_en.pdf [last accessed 1.11.11]

²⁰⁶ European Parliament Resolution 2007 note 15 generally. See also, European Parliament Study note 8 at paras 62-66.

²⁰⁷ European Parliament Study note 8 at para.63.

To that end, the European Parliament proposed an enhanced framework which emphasises business accountability and responsibility, stating that it is:

convinced that increasing social and environmental responsibility by business, linked to the principle of corporate accountability, represents an essential element of the European social model, Europe's strategy for sustainable development, and for the purposes of meeting the social challenges of economic globalisation.²⁰⁸

Furthermore, it proposed the clarification, strengthening and integration of existing initiatives²⁰⁹ as well as calling on the Commission to implement 'a mechanism by which victims, including third-country nationals, can seek redress against European companies in the national courts of the Member States.'²¹⁰ Improved functioning of OECD National Contact Points in EU States is also recommended.²¹¹

In addition, the European Parliament advocated that further consideration be given to the creation of an EU Ombudsman for CSR 'to undertake independent enquiries on CSR-related issues at the request of companies or any stakeholder group.'²¹² While this may offer a means for ensuring transparency, it is difficult to see how effective a CSR Ombudsman might be in the face of serious human rights abuses by business actors and is unlikely to offer any binding redress to individuals. Certainly, the existing European Ombudsman is empowered only to investigate complaints about maladministration within the EU institutions and to make recommendations to resolve the complaint.²¹³

John Ruggie has some sympathy for the ombudsman proposal but as he points out there are inherent flaws in an:

...ombudsman function that could receive and handle complaints. Such a mechanism would need to provide ready access without becoming a first port of call; offer effective processes without undermining the development of national mechanisms;

²⁰⁸ European Parliament Resolution 2007 note 15 at para.1.

²⁰⁹ European Parliament Resolution 2007 *ibid* at paras 5, 6,31,34,37 and 55.

²¹⁰ European Parliament Resolution 2007 *ibid* at para.32.

²¹¹ European Parliament Resolution 2007 *ibid* at para.47.

²¹² European Parliament Resolution 2007 *ibid* at para.36. For further support for a CSR Ombudsman see Support for EU Ombudsman on CSR, Hearing on Corporate Social Responsibility, Human Rights Subcommittee of the European Parliament, 23rd of January 2007, Brussels, http://www.europarl.europa.eu/comparl/afet/droi/hearings/200701_report.pdf [last accessed 1.11.11] at 3 and 5.

²¹³ <http://www.ombudsman.europa.eu/atyourservice/home.faces> [last accessed 1.11.11]

provide timely responses while likely being located far from participants; and furnish appropriate solutions while dealing with different sectors, cultures and political contexts. It would need to show some early successes if faith in its capacity were not quickly to be undermined. To perform these tasks any such function would need to be well-resourced. Careful consideration should go into whether these criteria actually can and would be met before moving in this direction.²¹⁴

Although SGSR Ruggie is referring to a *global* CSR ombudsman, these weaknesses would apply equally to an EU specific model.

In conclusion, it is difficult to see how the EU can lay any credible claim to being a 'Pole of Excellence' in CSR. As the European Parliament puts it, 'CSR policies should be promoted on their own merits and should represent neither a substitute for appropriate regulation in relevant fields, nor a covert approach to introducing such regulations.'²¹⁵ In ten years of attempts there remains no effective EU CSR policy or accountability strategy and there has been no necessary shift of emphasis, by the Commission in particular, 'from processes to outcomes.'²¹⁶ It seems unlikely that the forthcoming 'framework initiative' will substantially change the current position.²¹⁷

The EMS Forum 2010 represents a step in the right direction but it seems obvious that in the absence of legislative provisions within the smart mix of regulation there will be no redress mechanisms implemented. In addition to voluntarily adhering to the UNGPs the EU institutions will also be *required* to have regard to current developments at the Council of Europe where the Parliamentary Assembly supports mandatory provisions in the

²¹⁴ Protect, Respect and Remedy: a Framework for Business and Human Rights,' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie A/HRC/8/5 7 April 2008 <http://198.170.85.29/Ruggie-report-7-Apr-2008.pdf> [last accessed 27.8.11] (hereinafter 'Protect, Respect and Remedy') at para.103.

²¹⁵ European Parliament Resolution 2007 note 15 at para.4.

²¹⁶ European Parliament Resolution 2007 at para.7. For some possible outcomes see ECCJ, 'Principles and Pathways: Legal Opportunities to Improve Europe's Corporate Accountability Framework, November 2010, http://www.corporatejustice.org/IMG/pdf/eccj_principles_pathways_webuseblack.pdf [last accessed 1.11.11].

²¹⁷ Green Paper on Corporate Governance note 201 at 2.

business and human rights domain.²¹⁸ Certainly the EU cannot be described as a leader in the CSR field and thus as a follower, the Commission in particular will have to decide the extent to which it will be pushed into considering binding regulatory options in order to be Ruggie-compliant. History suggests that the EU's smart mix approach to CSR will not be mixed at all.

²¹⁸ Council of Europe, Parliamentary Assembly Resolution 1757 (2010) on Human Rights and Business, 6 October 2010 <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1757.htm> [last accessed 29.8.11]; See Council of Europe, Parliamentary Assembly Recommendation 1936 (2010) on Human rights and business, 6 October 2010 <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1936.htm> [last accessed 29.8.11]. See also Council of Europe, Report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Holger Haibach Doc. 12361, 27 September 2010 Human rights and business <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12361.pdf> [last accessed 28.8.11].

Chapter 7

Conclusion: Reputational Carrots, Regulatory Sticks and the Future Ordering of Business and Human Rights

So how can it be that corporations can be held responsible for their complicity in oil spills, but not for their complicity in genocide? How can corporations be held liable under European Law for anticompetitive behavior, but not for slavery?¹

7.0 Introduction

The concluding chapter of this dissertation serves two functions. Firstly, it provides a brief overview and summary of the preceding chapters. Secondly, and more importantly it seeks to ‘point forward’ to the future and to offer some possible solutions to the problem of human rights violations by businesses identified throughout the dissertation. It certainly does not purport to offer a one-size-fits-all panacea, rather it suggests that there needs to be a top-down bottom-up or hybrid approach to regulating business actors which encompasses a variety of regulatory techniques, one of which is mandatory regulation. Reliance upon bottom-up human rights protection alone will not solve the problem quickly which is why scholars such as Koh and Zerk recognise the importance of also developing normative international approaches.² Currently, there is no mandatory international regulation of business actors in relation to human rights standards. Binding rules are essential, however, to act as a deterrent to human rights abuses as well as guaranteeing redress for victims because, as has been demonstrated, a self-regulatory approach on its own is insufficient. What this means is that *all* of the current international initiatives are inadequate, notwithstanding their substantial and important contribution to the norm internalisation process.

7.1 Overview of the Dissertation

¹ H.Koh, ‘Separating Myth from Reality About Corporate Responsibility Litigation’ 7 J. of Int’l Economic L. 263-274 (2004) (hereinafter ‘Koh (2004)’) at 265.

² Koh *ibid* at 273; J.Zerk, *Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 94. See also H.H.Koh, ‘Internalization through Socialization’ 54 Duke L.J. 975-982 (2005);

Chapter 1 of this dissertation sets out the historical background to the long-standing problem of business actors violating human rights and identifies the types of actors involved as well as numerous instances of human rights violations. In addition, it evaluates the relevant literature in the field. It catalogues how the rise of globalisation coupled with dominant neoliberal economic policies have created an environment whereby commercial activity has been permitted to flourish, particularly in the developing world, at the expense of regulation protecting individuals and communities, often in host countries. Typologies of human rights violations committed by business actors are set out. Furthermore it charts the emergence of the CSR movement and its reliance on self-regulatory mechanisms, culminating in the landmark adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) by the Human Rights Council in 2011. Finally, the chapter outlines the reasons why voluntarism alone is ineffective and why a binding parallel international regulatory mechanism is necessary to act as a deterrent and to provide effective remedies and redress for the victims of human rights abuses by business actors.

Chapter 2 explains why the prevailing international legal tradition which places the State and respect for State sovereignty at the heart of international law has resulted in business actors falling through the human rights regulatory net. A system based on States as the sole subjects of international law is rejected in favour of one of two options. Firstly, a system of international law where individuals (and potentially legal persons) are classified as subjects of international law thus acknowledging the primacy of the individual as opposed to the State. Such an approach would better safeguard the individual as Lauterpacht's 'ultimate subject' of international law as well as ensuring that business actors become dutyholders under international law as well as beneficiaries. The chapter gives examples of how States have long regarded business actors as subjects of international law because they demonstrated significant elements of international legal personality. Business actors have also been parties to international legal proceedings and their behaviour subject to the imposition of treaty provisions. Secondly, and alternatively, Chapter 2 argues that a participatory approach to international law, as advocated by Higgins and others, which acknowledges the involvement of a variety of different actors on the international plane is also to be preferred to the State-centric option. The rise of what

Slaughter calls global policy networks and the implementation of multistakeholder regulatory approaches exemplify the participatory approach in the business and human rights context.

Chapter 3 continues to employ Hersch Lauterpacht's theoretical framework arguing that because international human rights law places the individual at the heart of the international legal system, human rights violations ought to be addressed irrespective of the perpetrator. The chapter advocates a move away from the traditional vertical approach to human rights, which means that duties are imposed on States alone,³ proposing instead the application of a new horizontality which encompasses human rights violations by private business actors. A strict public/private distinction fails to recognise that human rights may be violated by entities other than States and thus business actors ought to have direct and binding human rights obligations. The chapter also examines the historical development of business and human rights initiatives at the UN, specifically the UN Draft Code and the Norms project, and the largely political reasons for their failure. It concludes with an analysis of the UN Guiding Principles on Business and Human Rights, arguing that while this denouement of SGSR Ruggie's work is an especially significant and timely contribution to the canon of CSR, it is ultimately flawed because a mandatory international regulatory approach is rejected outright and there is therefore no guarantee of effective remedies, redress or punishment of wrongdoers.

The final three substantive chapters focus on contemporary CSR efforts at the UN, the OECD and the European Union. All three initiatives contribute to incremental business and human rights norm internalisation, for example via increased dissemination of human rights principles, but they lack mandatory rules. Chapter 4 examines the UN Global Compact within the context of global policy networks and concludes that despite the weaknesses inherent in a voluntary initiative, the UNGC has a lot to offer in terms of grassroots development and dissemination of business and human rights principles. As a

³ There are a few exceptions such as the accession of the European Union to the European Convention on Human Rights by virtue of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 2007/C 306/01 Art.6(2) and ECHR ETS 5 Art.59(2) as amended by Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention ETS 194 (entered into force 1 June 2010).

policy network it is a good example of an international level multistakeholder approach to business and human rights, however, the chapter also notes that as a voluntary project the UNGC has the potential to be exploited for marketing purposes or ‘bluewashing’ rather than functioning as a truly effective mechanism for preventing human rights violations. It must be borne in mind, however, that the UNGC was conceived as a leadership platform for the purpose of creating policy dialogues and was never intended to function as a sanctions body. Nevertheless, the basic accountability mechanisms which are in place are of limited impact and the UNGC has a serious problem with corporate non-compliance.

Chapter 5 examines the long-established OECD Guidelines on Multinational Enterprises which underwent a revision in June 2011. While recognising the strides made in expanding the human rights provisions of the Guidelines and the important role played by some States in administering them, nevertheless, they are of limited impact especially in terms of punishment and remedies. This is demonstrated by way of case studies, in particular decisions made under the UK Specific Instance Procedure and others, which again illustrate the difficulties inherent in a non-mandatory regime, specifically the lack of redress and the potential for reoffending. The chapter also criticises the OECD adhering States for failing to seize the opportunity to radically reform the Guidelines, in particular, failing to require the restructuring of all National Contact Points. Consequently the meagre nature of the successes of this top-down - bottom-up regulatory system simply strengthens the argument for a binding international framework.

Chapter 6 critically evaluates the European Union’s approach to CSR noting that it has been slow to put in place any form of regulatory framework and thus can be described as a regulatory wasteland in this field. In particular, the Commission has been reluctant to embrace a hybrid approach to regulation and has remained resolutely attached to the business case for voluntarism, to the extent that it sought to exclude civil society from the regulatory debate. The influence of the business community is especially apparent in the EU context, in particular the desire to maintain CSR as a voluntary process. Nevertheless, as a participant in the broader, global and contemporary CSR paradigm the EU must begin to adopt a hybrid regulatory strategy in order to be compliant with the UN Guiding Principles. Indeed, the European Parliament has repeatedly indicated its support

mandatory regulation.⁴ There is certainly scope for the EU to champion and implement CSR standards in a variety of ways, for example through internal public procurement mechanisms or external relations policy. What is clear is that at present the EU is lagging behind both the UN and OECD in relation to addressing the issue of business and human rights and EU CSR practice must change if the organisation wishes to be regarded as a leader in the field.

7.2 Pointing Forward: The Future of Business and Human Rights

What do the foregoing examples in Chapters 3, 4, 5 and 6 say about the current state of regulation of business and human rights and what are the regulatory options for the future? There is no doubt that the international community of States, supported by the business community, has been consistently unwilling to put in place a binding international legal regime in order to regulate the behaviour of business in relation to human rights. The failure of both the UNCTC Draft Code and the Norms project to produce legislative provisions demonstrates this admirably. Most recently we have witnessed the revision of the OECD Guidelines and the birth of the UN Guiding Principles, neither of which have resulted in new mandatory rules, and in the case of the UNGPs represents a step backwards in terms of the weakened interpretation of States' human rights responsibilities.⁵ It is clear, therefore, that while there has been a paradigm shift in attitude towards the role and responsibilities of private business actors, and indeed a corresponding shift towards third way or new governance regulatory approaches,⁶ there remains a marked reluctance to create normative rules.

⁴ Council of Europe, Parliamentary Assembly Resolution 1757 (2010) on Human Rights and Business, 6 October 2010 <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1757.htm> [last accessed 29.8.11]; See Council of Europe, Parliamentary Assembly Recommendation 1936 (2010) on Human rights and business, 6 October 2010 <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1936.htm> [last accessed 29.8.11]. See also Council of Europe, Report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Holger Haibach Doc. 12361, 27 September 2010 Human rights and business <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12361.pdf> [last accessed 28.8.11].

⁵ *Infra* at Section 3.3.3.1.

⁶ See discussion *infra* at Section 4.0.

It is important to note, however, that this dissertation does not argue solely for hard legal solutions, rather it recognises the limitations of what Teubner calls the ‘proceduralism’⁷ of the traditional legal paradigm and therefore proposes a new governance paradigm where hard and soft regulatory options complement each other. Leading new governance scholars Trubek and Trubek argue that the ‘shift to ‘proceduralism’ in legal regulation, in which the law simply structures procedures for conflict resolution or problem-solving,’⁸ justifies a move towards alternative and softer modes of regulation as an adjunct to normative mechanisms. The move towards softer forms of regulation also fits with Koh’s promotion of norm internalisation as the key to human rights advancement.⁹

Within the business and human rights paradigm, a consistent narrative is being promoted which tells us that the days of the ‘voluntarism versus hard law’ dichotomy are over.¹⁰ This is true, but only in the sense that the possibility of establishing mandatory rules seems to have been removed from the equation by States and international organisations, as well as by Ruggie, frequently at the behest of the business community and notwithstanding the references to judicial remedies in the UNGPs.¹¹ Ruggie’s ‘smart mix’ of regulation is likely to remain a figment because on the whole, outside of civil society, there seems to be little desire for mandatory rules, thus all endeavours are likely to remain voluntary. Indeed, Chapter 3 demonstrates Ruggie’s own opposition to a treaty solution.¹²

It seems evident, therefore, that what we are witnessing is *not* a hybrid, third way, new governance or smart-mix regulation, it is maintenance of the legal and economic *status quo* because the essence of the hybrid regulatory approach is that it recognises the value of

⁷ G. Teubner, ‘Substantive and Reflexive Elements in Modern Law’ 17 Law & Soc’y Rev. 239-286 (1982-1983) at 266.

⁸ D.M. Trubek & L.G. Trubek, ‘New Governance and Legal Regulation: Complementarity, Rivalry and Transformation’ 13 Colum. J. Eur. L. 539 (2006-2007) (hereinafter ‘Trubek & Trubek’) at 548.

⁹ See generally Koh note 1. On norm internalization see H.H.Koh, ‘How is International Human Rights Law Enforced?’ 74 Ind. L. J. 1397-1417 (1999) at 1409; H.Koh, ‘Bringing International Law Home’ 35 Hous. L. Rev. 623-681 (1998). For a riposte to Koh’s theory of norm internalization see T.M.Franck, ‘Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh’s Optimism: Commentary’ 35 Hous. L. Rev. 683 (1998-1999).

¹⁰ See discussion *infra* at Sections 3.3.3.2, 3.2.1.2.3 and 3.3.3.3.

¹¹ *Infra* Section 3.3.2.3.

¹² See e.g. *infra* Section 3.2.1.2.3. See also *infra* Section 7.2.2.

combining both soft *and* hard regulatory options.¹³ Trubek and Trubek describe situations where new governance mechanisms and law operate ‘in the same policy domain’ as ‘coexistence’¹⁴ and where the systems merge into a ‘new hybrid process’ as ‘transformation.’¹⁵

7.2.1 Coexistence and Transformation: Possibilities for a Truly Hybrid Approach to Business and Human Rights

As demonstrated throughout this dissertation, NGOs and labour organisations have argued consistently for a hard law approach to business and human rights, in addition to indicating their willingness to also embrace and participate in soft law initiatives. This reflects a true hybrid or new governance approach to regulation and acknowledges the positive aspects of the process of human rights norm-internalisation and socialisation through soft law mechanisms. States and business actors, on the other hand, appear to remain largely entrenched in their support for voluntarism alone. Current business and human rights initiatives nonetheless demonstrate a shift away from traditional State-centric regulatory approaches (e.g. the UNCTC) with many of the softer new governance techniques being utilised, as highlighted in Chapters 3, 4, 5 and 6. The use of more flexible soft law mechanisms are themselves integral to a new governance model of regulation and the UNGPs, UNGC and OECD Guidelines all encourage participation through multistakeholder structures, crucial for hybridity. Other examples include the increasing use of low level decision making, or subsidiarity, such as the UNGC’s Local Networks, and the sharing of best practice generally.¹⁶ Nevertheless, the initiatives lack the vital new governance element of complementary hard regulation.¹⁷

¹³ J.Scott & D.Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ 8 European Law Journal 1-18 (2002) at 5; see also *infra* Section 4.0. See J.M.Conley & C.A.Williams, ‘Engage, Embed and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement’ 31 J. Corp. L. 1-38 (2005) at 6 for specific reference to new governance and CSR.

¹⁴ Trubek & Trubek note 7 at 543.

¹⁵ *Ibid* at 544.

¹⁶ *Ibid* at 6.

¹⁷ Trubek & Trubek note 7 at 544.

There is, however, scope for a truly third way of CSR regulation which would harness *both* hard and soft regulatory approaches. What would this third way look like in the business and human rights context? For the purposes of this analysis, three interconnected possibilities can be identified.

One possibility is the creation of ‘mix and match’ regulatory structures that bring together elements of voluntarism and hard regulation.¹⁸ Legislative measures could be combined with non-binding measures. For instance, a binding legislative obligation could be imposed upon firms to comply with their own voluntary codes of conduct.¹⁹ The content of the codes of conduct would thus be determined by business actors themselves. Nevertheless, litigation would be available as a strategy to enforce compliance with those obligations that firms chose to take upon themselves.²⁰ This kind of ‘immanent critique’ would respond to the criticism that voluntary codes of conduct are no more than empty promises. Another possibility would be to embed soft CSR standards within public procurement provisions, an option which has been considered by the EU.²¹

A second possibility is to use transparency requirements to promote compliance with human rights standards. Firms could be obliged to report publicly on what they have done to comply with CSR standards.²² These standards might be internally produced, by firms themselves, or created externally, either by non-enforceable legislative or other regulatory

¹⁸ For example, see K. Kolben, ‘Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes’ 48 Harv. Int’l L.J. 203 (2007). Kolben argues for the linkage of public and private regulatory approaches in order to incorporate social standards and labour rights into free trade agreements,

¹⁹ European Coalition for Corporate Justice (ECCJ), Advocacy Briefing, Corporate Social Responsibility at EU Level: Proposals and recommendations to the European Commission and the European Parliament, November 2006 at 2, 3 and 4. See also M. Nowak, ‘The Need for a World Court of Human Rights’ 7 Human Rights Law Review 251 (2007) at 256-257. Nowak proposes that a putative World Court of Human Rights could have jurisdiction over transnational corporations which accept voluntary codes of conduct with references to human rights standards.

²⁰ See *Kasky v. Nike Inc* 45 P.3d 243 (Cal.2002) where public statements by Nike regarding its labour record were held to be commercial speech and thus received a lesser level of constitutional protection than non-commercial speech; See also the decision of the US Supreme Court where the case was dismissed effectively allowing California Supreme Court’s ruling to stand, *Nike Inc et al v. Kasky* 539 U.S. 654 (2003).

²¹ See e.g. Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, at 5, COM (2002) 347 final (July 2, 2002): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:EN:PDF> [last accessed 29.10.11].

²² See e.g. UN Global Compact Integrity Measures, www.unglobalcompact.org/AboutTheGC/integrity.html [last accessed 28.10.11].

instruments, or by a participatory mechanism bringing together all of the relevant stakeholders (see below). A system of peer review, or external review by an international organization, or regional or national regulatory body, could provide an assessment of the reports. Examples of best practice would be made available for firms to draw upon in the future. Practices of ‘naming and shaming’ and league tables could induce firms to improve their CSR ratings, for reasons of image, and ‘good business sense.’²³ Some of these transparency elements are evident in the processes of the UN Global Compact, although as discussed in Chapter 4, its reporting system in particular is deeply flawed and some form of review or assessment mechanism is required to increase its effectiveness.

Alternatively, a system could be built on a participatory model. A participatory model would involve business, legislative authorities, and civil society. No single actor therefore, would have control over the creation of standards. All stakeholders would be involved in securing adherence to human rights standards. The standards themselves would be developed through an on-going dialogue between the relevant stakeholders, resulting in (provisional) statements of CSR good practice. The stakeholders would also monitor adherence to these non-binding norms, for instance through the practice of peer review, ‘naming and shaming’ and league tables outlined above. Such a system might be supported by legislative instruments that obliged the relevant parties to ‘come to the table’ and negotiate. A ‘penalty default’²⁴ of an enforceable CSR obligation might underpin such an approach, and ensure that it would be in the interests of all stakeholders to participate. While existing business and human rights initiatives have adopted some elements of a participatory model in terms of norm development, there are nonetheless ongoing concerns about the marginalisation of civil society within the processes.²⁵ This is notwithstanding Ruggie’s extensive efforts to include civil society in the drafting of the UNGPs.

²³ Ibid.

²⁴ The term ‘penalty default’ was first used by Ian Ayres and Robert Gertner, in ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’ 99 *Yale Law Journal* 87 (1989), in the context of contract law. A regulatory penalty default rule provides an incentive to stakeholders to reach agreed regulatory solutions, where the default position, which will apply in the absence of a bargained agreement, is unappealing to the stronger party. See B.C. Karkkainen, ‘Information-forcing Regulation and Environmental Governance’ in G. de Búrca and J. Scott (eds) *Law and New Governance in the EU and the US* (Oxford: Hart, 2006).

²⁵ See e.g. discussions *infra* at 3.3.3.2 and 6.2.

While it is clear that while new governance techniques have been adopted by various organisations and initiatives, the business and human rights paradigm cannot yet be said to have been ‘transformed’ into a truly hybrid regulatory system because of the lack of binding normative provisions.

7.2.2 Towards Transformation: The Need for an International Normative Framework

As established in Chapter 1, Berle and Dodd recognised that corporations have societal responsibilities beyond their duties towards shareholders.²⁶ They took the view that corporate actors owe obligations to their employees and to the communities in which they operate, among others, by virtue of their membership of society. It is clear that the international community is moving slowly towards this view, at least in principle, as it has become increasingly evident that business actors are capable of violating human rights standards in their own right and in complicity with States. This is evidenced by the unanimous acceptance of the UNGPs by the Human Rights Council in June 2011. What is also apparent, however, is that States are simply unwilling to move towards a binding international legal system where business actors can be held legally responsible for their human rights abuses. The proliferation of codes of conduct, both private and industry-based, leaders’ fora, and certification schemes supported by States demonstrate a strong preference for voluntary self-regulation as opposed to an overarching normative regulatory architecture. This seems to send out a very clear message that human rights violations by business are insufficiently significant to warrant greater legal protection, in terms of providing redress, punishment and deterrent.

It is indisputable that the Global Compact, the OECD Guidelines and the UNGPs, offer much in the way of dissemination of information and education about human rights abuses

²⁶ *Infra* at Section 1.2. See A.A.Berle, ‘Corporate Powers as Powers in Trust’ 44 Harv. L. Rev. 1049 (1931); A.A.Berle, ‘For Whom are Corporate Managers Trustees? A Note’ 45 Harvard L. Rev. 1365 (1932). D.Dodd, ‘For Whom are Corporate Managers Trustees?’ 45 Harv. L. Rev. 1145 (1932); A.A.Berle, & G.Means, *The Modern Corporation and Private Property* (with a new introduction by Weidenbaum, M. & Jensen, M.), (Transaction Publishers: New Brunswick, 1991) (originally published in 1932 by Harcourt, Brace and World Inc.). See also generally: J.Weiner, ‘The Berle-Dodd Dialogue on the Concept of the Corporation’ 64 Columbia L. Rev. 1458 (1964); C.A.Harwell Wells, ‘The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century’ 51 Kansas Law Review 77 – 140 (2002); K.Wedderburn, ‘The Social Responsibility of Companies’ 15 Melbourne University Law Review 4-30 (1985).

and standards, which is key to any strategy of human rights protection, but they also offer little in the way of remedies or redress for individual human rights abuses, nor do they seek to punish wrongdoers. Nevertheless such activities represent a further step towards Koh's internalisation of human rights norms. Koh writes that he has :

long argued in favour of a transnational legal process approach whereby techniques of process are used to internalize into transnational actors – here, multinational corporations – standards of right and wrong behaviour.²⁷

The UNGC and the OECD Guidelines are part of such a transnational legal process. The same can be said of the UN Guiding Principles (UNGPs), in that they are seeking to inculcate human rights standards among all business actors, but where they fall down is in the failure to insist upon direct binding duties with binding remedies and punishments as an adjunct to the voluntary standards. Arguably the UNGPs do not meet Ruggie's own standards as set out in the original 'Protect, Respect and Remedy' framework or indeed his stated aim of creating a regulatory smart-mix. While there is much to commend the UNGPs in terms of the elaboration of the due diligence principle, for example, and the reference to judicial remedies, Ruggie has been careful to avoid the imposition of any form of mandatory international rules with the emphasis on national approaches. The UNGPs cannot therefore lay claim to being a regulatory hybrid which is what seems to be implied by the term 'smart-mix.'

Furthermore, Ruggie has consistently made clear his distaste for a business and human rights treaty through his heavy-handed criticisms of the UN Norms²⁸ as well as public statements where he has indicated his disinclination to pursue the treaty option:

negotiations on an overarching treaty now would be unlikely to get off the ground, and even if they did the outcome could well leave us worse off than we are today.²⁹

He cites three reasons for his opposition:

²⁷ Koh (2004) note 1 at 273.

²⁸ *Infra* at Section 3.2.1.2. See also P.Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (forthcoming) 3 *Journal of Human Rights and Environment* (2012), available to download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933426 [last accessed 23.10.11] (hereinafter 'Simons') at 10; S Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' 31 *Human Rights Quarterly* 299 (2009) at 307-308.

²⁹ *Ethical Corp., By Invitation: John Ruggie: Business and Human Rights—Treaty Road not Travelled* (6 May 2008), available at http://www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf [last accessed 4.11.11] (hereinafter 'Ruggie (2008a)') at 42.

First, treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent. Second, and worse, a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights. And third, even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.³⁰

Ruggie states that advocates of the treaty approach have not adequately answered these questions³¹ but they are largely procedural issues and should not be used as a barrier to the creation of a normative framework. Ruggie also expresses concerns about human rights treaty processes resulting in normative documents which represent the lowest common denominator. While this is probably true, surely failing even to consider a normative framework is *also* pandering to the lowest common denominator: the ‘result will not be worth it, therefore we will not even bother’ approach to international regulation. It seems to amount to a rather defeatist attitude towards international law and what it may or may not achieve. Ruggie is right that soft measures may be the most efficient response to address the problem of human rights violations by business actors in the short term but that does not preclude normative options in the longer term. Moreover, there is no guarantee that softer approaches will give quicker results. It is also difficult to see how launching a parallel and complementary normative approach would undermine existing soft initiatives. Ruggie is not a lawyer and perhaps sees no value in the law but as Allott notes the value of law is broad and appealing:

law defeats the passage of time by retaining choices made in a society’s past, in a form – the law – which can take effect in a society’s future. the law which is retained from society’s past takes effect in society’s present, as the law is interpreted and applied in the light of actual circumstances, and so helps to make society’s future. the law carries the past through the present into the future. the law offers to society stability in the midst of ceaseless change, and change-from-stability as new human circumstances demand new human choices . . . law is a wonderful, and insufficiently appreciated, human invention.³²

While there is no doubt that Ruggie’s concerns about the limitations of the international legal process are genuine and difficult to resolve, nevertheless, the UNGPs would have been an ideal opportunity to make a recommendation for the creation of binding

³⁰ Ibid.

³¹ Ibid at 43.

³² P.Allott, *The Health of Nations: Society and Law Beyond the State*, (Cambridge: CUP, 2002) (hereinafter ‘Allott (2002)’) at 134 para. 5.7.

international obligations as a medium to longer-term goal.³³ Contrary to Ruggie's view, such a recommendation could coexist quite happily with regulatory soft options and would have offered a genuinely transforming regulatory smart mix. A top-down - bottom-up approach which involves the international community, individual States, business actors, as well as civil society, would also help to address the issue of what Ruggie describes as the 'math' i.e. the sheer numbers of business actors involved.³⁴

There is also a danger that attempts to 'Ruggie-proof' the commercial policies of business actors will result in corporate lawyers seeking to achieve the lowest possible levels of human rights compliance by their clients as opposed to raising the bar. To be effective, norm internalisation must be accompanied by a sort of corporate 'inner morality' which demands the adoption of higher standards, notwithstanding any duties imposed, in this case the duty to respect human rights and take care to 'do no harm.' This is in essence an application of Lon Fuller's thesis on the morality of aspiration versus the morality of duty. That is, the pursuit of 'excellence' or how society ought to be, versus the imposition of the most basic preconditions necessary for an 'ordered society.'³⁵ As Fuller puts it 'the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom.'³⁶ Thus demands for the regulation of business and human rights require more than a simple exhortation to 'do no harm:'

To meet these demands human energies must be directed towards specific kinds of achievement and not merely warned away from harmful acts.³⁷

An aspirational approach to business actors' human rights obligations is to be preferred because a morality of duty condemns the individual and her human rights to the lowest possible standards of protection. Notwithstanding the inherent difficulties of implementing aspirational rights, notions of corporate 'inner morality' run into difficulties because

³³ Simons note 27 at 6 at 10-11 criticises Ruggie's refusal to consider binding international obligations.

³⁴ Ruggie (2008a) note 28 at 43.

³⁵ L.Fuller, *The Morality of Law* (Revised Edition) (Yale University Press: New Haven and London, 1964) (hereinafter 'Fuller') at 5.

³⁶ *Ibid* at 5.

³⁷ *Ibid* at 42.

obviously corporate entities have ‘no soul to damn’ which brings us to another significant problem, that of separate legal personality.

7.2.3 Souls to Damn and Bodies to Kick: The Responsibility of Owners and Managers

The legal fiction of the separate legal personality of the corporation has led to a disconnect or a distance between the people who own and manage companies and the people and communities where they do business. This dehumanisation occurs irrespective of the size of the business, because as has been demonstrated, human rights violations are committed by some of the largest enterprises in existence, such as Royal Dutch Shell discussed in Chapter 1, and by small companies with only one or two directors, such as Afrimex which was discussed in Chapter 5. Incorporation of a business creates a legal entity separate and ‘veiled’ from those who own and manage the company. What is crucial is that the fiction protects the owners and managers from personal responsibility even where human rights abuses occur.³⁸ It is suggested that lifting the veil of incorporation, which insulates those responsible for making the decisions which intentionally or unintentionally result in human rights violations, would moderate corporate behaviour significantly. It is morally repugnant that a legal entity, created by humans, should be permitted to harm other human beings with impunity. It is even more abhorrent when it is considered that legal systems will lift or pierce the veil of incorporation in order to identify, for example, fraudulent behaviour by managers and owners.

In order for business enterprises to be good international citizens, a human rights ethos must be respected by the citizens who own and manage them. Human rights abuses are not physically perpetrated by companies, which are merely legal constructs, rather they are committed by those who work for the companies, the employees, managers and sub-contractors. One possibility for dealing with this, therefore, is to adopt the management responsibility model used in the *IG Farben*, *Flick*, *Krupp*, and *Roechling* decisions of the

³⁸ With the exception of the mandate of the International Criminal Court over the offences of genocide, crimes against humanity and war crimes committed by individuals. Rome Statute of the International Criminal Court A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002 <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> [last accessed 18.9.11] Arts 6,7 and 8.

Nuremberg Tribunals. As highlighted in Chapter 1, the NMT convicted leading members of the *Vorstand* or board of management.³⁹ The rationale was that as companies have no body to kick nor a soul to damn then it made sense to punish those who ran the business and made the day to day decisions which resulted in the human rights violations, in these cases, crimes of aggression, crimes against peace, spoilation, and using forced labour. In other words, the corporate veil was lifted because the individuals were utilising the ‘instrumentality’ of the companies to commit the abuses. Furthermore, international law already recognises that individuals are capable of committing human rights abuses under the Rome Statute of the International Criminal Court,⁴⁰ so extending the principle to the managers of a business would not require some great theoretical shift. There are numerous national precedents where courts have lifted the corporate veil where there is suspicion of fraudulent behaviour and exploitation of the corporate entity.⁴¹ A court could easily be empowered to lift the corporate veil in order to identify and punish owners and managers when a corporate device is being misused for the purposes of insulating from responsibility those individuals committing human rights abuses. The creation of personal liability would be likely to have a strong deterrent effect.

7.3 Are the UN Guiding Principles on Business and Human Rights the Solution?

What hope is there that the UN Guiding Principles will resolve the various problems outlined throughout this dissertation? In essence the Protect, Respect and Remedy framework which underpins the UNGPs adheres to a traditional conception of international law, that is, one where the subject-object dichotomy still prevails. Under the current State-centric system of international law, it is self-evident that States have the primary responsibility for protecting human rights but such an approach is arguably too formalistic

³⁹ *Infra* at Section 1.2.

⁴⁰ Rome Statute of the International Criminal Court July 17, 1998, UN Doc. A/CONF.183/9; 37 ILM 999 (1998) (as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999) Article 25.

⁴¹ For a discussion of case law in this area see e.g. J.M.Dobson, ‘Lifting the Veil in Four Countries: The Law of Argentina, England, France and the United States’ 35 ICLQ 839 (1986); J.Payne, ‘Lifting the Corporate Veil: A Reassessment of the Fraud Exception’ 56(2) Cambridge Law Journal 284-290 (1997); S.Ottolenghi, ‘From Peeping Behind the Corporate Veil, to Ignoring it Completely’ 53 MLR 338-353 (1990). See also OECD, ‘Behind the Corporate Veil’ Using Corporate Entities for Illicit Purposes (OECD: Paris, 2001) <http://www.oecd.org/dataoecd/0/3/43703185.pdf> [last accessed 29.10.11].

and in addition ignores the reality of power. It allows States a ‘get out.’ For example the UK has stated its position clearly:

The UK agrees that certain treaty provisions may impose an express or implied duty on States to protect against non-State human rights abuses. However, it does not consider that there is a general duty to protect under the core UN human rights treaties, nor that such a duty is generally agreed to exist as a matter of customary international law.⁴²

States and others also engage in a circular argument which goes something along the lines of: business actors were not participants in the creation of international human rights instruments (because they are not subjects of international law), therefore, they ought not to be subject to those human rights obligations and we, as States, do not wish to consider them as subjects of international law.⁴³ Nevertheless ‘many treaties and international instruments do impose substantive duties upon corporations’⁴⁴ in a more general context, so why not in relation to human rights?

Chapter 1 of this dissertation makes clear that business actors are active and powerful participants on the international stage, wielding tremendous economic and political power in both developed and developing States. Thus States ought to exercise careful authority over them on behalf of their citizens. Nevertheless, there is an insistence that business entities need only respect human rights standards which implies a passivity on their part and in turn supports the argument that they exist as mere objects under international law. This is apparent in the UNGC, the OECD Guidelines and now the UNGPs, none of which impose a binding human rights obligation on business actors. Chapters 2 and 3 of this dissertation, however, demonstrate that business actors may be considered subjects of international law, or at least participants in it, and therefore ought to be categorised as dutyholders. Human beings need protection from abuse, no matter the source, whether it is a State, an individual or a business. International law has created international regulatory mechanisms to deal with human rights abuses committed by States and to a certain extent,

⁴² Letter to SGSR Ruggie from Daniel Bethlehem, UK Foreign and Commonwealth Office, Legal Adviser, 9 July 2009 <http://198.170.85.29/UK-Foreign-Office-letter-to-Ruggie-9-Jul-2009.pdf> [last accessed 18.9.11].

⁴³ See e.g. Responses to the Note Verbale from the High Commissioner for Human Rights, Decision 2004/116 of 20 April 2004 ‘Responsibilities of transnational corporations and related business enterprises with regard to human rights, in particular the US response to the Norms and that of Mendelson.

⁴⁴ Koh (2004) note 1 at 264.

individuals, specifically via the Statute of the ICC.⁴⁵ Why, therefore, should corporate business actors be excluded? It is becoming increasingly difficult to justify their exclusion because a State-centric system of international law values maintenance of the theoretical and practical *status quo* over individuals and in so doing permits misbehaviour by business entities to continue with impunity. Such a system represents a ‘legal positivism’ that assumes:

law should be viewed not as the product of an interplay of purposive orientations between the citizen and his government but as a one-way projection of authority, originating with government and imposing itself on the citizen.⁴⁶

When such a State-centric ‘authority-based view of society’ is permitted to flourish, it:

‘tend[s] to make all society seem to be essentially a system of authority, and . . . to make societies incorporating systems of authority seem to be the most significant forms of society, at the expense of all other forms of society, including non-patriarchal families, at one extreme, and international society, at the other.’⁴⁷

This results in an international system which alienates individuals because it ‘seems to be the business of a foreign realm, another world, in which they play no personal part.’⁴⁸ It also creates a system where the interests of the State and commercial actors trump those of individuals and international law is (mis)directed in such a way as to protect that arrangement. States have become the primary actors in all matters, ‘forgetting’ that they exist solely to serve the human beings who created them and resulting in a ‘tail wagging the dog’ scenario.

7.4 What of the OECD Guidelines on Multinational Enterprises 2011?

The OECD, in its May 2011 update of the Guidelines on Multinational Enterprises, has wasted a golden opportunity to strengthen the role of its National Contact Points and thus enhance the ‘remedy’ aspect of the OECD system. Nevertheless, the inclusion of a specific human rights chapter, linkage with the Ruggie Protect, Respect and Remedy framework,

⁴⁵ Art.25 note 37.

⁴⁶ Fuller note 34 at 204.

⁴⁷ P.Allott, *Eunomia: New Order for a New World*, (2nd ed.), (Oxford: OUP, 2001) (hereinafter ‘Allott (2001)’) at 200 para.12.54.

⁴⁸ Allottt *ibid* at 298-299 para.16.8.

and a clear emphasis on the due diligence principle is to be welcomed,⁴⁹ albeit cautiously. Notwithstanding these positives, the update does not go far enough. In particular, the amendments will make little difference to preventing the behaviour of rogue business actors in the vein of Afrimex. While UK, Dutch and Norwegian NCPs and SIPs are far from perfect as highlighted in Chapter 5, they at least offer a glimpse of a system whereby transnational business actors can be held publicly accountable for their actions in host States even if they cannot be punished, whereas many of the other NCPs ‘grossly underperform.’⁵⁰ The OECD has disappointed by failing to establish consistent standards for NCPs and an uneven NCP architecture remains in place. As Amnesty International highlights, the NCPs have been in place for more than ten years, giving ample time for a great deal to be ‘learnt about what works and what does not work’ in relation to their structure and functioning.⁵¹ What seems clear therefore is that there is insufficient will on the part of Adhering States to put in place a truly effective redress mechanism. The majority of NCPs lack transparency, they offer no remedy for the victims of human rights violations and all lack any punishment or deterrent effect.

7.5 The Limitations of Reputational Carrots and The Need for Regulatory Sticks

Experience shows that there are some businesses for which reputation is tremendously important but what of those businesses who ‘fly under the radar’ as Ruggie puts it? What of companies like Afrimex, discussed in Chapter 5, which seek to continue doing business while ignoring basic standards of behaviour? Such commercial actors will never respond to reputational carrots. They are too far removed from consumers to attract negative publicity let alone to care about or be affected by boycotts. They will never be persuaded that being ethically ‘good’ is also good for business. Indeed there is empirical evidence to suggest that boycotts have little impact on the behaviour of even the most prominent

⁴⁹ Amnesty International Public Statement, ‘The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation,’ 23 May 2011, AI Index: IOR 30/001/2011 at 1.

⁵⁰ Ibid at 2.

⁵¹ Ibid at 2.

companies because of their limited economic effect.⁵² Given these facts, how therefore should the international community deal with rogue businesses?

States, of course, will reiterate that it is the responsibility of States to protect against human rights abuses, and there is no question that the primary responsibility for human rights protection *does* rest with States. Allowing private business actors to fall within the scope of international human rights law does not diminish the obligations of States, rather it acknowledges that there are others actors which are capable of violating human rights norms. Of course, States must not be permitted to escape liability for their own failures, but if commercial entities are capable of committing human rights abuses then it makes sense to hold them to account for their actions in addition to, and irrespective of, the role of the State.

To achieve that accountability, the international community must insist that business actors act in a socially responsible manner no matter where they do business. Furthermore, there must be an acknowledgement that commercial entities are, at minimum, participants in the global community and as such their behaviour ought to comply with the normative standards established by the global community. It is unacceptable to allow business actors to act with impunity in relation to human rights because they did not participate in the drafting of a treaty or because a positivist interpretation of international law concludes that they are merely objects of international law. Such arguments fail to recognise that the individual is at the heart of international law as argued in Chapter 3. It is therefore the role of States to protect individuals from abuse, not simply as the legal guardians of human rights treaties, but as legislators and policy-makers. Protecting individuals from human rights abuses includes creating systems of accountability and responsibility for those who do wrong, as well punishing them. Existing initiatives, such as the Global Compact and the OECD Guidelines, while laudable and certainly effective at disseminating information and educating business about human rights, provide little in the way of redress for individuals affected by human rights abuses. The UNGPs sidestep the issue by devolving

⁵² See S.Zadek & M.Forstater, 'Making Civil Regulation Work', in M.K.Addo, (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, (London: Kluwer Law International, 1999) 69-76 at 69-70; P.Muchlinksi, 'Human Rights and multinationals: is there a problem?' 77 *International Affairs* 31-47 (2001) at 39.

the responsibility to legislate and to create judicial remedies to individual States. Of course, dissemination and education play an important role in preventing human rights abuses but these initiatives cannot stop human rights abuses from continuing once they are occurring, nor can they punish the wrongdoers and thus act as a deterrent. Therefore, in addition to soft regulatory mechanisms, national judicial and non-judicial remedies, a binding international regulatory framework ought to be implemented.

7.6 The Prospect for International Regulation

...if there is power there must be responsibility.⁵³

There is no question that States are the main abusers of international human rights standards. Modern international human rights law developed as a reaction to the excesses of States and a catalogue of contemporary examples demonstrate the urgent need to implement and enforce human rights principles against the worst State offenders. It has not been the purpose of this dissertation, however, to deflect responsibility for human rights abuses from States to non-State actors, specifically business entities. Rather, this dissertation has established that commercial entities are capable of violating human rights in their own right, as well as in complicity with States, and that the international initiatives which have developed to address the issue of business and human rights have limited impact in terms of preventing, stopping or remedying these abuses given the lack of enforcement, punishment, deterrent and individual redress mechanisms.

It should be borne in mind that international human rights law sets out the *minimum* standard of behaviour expected of States and there is nothing to prevent States from adhering to higher standards of behaviour, indeed many human rights are aspirational in nature. This is especially true in relation to economic and social rights, such as the right to health and the right to housing, which require financial outlay by the State. So, for example, the rights contained within the International Covenant on Economic, Social and Cultural rights are to be ‘progressively realised’ by States, a principle designed to take account of developmental differences between industrialised and developing nations. Thus some States are able to provide sophisticated, multi-layered levels of healthcare, for example, whereas the poorest nations may struggle to offer its citizens the most basic

⁵³ C.G.Weeramantry, ‘Human Rights and the Global Marketplace’ 25 Brooklyn J. Int’l L. 27 (1999) at para. IX.

primary healthcare. Nevertheless, a rich State may be violating its obligations under the ICESCR if it does not actively seek to ‘progressively realise,’ i.e. improve, the right to health it affords, and a poor State may be complying with its human rights duties by the provision of emergency healthcare only because only that is within its particular developmental narrative.

The international community cannot deny that private business actors are involved in human rights violations. From Shell’s operations in the Niger Delta to the activities of ‘off the shelf’ companies in the DRC, from the textile sweatshops in developing nations around the globe, to Total turning a blind eye to the use of forced labour in Burma/Myanmar, businesses of all shapes, sizes and legal formats are engaged directly in human rights violations and are actually doing harm or are failing to engage in adequate due diligence as regards their relationships both with States and other businesses within their supply chain. These are facts and it is hard to see how soft approaches would have changed the behaviour of these companies.

There is an undeniable timidity on the part of States in addressing this issue. If the international legal system is truly State-centred then States ought to be able to control miscreant objects of international law such as private business actors. As constructs of society why should they not act as agents for an ethical global society? The responses are that the sole purpose of business is to make profit; that it is not the job of business to save the world; that business actors did not participate in the establishment of human rights norms and thus ought not to be bound by them; and that it is the State’s role to address the extraterritorial behaviour of its nationals. To which the reply must be, firstly, the mantra that the sole responsibility of business is to make profit is a self-fulfilling neo-liberal maxim that no longer enjoys universal acceptance. It has long been established that business actors have, or at least ought to have, additional responsibilities to a variety of stakeholders, not least their employees and the communities in which they operate. Secondly, this is no plea for private business actors to save the world. Rather it is a plea for the international community to take a look at the participants on the international plane, to acknowledge that non-State actors are capable of wielding immense power and, in turn, that they are capable of abusing that power. States are understandably concerned about the

rolling back of State power but in failing to properly regulate the behaviour of private business actors, further human rights violations are inevitable. Thus the international community is contributing to a situation whereby developing nations in particular are often rendered powerless or complicit in human rights abuses.

States are right to highlight the major deficits in State adherence to international human rights standards but by refusing to extend human rights obligations to business actors in a formal manner, States are clinging to an archaic system of international law which protects State sovereignty at the expense of individuals who experience human rights abuses as a result of commercial activities. The international community may be unable or unwilling to address the crimes committed for the reasons outlined in Chapter 1. For example, a host State may be reliant on foreign direct investment and beholden to neoliberal conditionalities imposed by the IMF or World Bank. A home State may similarly be unwilling to challenge the neoliberal paradigm because of a political adherence to such economic policies by its elected government. Of course this reluctance becomes apparent in policy-making and negotiations at the UN, OECD, EU and elsewhere.

If international standards of behaviour were established, then it would become increasingly difficult for business actors to ‘bottom feed.’ It would create an ever more level international playing field for commercial activities and developing nations would be not be fearful of losing foreign direct investment because the same normative framework would be applicable in all States. The incentive to do business in a country with lower standards would thus disappear. In the same way, therefore, that States are encouraged to put in place laws protecting investors in order to create a safe commercial environment, so too should there be laws which guarantee a safe environment for individuals and communities. Indeed Koh argues that the creation of a level human rights playing field via a treaty would actually contribute to a stable investment and commercial environment for business actors, because:

Corporations...need a safe harbor: certainty that conduct in which they self-consciously and thoughtfully engage will not automatically expose them to domestic human rights lawsuits.⁵⁴

⁵⁴ Koh (2004) note 1 at 273

Industrialised nations are in no position to preach to rogue States which consistently abuse human rights if they are willing to export business actors who also pay scant regard to minimum standards of behaviour to local populations. As discussed in Chapter 1, many of the most powerful transnational business enterprises are headquartered in developed States, and frequently operate double standards in relation to their minimum expected behaviour. Activities which would not be tolerated or which might be illegal in an industrialised nation take place with impunity in countries with less effective regulatory provisions.

The implementation of normative standards for business actors is possible. So for example, an international regulatory approach to corruption and bribery has been successful, with the internalising of ‘standards of right and wrong behaviour’ in business actors taking place. Koh elaborates:

In 1977...Congress passed a Foreign Corrupt Practices Act, which imposed certain standards on US corporations through domestic civil and criminal legislation. Then, as now, alarmists claimed that the chance of liability would cost US corporations billions and slash foreign direct investment. But the fact that US corporations were subjected to these legal constraints soon made them advocates for an OECD Bribery Convention, which is now functioning and becoming internalized into the law of the member nations.⁵⁵

Koh expresses the hope that a similar approach could be successfully applied to human rights abuses.

If the UNGP approach is to be effective then the requirement of *effective* remedies cannot be ignored. It is simply not enough to rely on business actors to regulate themselves or for States to individually implement the normative standards proposed by the UNGPs. The past two decades have demonstrated that self-regulation does not work because some of the worst cases of human rights abuses by business actors have occurred during an era of voluntarism typified by codes of conduct and industry self-regulatory initiatives. Thus the need for a deterrent ought not to be underestimated. Even where the most egregious human rights violations take place companies such as Blackwater/Xe do their best to circumvent the reach of the voluntary initiatives, by refusing to submit to scrutiny processes despite

⁵⁵ Koh (2004) note 1 at 274.

having earlier indicated that they would.⁵⁶ Others such as Afrimex simply feign participation in and adherence to the processes, as described in Section 5.5.3.

What would be the outcome of an international legal system that recognised that legal persons have obligations under international law, specifically in relation to human rights? At minimum, institutional mechanisms could be put in place with periodic monitoring and reporting functions as well as fostering ‘critical thinking and best practices, advice and support’ and ‘standard-setting for human rights impact assessments.’⁵⁷ It is to be hoped that mandatory punishments would have a substantial deterrent effect and that business actors would refrain from violating human rights. Furthermore it would offer the victims of human rights abuses redress. As Koh says, ‘international legislative developments’ are ‘[w]hat we need most now.’⁵⁸

The international community has settled into a complacency, exemplified by the UN Guiding Principles, whereby there is a belief that human rights cannot be protected by international regulatory mechanisms and therefore they are not even attempted. It may be difficult to create international legislation and indeed, the outcome of a treaty process may not even be very good law. Nevertheless, a world where there is at least an attempt to legally reign in the abuse of power by business actors in order to protect and defend human beings is better than a world which sits back and forgets that both States and business

⁵⁶ Blackwater was a US private military and security company whose operatives were involved in a massacre of civilians in Nissour Square in Iraq. The company was a member of the International Peace Operators Association (now the International Stability Operations Association) and subject to that organisation’s internal code of conduct. On being informed of an investigation into events, Blackwater left IPOA, changed its name to Xe and continues to win US government contracts to operate in Iraq. See A.Cole, ‘Blackwater Quits Security Association’ Wall Street Journal, 11 October 2007, <http://online.wsj.com/article/SB119207104012555696.html> [last accessed 31.10.11]. See also S.MacLeod, ‘The Role of International Regulatory Initiatives on Business and Human Rights for Holding Private Military and Security Companies to Account’ in F.Francioni & N.Ronzitti, (eds) *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (OUP: Oxford, 2011) (hereinafter ‘War by Contract’) 343-361. For an outline of the Nisour Square incident see S.Chesterman & A.Fisher, ‘Private security, public order’ in S.Chesterman & A.Fisher (eds), *Private Security, Public Order: The outsourcing of public services and its limits* (OUP: Oxford, 2009) 222–226, at 222. On the failed criminal prosecution in the US see O.Quirico, ‘The Criminal Responsibility of PMSC Personnel under International Humanitarian Law’ in *War by Contract* 423-447 at 423-424.

⁵⁷ R.McCorquodale, Submission to the Consultation on the Guiding Principles, ‘Draft Guiding Principles for the Implementation of the Protect, Respect and Remedy Framework: Comments’ <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions> [last accessed 23.10.11] at 3.

⁵⁸ Koh (2004) note 1 at 273.

actors are human creations and are subject to human will. If States continue to resist mandatory international regulation of business and human rights then it simply lends credence to Allot's devastatingly pessimistic conclusion that:

...the only constant in human social history is the ruthless self-protecting of social privilege. The only human right which is universally enforced is the right of the rich to get richer.⁵⁹

⁵⁹ Allott (2002) note 31 at 92, para.3.46.

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