



FACULTY OF LAW  
University of Lund

Anna Bohman

The added value of the UN Draft  
Norms as compared to existing  
codes on Corporate Social  
Responsibility and their legal  
status

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Supervisor:  
Prof. Gudmundur Alfredsson

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## SUMMARY

When the United Nations was created in 1945, states were the only significant decision-makers. Even with the construction of the human rights regime in the aftermath of the Second World War, states were designated as the only duty-bearers who could violate international human rights law. States alone were held responsible for implementing human rights principles by enforcing treaty-based obligations or customary norms within their domestic jurisdictions.

Today we live in a global world wherein not only states, but a variety of actors have come to play significant public roles. Some 70,000 transnational companies, together with roughly 700,000 subsidiaries and millions of suppliers span every corner of the globe. The rights of transnational companies - their ability to operate and expand globally – have increased greatly as a result of trade agreements, bilateral investment treaties and domestic liberalization. When global firms are widely perceived as abusing their power, demands for corporate responsibility and accountability has generated greater support.

Instituting effective policies and practices to deal with corporate responsibility has been on the agenda of civil society actors, corporations and Governments for some time. Numerous initiatives have been adopted by companies, both individually and collectively, Governments and international organisations.

All existing instruments specifically aimed at holding corporations to international human rights, labour and environmental standards are of a voluntary nature. Voluntary initiatives do have some value in that they provide minimum standards for companies to follow and raise the level of company behavior. Furthermore, voluntary codes raise consciousness about the need for standards and provide guidance for laws that could be adopted at a national level.

Despite the growing number of voluntary initiatives, such approaches are often characterized by significant weaknesses. Current initiatives are rarely based directly on internationally agreed standards, are not able to effectively influence the performance of “determined laggards” and fail to cover many critical corporate responsibility issues. Voluntary initiatives cannot be seen as a substitute for regulation which establishes a baseline of rights, duties and consistent behaviour.

The United Nations’ Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights set out, in a single document, a comprehensive list of human rights obligations of companies and their reach is extensive. They deal with a variety of corporate responsibilities, including some that are traditionally dealt with outside the human rights framework such as environmental issues and consumer protection. The Draft Norms fill an important gap in the

protection of human rights, applies to all companies and can help to level the playing field for companies that want to do the right thing for human rights. They are the most comprehensive effort as regards standards on corporate responsibility so far but not as unique or unforeseen as some businesses think. The Draft Norms simply attempt to restate relevant human rights law in regard to the obligations of businesses within their particular spheres of influence and activity. As reiterated in the Draft Norms, primary responsibility to protect and promote human rights in international law as well as national law remains with governments. Business cannot and should not replace government. The two should have complementary roles in protecting human rights.

Even though the Norms were drafted with the intent of becoming legally binding, the Commission on Human Rights, in its decision 2004/116 of 20 April 2004, expressed the view that while the Draft Norms contained “useful elements and ideas” for its consideration, as a draft the proposal had no legal standing. The Draft Norms cannot be enforced and therefore have similar problems to other existing voluntary initiatives and, given the absence of any defined implementation or monitoring mechanism, have at present even fewer teeth than the OECD Guidelines.

Given the divergent ongoing efforts of the international community to bring business in line with human rights, it must be foreseen that some kind of international regulation over the years will be established. Whether the Draft Norms are the answer to the corporate accountability vacuum is debatable.

However, the Draft Norms are designed to incorporate and encourage further evolution and are by no means the last step in relation to corporate responsibility and human rights. It must be stressed that the Norms made an invaluable contribution to addressing the shortcomings of current approaches to corporate social responsibility and have set an important benchmark for any future normative efforts.

The Draft Norms have put businesses’ responsibilities at the top of the agenda and a positive outcome to the issue of accountability of corporations must be ensured. There is still a gap in understanding what the international community expects of business. Common benchmarks that provide clarity in regards to responsibility and accountability are therefore needed.

The change towards corporate responsibility will not be a swift one but will take time to gain support. If the debate on corporate responsibility ends without an outcome, all stakeholders will be losers. However, the biggest losers will be companies that will be seen as putting profit before principle. The challenge for companies will grow as corporate influence continues to increase. Under international law “every organ of society” should be held accountable.

# Abbreviations

UN	United Nations
CSR	Corporate Social Responsibility
OECD	Organisation for Economic Co-operation and Development
ILO	International Labour Organisation
BIAC	The Business and Industry Advisory Committee
UDHR	Universal Declaration of Human Rights
NGO	Non-Governmental Organisation
CIME	Committee on International Investment and Multinational Enterprises
NCP	National Contact Point
TUAC	The Trade Union Advisory Committee
DRC	Democratic Republic of Congo
GC	Global Compact
GCO	Global Compact Office
OHCHR Rights	Office of the High Commissioner for Human Rights
MNE Declaration	Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

# 1. Introduction

After the Second World War an international system for the protection and promotion of human rights started to develop. With the aim that such atrocities that took place during the war should never again be repeated, international and regional treaties for the protection of human rights were drawn up. The framework for enhancing the observance and protection of human rights has consistently expanded and has obtained increasing authority. Human rights now have a permanent position on the international political agenda.

The increased attention given to human rights protection was paralleled by developments in other areas. Trade, capital and communication rapidly expanded across national borders. As a result of this changing economic climate, commonly referred to as globalisation, new actors gained a considerable influence on the international plane. In 1970 Milton Friedman wrote that “the one and only social responsibility of business is to increase its profits”.<sup>1</sup> However, since the 1970s international business has undergone a tremendous development. Non-governmental organisations, international financial institutions and multinational corporations have now acquired important roles in areas previously dominated by states. The number of multinational corporations in the world increased from 7000 in 1970 to more than 60 000 with over 800 000 affiliates in 2001. Of the 100 largest concentrations of wealth in the world, 51 percent are owned by global corporations and only 49 percent by states. Ford’s trade totals are more than South Africa’s gross national product and Royal Dutch Shell’s income is more than Norway’s.

Although international law first and foremost considers states to be bearers of human rights obligations<sup>2</sup>, globalisation has contributed to the increased influence of multinational corporations in general and to their effect on human rights in particular. With increased influence follows growing obligations. A significant step towards realising these obligations was taken in August 2003 by the United Nations’ Sub-Commission on the Promotion and Protection on Human Rights when it approved the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.<sup>3</sup>

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<sup>1</sup> M. T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, 2000, p. 19.

<sup>2</sup> This notion was confirmed in the Vienna Declaration and Program of Action, part 1, article 1. The prime responsibility of states was also stressed in the preamble to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, General Assembly resolution 53/144, adopted on 8 March 1999.

<sup>3</sup> Sub-Commission resolution 2003/16 of 13 August 2003.

A few states have already created supporting legislation to promote corporate responsibility, such as UK and German pension funds, Australian investment law and French and Australian reporting requirements for listed companies. However, the UN Draft Norms are the first attempt to establish a mandatory international legal framework for standards on corporate social responsibility, CSR.<sup>4</sup>

Corporations can influence human rights in several ways. The impact of corporate activities on human rights can be considerable. Because of the economic power of corporations and their ability to move their investments elsewhere, they can force a country, competing for foreign direct investment, to lower its standards. The competition between corporations can lead to lower social and environmental standards, often referred to as “a race to the bottom”. Corporations can also themselves be involved in human rights violations, either directly or in collusion with others, such as states.

Several corporations are increasingly recognising that they have responsibilities in the field of human rights and are actively promoting such rights. In recent years the negative impact of corporations on the effective enjoyment of human rights has received increasing attention. The reputation of companies is influenced by their willingness to recognise their role in respect of human rights. Growing attention is paid to CSR. The days when companies could remain silent about human rights issues are over. Initiatives and standards relevant to CSR have increased rapidly over the last 15 years. International guidelines on the social policies of corporations have been adopted and these directly address corporations. Four of these agreements on CSR, two of which were produced at an inter-governmental level, have been selected as the subject of this presentation, namely the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the Global Compact and finally the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

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<sup>4</sup> S. Skadegard Thorsen and A. Meisling, ”Perspectives on the UN Draft Norms”, p. 2. Available at [www.lawhouse.dk](http://www.lawhouse.dk)



## 1.1 Subject and aim

The aim of this thesis is to examine and compare the scope and legal status of selected standards on corporate responsibility and to analyse to what extent the UN Draft Norms bring any added value to existing codes. The varying existing standards and initiatives make any comparison of their scope and legal status complex. Nonetheless the following criteria have been taken into account:

### - *Objective*

Initiatives and standards on business and human rights might seek to protect human rights, promote human rights or a mixture of the two. For example, the Global Compact is promotional in character in that it asks companies to embrace, support and enact a set of core principles including two on human rights. Some initiatives are both promotional and protective; for example, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy aims to encourage the positive contribution of business while minimizing and resolving risks and difficulties. The OECD Guidelines create a system of national focal points to resolve specific issues arising in implementation.

### - *Source*

The source of an initiative and standard - government, intergovernmental, business, civil society - can be relevant to determining its reach and authority. For example, initiatives and standards agreed or adopted in the context of the United Nations or ILO can carry significant authority given the international and intergovernmental character of these organizations.

### - *Coverage including human rights*

The level of specificity of references to human rights in initiatives and standards provides an important indication of scope from a human rights perspective. Many initiatives and standards refer to human rights in general terms; however relatively few actually set out specific human rights provisions that are relevant to the activities of business. For example, the OECD Guidelines on Multinational Enterprises refer to human rights in only broad terms, while the ILO Tripartite Declaration refers to specific workers' rights.

### - *Implementation and monitoring*

Initiatives and standards apply a range of implementation or monitoring mechanisms. Some voluntary initiatives, such as the Global Compact, do not envisage monitoring as such. International instruments such as human rights treaties or the United Nations Convention against corruption envisage national monitoring.

### - *Legal status*

Differentiation is made between standards that are:

1. Binding on companies

Constitutions and national legislation in many states include human rights responsibilities that are binding on companies. Companies themselves might also make human rights initiatives binding through inclusion of specific terms to that effect in contracts.

## 2. Binding on States

International treaties such as the principal human rights treaties are binding on States parties. While international declarations are not binding on States, they do indicate a level of commitment on behalf of the State to uphold the principles in the instrument.

## 3. Non-binding

The bulk of existing initiatives on business and human rights fall within the category of non-binding.<sup>5</sup>

# 1.2 Limitations

The subject of this thesis is the multinational corporation, defined as a legal person that owns or controls production, distribution or service facilities outside the country in which it is based.<sup>6</sup> Besides the term corporation, enterprise, business and company will also be used.

A multitude of codes on corporate social responsibility exist at the international and regional level. The term voluntary initiatives is often used for these codes which is somewhat misleading since at present there are no codes of conduct that are binding for companies and thus all initiatives so far have been voluntary. A better approach is to make a distinction between governmental and non-governmental initiatives. Two of the codes discussed in this presentation, the OECD Guidelines and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), have been chosen due to the inter-governmental aspect of their drafting procedure. Moreover, two of the UN's initiatives on CSR, the Global Compact and the UN Draft Norms, have been selected because they originate from the most influential and widely represented international organisation in the world. The aim, function, scope, key issues and legal status of the codes will be analysed. The thesis will examine what added value the UN Draft Norms offer as compared to the other codes and what their legal implications would be, should they be adopted. The challenging questions of whether companies can assume binding obligations under international law, to what extent they in that case have obligations as regards human rights and the possible remedies for violations will not be ventured into but are in themselves issues for a thesis.

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<sup>5</sup> See 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, document E/CN.4/2005/91 of 15 February 2005 at pp. 4-5.

<sup>6</sup> M. T. Kamminga, "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC", in Alston (ed.), *The EU and Human Rights*, 1999, p. 553.

## **1.3 Method and materials**

The thesis is structured as a combined descriptive and analytical study of four different standards that address companies. These standards are examined in accordance with certain criteria including objective, key issues, supervision and implementation and legal status. I have attempted to determine whether the UN Draft Norms add value to the existing standards or whether a different framework is needed to regulate company behaviour. The sources used are international standards addressing corporate responsibility and explanatory material, literature, articles found in various periodicals, UN documents and resolutions, OECD and ILO documents and NGO publications.

## **1.4 Outline**

I have divided the thesis into 6 sections. Following the introduction, chapters 2-4 in turn deal with the OECD Guidelines, the MNE Declaration and the UN Global Compact. Chapter 5 gives an overview of the UN Draft Norms and examines their value as compared to the standards mentioned previously. The final part of the thesis discusses positive and negative aspects of a voluntary approach when dealing with corporate responsibility and whether binding regulation should be introduced at an international level or if it should be left up to national regulators to decide.

## 2. The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises, hereafter referred to as the Guidelines, were drawn up in the 1970s, a decade during which the activities of corporations became a topic of discussion among international organisations. The negative impact of corporations on developing countries was given increased attention and harmful activities of companies to countries where they were established met growing opposition. The legal regulation of businesses was called for and international guidelines controlling their conduct were set up by international organisations such as the OECD, the UN and the ILO.<sup>7</sup> This chapter will discuss the OECD Guidelines. Instruments developed by the ILO and the UN will be presented in the following chapters.

### 2.1 Introduction to the Guidelines

The Guidelines were adopted on 21 June 1976 by all OECD member states, except for Turkey, as part of a package which consisted of the Declaration on International Investment and Multinational Enterprises for the facilitation of direct investment among OECD member countries together with four instruments related to the Declaration. The Guidelines are recommendations by the governments of the 30 OECD member states together with nine non-member countries (Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia) directed at corporations. Originally, the Guidelines only applied to companies operating within the OECD countries. However, the latest review of the Guidelines, conducted in 2000, widened their scope to include companies operating in or from OECD member states. As a result of the somewhat sceptical attitude of the Business and Industry Advisory Committee to the OECD, BIAC, the final text holds that *governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.*<sup>8</sup> The guidelines apply to all parts of a multinational, including subsidiaries, which are either based in or operating from an endorsing country.<sup>9</sup>

The Guidelines have been reviewed several times: in 1979, 1982, 1984, 1991 and most recently in 2000. During the 1991 review, a chapter on

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<sup>7</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, pp. 100-101.

<sup>8</sup> The Guidelines, chapter I, para 2.

<sup>9</sup> Friends of the Earth, "A Guide to the Guidelines – Practical Guidance for Individuals, Communities and NGOs on the Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises", p. 7.

environmental protection was added, reflecting the growing concerns with the environment and the role that can be played by companies and governments in ensuring greater environmental protection. The latest review included supply chain responsibility which means that companies should encourage business partners, including sub-contractors, to do business in a manner compatible with the Guidelines. Chapters on combating bribery and protecting consumers were also added.<sup>10</sup> Furthermore, the review addressed the implementation procedure.

Adhering governments are home to almost 90 per cent of foreign direct investment flows and to 97 out of the top-100 multinational enterprises.<sup>11</sup> The Guidelines aim to ensure that the operations of multinational corporations are in harmony with government policies, that the basis of mutual confidence between corporations and the societies in which they operate is strengthened, that the foreign investment climate is improved and that the contribution to sustainable development made by multinational corporations is enhanced.<sup>12</sup> The Guidelines establish non-binding principles and standards covering areas relating to employment and industrial relations, including trade union recognition, collective bargaining, discrimination and child and forced labour; general policies such as respect for human rights, compliance with the law, protection of whistleblowers; environment, including environmental management systems, precaution and continual improvement; information disclosure; combating bribery, including illegal political donations; consumer interests such as labelling; competition; taxation; and science and technology.<sup>13</sup> These principles and standards draw on the same set of core values in the areas of human rights, labour standards, the environment and anti-corruption as the UN Global Compact which will be dealt with in chapter 4.

Even though it is mentioned that the growth of activities by companies can lead to abuse of concentrations of economic power and to conflicts with national policy objectives,<sup>14</sup> emphasis is put on positive contributions that companies can make to economic and social progress.<sup>15</sup> Chapter IV on employment and industrial relations is fairly detailed and includes paragraphs on freedom of association (paras 1, 8), collective bargaining (paras 1, 2, 8, 9) and non-discrimination policies (para 7). Regrettably, there are no references to other internationally accepted standards such as the ILO Conventions. Instead the Guidelines are formulated in their own more vague

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<sup>10</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, pp. 101-103.

<sup>11</sup> The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and distinctive contributions, DAF/INV/(2005)6, 26 April 2005, p. 3.

<sup>12</sup> Preface to the Guidelines, paragraph 1.

<sup>13</sup> [http://www.oecd.org/document/58/0,2340,en\\_2649\\_34889\\_2349370\\_1\\_1\\_1\\_37439,00.html](http://www.oecd.org/document/58/0,2340,en_2649_34889_2349370_1_1_1_37439,00.html) Last visited 2005-08-31.

<sup>14</sup> See Preface, para 6.

<sup>15</sup> Preface, para 4. See also J. Oldenziel, "The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct", SOMO, Amsterdam, September 2000, pp. 6, 12.

terms. Furthermore, some elements that are accepted as standard in other codes are lacking in the Guidelines such as hours of work and living wages.<sup>16</sup>

## 2.2 Key issues

### 2.2.1 Human Rights responsibilities

Before the revision in 2000 the Guidelines did not explicitly provide that corporations should observe human rights even though it did contain some provisions that directly or indirectly dealt with human rights, such as the prohibition of discrimination. Even though the new version does not mention specific human rights instruments, the Guidelines explicitly refer to human rights.<sup>17</sup> Chapter II, paragraph 2 states that enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments. NGOs wanted to leave out the reference to host governments because it implies that companies only have the obligation to conform to national laws and commitments instead of abiding by existing fundamental principles as set out in the Universal Declaration of Human Rights, hereafter referred to as UDHR.<sup>18</sup> Despite pressure from NGOs it was decided not to refer to the UDHR. Furthermore, a major omission is the lack of reference to complicity in human rights violations. On a positive note, the explicit reference to human rights can be seen as an indication that the concept of corporate responsibility in the area of human rights is gaining acceptance.<sup>19</sup>

Chapter IV on Employment and Industrial Relations refers to all four fundamental principles and rights at work contained in the ILO's Declaration on Fundamental Principles at Work.<sup>20</sup> The commentary to the Guidelines spells out that the Guidelines, as a non-binding instrument, have a role to play in promoting observance of those standards and principles among multinational enterprises. ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy is mentioned

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<sup>16</sup> J. Oldenziel, "The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct", SOMO, Amsterdam, September 2000, pp. 7, 18.

<sup>17</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, p. 103.

<sup>18</sup> J. Oldenziel, "The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct", SOMO, Amsterdam, September 2000, pp. 14-15.

<sup>19</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, p. 106.

<sup>20</sup> These four principles are: freedom of association and the right to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced or compulsory labour and non-discrimination in employment and occupation. The Guidelines, chapter IV, paras. 1 a-d.

specifically and it is stated that it is intended to have parallel function to the OECD Guidelines.<sup>21</sup> This instrument will be dealt with *infra*.

### 2.2.2 Environment

The chapter on environment was first introduced in 1991 but it has been rewritten several times due to its meagre content. There are several guidelines in chapter V that deal with multinational enterprises continually improving their environmental performance. Paragraphs 1 a-c make clear that companies should adopt and maintain an environmental management system that includes regular monitoring and verification of progress towards environmental, health and safety objectives and targets. An important issue in the chapter is the precautionary principle which means that companies should take measures to prevent environmental damage when such a threat exists, even when there is no complete scientific evidence of such damage. The burden of proof rests with the possible polluter.

Chapter V, paragraph 4 reads: *Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage.*<sup>22</sup>

### 2.2.3 Supply chain responsibility

One of the characteristics of globalisation is the increased use of outsourcing and sub-contracting by companies. Labour intensive production of goods sold by companies originating from OECD member states is to a large extent manufactured by suppliers and sub-contractors in developing countries. Some of the worst violations of labour, human rights and environmental standards occur at this level which is directly connected with the activities of multinationals.<sup>23</sup>

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<sup>21</sup> Working Party on the OECD Guidelines for Multinational Enterprises. *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, DAF/IME/WPG(2000)15/FINAL, para 20.

<sup>22</sup> The phrase *consistent with scientific and technical understanding of the risks* has been considered by NGOs as functioning as a possible loop hole for companies to circumvent the spirit of the principle, as it implies that threats of damage to the environment should be backed up by some sort of scientific evidence. The wording in the 1992 Rio Declaration on Environment and Development should have been repeated. Its principle 15 reads: *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.* See J. Oldenziel, “*The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct*”, SOMO, Amsterdam, September 2000, p. 18.

<sup>23</sup> J. Oldenziel, “*The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct*”, SOMO, Amsterdam, September 2000, p. 1.

The scope of the Guidelines and the definition of the activities to which they are thought to apply have gained increasing attention lately. The latest review of the Guidelines, which took place in 2000, brought about a major change in extending their applicability to multinational corporations' supply chains. Chapter II, paragraph 10 of the revised Guidelines asks enterprises to: *Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.*<sup>24</sup>

The scope of the extension of the Guidelines to cover supply chain issues has led to heavy debate. A key issue in the debate relates to whether the Guidelines apply only to investment or also trade activities. The trade versus investment issue was discussed at the 2002 OECD Roundtable on Corporate Responsibility: *Supply chains and the OECD Guidelines for Multinational Enterprises*, which was part of the Committee on International Investment and Multinational Enterprises', CIME, annual meeting. Opponents to a generous application of the Guidelines claim that they were originally created to promote investment among OECD countries and therefore do not apply to trade activities, including the supply chain. On the other hand, supporters of supply chain responsibility argue that the Guidelines are intended to have the widest possible scope and that they apply to both investment and trade activities.<sup>25</sup> Supporters rely on the fact that the preface of the Guidelines refers to both trade and investment (para 4). It can also be held that globalised production systems and intra-company trading makes it impossible to distinguish between trade and investment.

In a June 2003 statement by CIME it was held that the fact that the Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises and that supervision of the Guidelines is entrusted to CIME, indicates the investment intent of the drafters of the instrument as opposed to trade. CIME has further held that the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus.

When considering the application of the Guidelines, flexibility is required. In considering chapter II, paragraph 10 of the Guidelines, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. CIME has also declared that the fact that the OECD Declaration does not provide precise definitions of

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<sup>24</sup> The phrase *where practicable* leaves a loophole which was undesired by NGOs at the time of drafting. They were of the opinion that encouragement usually is not enough to bring about actual changes of business behaviour in the supply chain. The wording responded to BIAC's concerns over the practical difficulties with implementing supply chain responsibility. See J. Oldenziel, *The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct*, SOMO, Amsterdam, September 2000, p. 15.

<sup>25</sup> OECD Watch, *Review of National Contact Points June 2002 – June 2003*, OECD Watch Newsletter No. 2, p. 5.



international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances.<sup>26</sup>

When faced with a complaint involving the supply chain, National Contact Points, NCPs (dealt with *infra*), will thus look for an identifiable investment nexus. According to CIME, investment nexus exists when the multinational corporation has some degree of influence in the host country or has an investment-like relationship with its suppliers. Despite clear references to supply chain responsibility in the Guidelines, CIME has interpreted the references strictly and some NCPs have shown unwillingness to accept cases due to lack of an investment nexus.

The investment nexus test is a negative development in that it significantly weakens the Guidelines and reduces their scope. A restrictive interpretation undermines the usefulness of the instrument and goes against the spirit of the review. The full implications of how the investment nexus will affect future supply chain related complaints are however not yet known. The supply chain debate is still ongoing.<sup>27</sup>

## 2.3 Supervision/Implementation

The institutional set-up of the Guidelines consists of the National Contact Points (NCPs), CIME, the advisory committees of business and labour, Business and Industry Advisory Committee to the OECD, BIAC, and Trade Union Advisory Committee, TUAC. As the Guidelines are recommendations to companies by OECD member states, the procedures are mainly aimed at implementation from the government perspective. It is intended that governments should promote and increase the use of the Guidelines by companies. However, the only formal obligation that the Guidelines put on countries is to set up National Contact Points, NCPs, whose primary responsibility it is to ensure the follow-up of the Guidelines.<sup>28</sup>

If there is a dispute about the applicability, CIME, which consists of governmental representatives of the OECD member states, may be asked to consider an amendment to the text or give a clarification of a particular clause. This clarification element is needed because of the vague and general terms in which the Guidelines are drafted and can be sought by member countries, TUAC or BIAC. NGOs and other interested parties

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<sup>26</sup> The position of CIME on Supply Chain Responsibility in the OECD Guidelines. Report of the annual meeting, September 2003.

<sup>27</sup> Friends of the Earth, "A Guide to the Guidelines. Practical Guidance for Individuals, Communities and NGOs on the Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises", pp. 8-9.

<sup>28</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", School of Human Rights Research Series, Volume 17, 2002, p. 106. See also Decision of the OECD Council of June 2000, DAFE/IME/WPG(2000)15/FINAL, para I.1.

cannot seek clarification but can bring complaints under the specific instances procedure which will be discussed *infra*.

CIME is not a tripartite review committee. BIAC and TUAC have a mere consultative function. CIME cannot pronounce itself on the question whether a particular company has or has not respected the Guidelines in any given case which weakens the corrective function of the supervisory mechanism of the Guidelines.<sup>29</sup> In the case of non-observance, a sanction cannot be imposed upon a member country or company. Relatively few requests have been brought before CIME for clarification. Besides the clarification task, CIME conducts periodic reviews of the experiences with the provisions of the Guidelines.<sup>30</sup>

### **2.3.1 The role of the National Contact Point**

Countries adhering to the Guidelines are to set up National Contact Points (NCPs). NCPs are supposed to operate according to the four core criteria of visibility (promotion activities), accessibility (issues of standing), transparency (more clearly defined procedures and openness) and accountability (reporting)<sup>31</sup>. The role of the NCP is to further the effectiveness of the Guidelines by: promoting them, informing investors about them, gathering information on experience with the Guidelines and dealing with specific instances (which is the term used for complaints).<sup>32</sup> If the parties involved do not reach an agreement with regard to the specific instance, the NCP is required to issue a statement.<sup>33</sup> In its statement the NCP can decide to make the results of the proceedings public unless preserving confidentiality would be in the best interest of effective implementation of the Guidelines.<sup>34</sup>

NCPs should respond to enquires about the Guidelines from other NCPs, the business community, employee organisations, NGOs, the public and governments from non-adhering countries. However, NCPs have the right to screen cases, i.e. decide if they are admissible or not through the initial assessment procedure. When a party raises a case, the NCP is required to make an initial assessment of whether the issue raised merits further examination and respond to the party.<sup>35</sup> After completion of the initial

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<sup>29</sup> M. T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, 2000, pp. 200-201. See article II. 4 of the Decision of the Council on the Guidelines for Multinational Enterprises, C(2000)96/FINAL.

<sup>30</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, p. 107.

<sup>31</sup> These four criteria are commonly referred to by CIME as "functional equivalence".

<sup>32</sup> Friends of the Earth Netherlands, "Using the OECD Guidelines for Multinational Enterprises: A critical starterkit for NGOs", pp. 6-7.

<sup>33</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, p. 109.

<sup>34</sup> Procedural Guidance, I C 4 (b).

<sup>35</sup> The OECD commentaries to the Guidelines offer some guidance on how to interpret the wording "merits further examination". Accordingly, the NCP should determine whether the

assessment, the focus is on problem solving with help from experts, stakeholders, other NCPs and the CIME and through mediation with the parties involved. NCPs meet annually to share experiences and report to the CIME.<sup>36</sup>

The institutional set up of the NCP differs from country to country. What counts in making the Guidelines an effective instrument are the resources governments are willing to put into building the capacity of the NCPs and the degree to which they promote the Guidelines across governmental departments and within the business community. In many countries there is a failure to integrate the NCPs into wider discussions about corporate accountability and there is confusion about the placement of the Guidelines as related to other international and national corporate responsibility initiatives. There is also little agreement about the role of the Guidelines in relation to existing legal, regulatory or administrative procedures in the host countries. Performance and transparency varies widely among the national NCPs and few would appear to have legal or human rights training. It generally takes too long for NCPs to respond to cases.<sup>37</sup> Although the average time taken by NCPs to conclude the specific instance procedure is about 12 months, some have taken twice as long to decide on the admissibility of a case. In many countries, complaints have dragged on for years without resolution.<sup>38</sup>

An additional problem is accountability. In a large number of countries the NCPs do not make their annual reports publicly available. Greater transparency in reporting will have to become the norm if the NCP procedure is to inspire confidence. Lack of continuity in handling cases is also of concern.<sup>39</sup> According to the OECD, by June 2005, over 100 complaints had been filed by NGOs and trade unions since the Guidelines were revised. Over the past five years, NGOs have submitted over 45 complaints to NCPs, and the number is steadily rising. To date, only eight of

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issue is bona fide and relevant to the implementation of the Guidelines. In this context it will, among other things, take into account the identity of the party concerned and its interest in the matter, whether the issue is material and substantiated and how similar issues have been or are being treated in other domestic or international forums. There is nothing to prevent a party from raising a case that is being handled elsewhere. See J. Evans, "OECD Guidelines, one tool for corporate social responsibility", *Corporate social responsibility: Myth or reality?*, *Labour Education 2003/1, No. 130*, ILO 2003, p 27.

<sup>36</sup> J. Oldenziel, "The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct", SOMO, Amsterdam, September 2000, p. 21.

<sup>37</sup> The "worst" case in this respect is the US where five cases have been raised by trade unions and not a single one has led to conclusions by the NCP. J. Evans, "OECD Guidelines, one tool for corporate social responsibility", *Corporate social responsibility: Myth or reality?*, *Labour Education 2003/1, No. 130*, ILO 2003, p 28.

<sup>38</sup> OECD Watch "Five years on. A review of the OECD Guidelines and National Contact Points", 2005, p. 15, available at

[http://www.oecdwatch.org/docs/OECD\\_Watch\\_5\\_years\\_on.pdf](http://www.oecdwatch.org/docs/OECD_Watch_5_years_on.pdf) last visited 2005-09-25.

<sup>39</sup> OECD Watch, Review of National Contact Points June 2002 – June 2003, *OECD Watch Newsletter No. 2*, June 2003, pp. 1, 3-4, and 6.

those complaints filed have been concluded with a statement by the NCP or resolved outside the NCP forum.<sup>40</sup>

It is stipulated in the Procedural Guidance in paragraphs C (4) a-b that while procedures about a certain case are underway, a confidentiality rule is applied. It is held that information and views provided during the procedures by another party involved will remain confidential, unless that other party agrees to their disclosure. If the parties have not agreed on a resolution of the problem at the end of the procedure, the results are to be made public by the NCP unless preserving confidentiality would be in the best interest of effective implementation of the Guidelines. Obviously some room is left for the NCP involved to keep certain cases and issues confidential.<sup>41</sup> There is wide variety in the way NCPs balance the competing demands of confidentiality and transparency when dealing with complaints. NCP practices differ when it comes to disclosure of information both before and after the conclusion of a case.<sup>42</sup> Some NCPs trigger the confidentiality rule at an earlier stage in the process than what is provided for, possibly to win business confidence.<sup>43</sup> A broad interpretation of the confidentiality rule clearly takes away the deterrent of name and shame.

## 2.4 Legal status

In the Declaration on International Investment and Multinational Enterprises the OECD member states jointly recommend to multinational enterprises to observe the Guidelines. The observance of the Guidelines is voluntary, therefore not legally enforceable. They are not formally binding on the states that have adopted them or to the multinational enterprises to which they are addressed. It is assumed that international law does not normally bind individuals or companies, but is directed towards states.<sup>44</sup> The validity of this assumption can be questioned, today perhaps more easily than in 1976 when the Guidelines were drafted. Even under the traditional doctrine it would have been possible for the governments to accept binding obligations to the effect that they would issue formally binding domestic legal norms. To the extent that national law would not be sufficient, such law could be complemented by international commitments

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<sup>40</sup> OECD Watch "Five years on. A review of the OECD Guidelines and National Contact Points", 2005, pp. 5 and 15.

<sup>41</sup> Friends of the Earth Netherlands, "Using the OECD Guidelines for Multinational Enterprises: A critical starterkit for NGOs", pp. 11-12.

<sup>42</sup> OECD Watch, *Review of National Contact Points June 2002 – June 2003*, OECD Watch Newsletter No. 2, June 2003, p. 6.

<sup>43</sup> P. Feeney, Rights and Accountability in Development, *Making Companies Accountable. An NGO Report on Implementation of the OECD Guidelines for Multinational Enterprises by National Contact Points*, October 2002, p. 3.

<sup>44</sup> I. Trigo de Sousa, "Codes of Conduct and Monitoring Systems", Bangladesh People's Solidarity Centre, Amsterdam, 2000, p. 21.

to intergovernmental cooperation in implementation of the Guidelines.<sup>45</sup> Using the anti-bribery effort as a model, the OECD could adopt a treaty requiring member states to enact laws similar to its guidelines that would be enforceable under national criminal or civil codes, carrying penalties such as fines, or in extreme cases, imprisonment. Like anti-bribery laws, national legislation would bind any company operating in that nation's jurisdiction.<sup>46</sup> However, there is a collective unwillingness of the states concerned to adopt binding standards. Generally, governments tend to take a very passive attitude when it comes to addressing the responsibilities of corporations. There is very little, if any, governmental support for binding legislation.

Although the Guidelines are not binding, adhering states are committed to promoting them. In spite of their significant reach, the Guidelines are recommendations of 39 states and so do not have universal authority.<sup>47</sup> However, they are a widely recognised standard promoted by OECD member states and can be said to have moral value. The normative force of the Guidelines implies that the addressee of the norm is willing to accept it as a guideline for its behaviour. The general acceptance of the Guidelines by governments and employers' and workers' organisations points to it constituting standards which society expects to be upheld. Also, specific complaints can be filed if companies do not abide by the Guidelines which indicate that it is a violation not to adhere to them.<sup>48</sup>

## 2.5 Conclusion

The positive aspects of the Guidelines include that they cover a wide range of issues, not just labour or environmental issues. They are recommendations made up by governments which make them an important pressure tool for corporate responsibility. The complaint procedure has governmental backup which is not necessarily the case when companies establish their own codes of conduct. An alleged breach could result in bad publicity for the company involved and damage its brand name. The Guidelines and their complaint procedure can help put pressure on companies that are not acting in a socially and environmentally responsible manner to improve their behaviour. Also, the burden of proof is not as judicially heavy as is the case when a company is taken to court. Finally, the applicability of the Guidelines is extra-territorial in that they are also valid outside the OECD member states. The Guidelines can thus be an option for

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<sup>45</sup> Directorate for Financial, Fiscal and Enterprise Affairs and Committee on International Investment and Multinational Enterprises, *The OECD Guidelines in a globalising world*, OECD Document DAF/FE/IME/RD(99)3, p. 7.

<sup>46</sup> K. Roth, *Rules on corporate ethics could help, not hinder, multinationals*, The Financial Times, 21 June 2005, p. 2.

<sup>47</sup> 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, document E/CN.4/2005/91 of 15 February 2005, p. 7.

<sup>48</sup> J. Oldenziel, "The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct", SOMO, Amsterdam, September 2000, pp. 42-43.

countries where the legal framework is not functioning properly or where NGOs do not have easy access to the legal system.

The revised Guidelines have renewed the interest in them. Recently they were referred to in a three-year investigation by a United Nations Panel of Experts which found that sophisticated, high-level political, military and business networks were using the DRC's natural resources to enrich individuals and to fund the war effort of the various factions in the conflict. In their third report, the UN Panel published an Annex<sup>6</sup> listing eighty-five companies that it considered to be in breach of the Guidelines. The publication of the list caused uproar and perhaps more than anything, drew international attention to the existence of the Guidelines.

Most OECD governments refused to investigate the Panel's allegations and in the face of their inaction, NGOs started to file complaints. Some of these complaints are on-going, but many were rejected outright. Other cases have been kept pending indefinitely. While the outcome of the DRC complaints has been disappointing, the UN Panel's work has prompted the Investment Committee to undertake one of its most innovative pieces of work: a study about improving implementation of the Guidelines in areas described as "weak governance zones". Based on this study, the Investment Committee intends to draw up detailed guidance for companies operating in conflict prone countries and countries with weak governance. It is worth noting that the Group of Eight leaders affirmed their commitment to the Investment Committee's work to develop specific guidance for companies operating in post-conflict countries or countries with weak governance in their 2005 Communiqué. In addition, the OECD Guidelines are discussed at length in the Commission for Africa's report, which was prepared for the July 2005 G8 Summit in Gleneagles. The Commission has called for the OECD Guidelines to be strengthened.<sup>49</sup>

Despite increased attention and call for strengthening, negative aspects obviously include their voluntary nature which means that they cannot be enforced by law. Weak wording such as "where practicable", "when appropriate" water down the meaning of many paragraphs. Supervision under the Guidelines is not very effective as a result of the arrangements with regard to confidentiality and the lack of sanctions. Weak implementation offers no other sanction than "name and shame". In an age of inflated brand values and corporate reputation such an approach is not altogether toothless, but relies heavily on political will. In reality, the sanction of reputational risk is not enough to change corporate behaviour.

NCPs can choose to withhold some or all information about a complaint from the public, including the name of the company, without explaining why or what information is being withheld. In such cases, the only sanction in the form of negative publicity disappears. As there is no uniform

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<sup>49</sup> OECD Watch "Five years on. A review of the OECD Guidelines and National Contact Points", 2005, p. 23.

procedure for how NCPs should handle cases their outcomes are very uncertain. The renewed implementation procedure still relies largely on the will of governments, through their NCPs, to deal openly and effectively with the specific instances. Too much discretion is left to the individual NCP in the handling of specific instances and NGOs and other interested parties still have no mechanism of appeal. Standardised procedures for the handling of cases are needed and time limits should be introduced. Furthermore, the performance of NCPs should be monitored.

The value of the Guidelines is diminished by the fact that they do not refer to specific paragraphs of other international instruments like ILO and environmental instruments. Their existence, as well as the UDHR, is recognised in the Preface, paragraph 8, but it is not stated that companies should respect the principles expressed therein. The Guidelines have a more vague description of labour rights and the precautionary principle than what is established in ILO Conventions and the Rio Declaration respectively.

Finally, the Guidelines focus on positive contributions that companies can make to economic and social progress and these fundamental economic contributions are not questioned.

The Guidelines are touted as a key contribution to CSR. If the Guidelines are to be an efficient instrument as regards corporate social responsibility, efforts are needed as regards campaigning towards supplying the Guidelines with sanctions and incentives. Another solution to enhancing the effectiveness of NCPs would be to make them accountable to national parliaments. Investors and fund managers should use adherence to the Guidelines as a criterion for ethical investment decisions and governments should withdraw discretionary support from companies found to be in breach of the Guidelines. The Guidelines can be an effective instrument if governments take their responsibility seriously.

In order to receive export credit guarantees, Dutch companies have to state that they comply with the Guidelines and French enterprises have to sign a letter saying that they are aware of the Guidelines. There are also other areas where a linkage to the Guidelines could be developed. References to them should be made in bilateral investment treaties between adhering and non-adhering countries. This would make non-adhering countries aware of the expectations that multinational enterprises are facing.<sup>50</sup> It has been five years since the guidelines were last revised and now is an opportune time to review experience and further develop the Guidelines to deal with existing shortcomings.

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<sup>50</sup> J. Evans, "OECD Guidelines, one tool for corporate social responsibility", *Corporate social responsibility: Myth or reality?*, Labour Education 2003/1, No. 130, ILO 2003, p 29.

# 3. The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

## 3.1 Introduction to the Declaration

The International Labour Organisation (hereafter referred to as the ILO) plays an important role in regulating corporate behaviour as regards labour rights and has adopted over 180 Conventions regulating the issue of labour conditions. In 1977, one year after the first adoption of the OECD Guidelines, the Governing Body of the ILO drafted its own code of conduct: the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (hereafter called the MNE Declaration). It was intended to become part of a UN Code of Conduct on Transnational Enterprises but that code was never ratified.

The MNE Declaration is addressed to governments, employers' and workers' organisations as well as multinational enterprises operating on their territories and applies to all multinational enterprises.<sup>51</sup> It contains the only set of voluntary guidelines on social policy for multinational enterprises globally agreed by three groups; business, labour and government.<sup>52</sup> Its aims are to encourage the positive contribution which multinational enterprises can make to economic and social progress<sup>53</sup> and to minimize and resolve the difficulties to which their various operations may give rise.<sup>54</sup> It is intended to be a living document, changing with the needs and circumstances of government, business, trade unions and MNEs. The MNE Declaration places great stress on the primacy of national sovereignty, i.e. to obey national laws and regulations, to give consideration to local practises and respect relevant international standards. The MNE Declaration has a non-mandatory character. Governments, employers' and workers' organisations are recommended to observe the principles on a voluntary basis.<sup>55</sup>

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<sup>51</sup> Preamble of the MNE Declaration, para 4.

<sup>52</sup> A Guide to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, p. 11, available at <http://www.ilo.org/public/english/employment/multi/download/guide.pdf> Last visited 2005-09-02.

<sup>53</sup> Emphasis is put on promoting employment. See paras 16-20.

<sup>54</sup> Preamble of the MNE Declaration, para 2.

<sup>55</sup> Ibid, para 7, A Guide to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, p. 1.



The MNE Declaration consists of five major sections covering areas on general policies, employment, training, conditions of work and life and industrial relations. In each of the sections emphasis is put on the need for all parties to respect the development priorities, social aims and structures of the host countries and the need for corporations to adhere to the best possible practises.<sup>56</sup> The adoption of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up in 1998 highlighted the importance of the fundamental Conventions in realizing the objectives of the ILO, and consequently, the MNE Declaration takes into account the objectives of the 1998 Declaration.<sup>57</sup> The Declaration also calls on member states to ratify ILO Conventions 87 (Convention Concerning Freedom of Association and Protection of the Right to Organise), 98 (Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively), 111 (Discrimination (Employment and Occupation)) and 112 (Minimum Age for Admission to Employment as Fishermen) and recommendations 11 (Unemployment (Agriculture) Recommendation), 119 (Termination of Employment Recommendation) and 122 (Employment Policy Recommendation).

## 3.2 Key issues

### 3.2.1 Human rights obligations

A general reference to human rights is made in paragraph 1 of the Preamble which states that companies can make an important contribution to the enjoyment of basic human rights, including freedom of association, throughout the world. In paragraphs 8-12 of the section on general policies corporations, governments, business and trade unions are recommended to obey national law, take into account local practices and respect international human rights and labour standards. Along with international human rights instruments such as the Universal Declaration and corresponding International Covenants adopted by the UN General Assembly, all parties are exhorted to respect the ILO Constitution and its principles according to which freedom of association and expression are essential to sustained progress. For companies, strategies include consultations with governments and wherever appropriate, national employers' and workers' organisations, to help make operations consistent with national policies, development priorities and social aims and structures of countries of operation.<sup>58</sup>

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<sup>56</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, p. 111.

<sup>57</sup> See the Declaration p. V available at <http://www.ilo.org/public/english/employment/multi/download/english.pdf> Last visited 2005-09-02.

<sup>58</sup> A Guide to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, p. 12.

References are made to specific ILO Conventions and recommendations that deal with human rights.<sup>59</sup> In 2000 the text of the MNE Declaration was revised by a decision of the Governing Body to fully incorporate the fundamental principles and rights at work as these have been laid down in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.<sup>60</sup> The parties to which the Declaration is commended (governments, workers, employers and MNEs) should "contribute to the realization of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up" (see para 8). The reference does not in any way affect the voluntary character or the meaning of the provisions of the MNE Declaration.<sup>61</sup>

### **3.2.2 Conditions of work and life**

Paragraphs 33-35 entail recommendations involving wages, benefits and conditions of work. For governments, priority is placed on helping companies' activities benefit lower income groups and less developed areas whereas companies' goals include offering wages, benefits and conditions of work that are at least as favourable as those offered by employers of comparable size and resources. In developing countries where comparable employers do not exist, companies should offer the best possible wages, benefits and conditions of work, at least adequate to satisfy basic needs of workers and their families.

Several other specific references are made to labour rights such as freedom of association, the right to organise (paras 41-47) and equality of opportunity and treatment (paras 21-23). Governments are urged in paragraph 9 to ratify along with the Conventions mentioned, the minimum age and child labour conventions, Convention Nos. 138 and 182, respectively, and the corresponding Recommendations Nos. 146 and 190. Furthermore, paragraph 36 states that "*multinational enterprises, as well as national enterprises, should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour*".<sup>62</sup>

### **3.2.3 Industrial relations**

Guidelines to achieve sound industrial relations in company operations are found in paragraphs 41-59. Companies are urged to observe standards at

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<sup>59</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, p. 112.

<sup>60</sup> International Labour Office Governing Body Document GB. 279/12, 279<sup>th</sup> Session, Geneva, November 2000.

<sup>61</sup> See Addendum II to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office at its 277<sup>th</sup> Session (Geneva, March 2000).

<sup>62</sup> A Guide to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, p. 14.

least as favourable as those of comparable employers in the country. Rights promoted include freedom of association and the right to organise (paras 42-48) and means ensuring that workers employed have the right to establish and join organisations of their own choosing, are protected from anti-union discrimination and that their representatives can consult together provided this does not prejudice the functioning of enterprise operations. For companies, the guidelines also encourage support for employers' organisations.

Paragraphs 49-56 deal with effectively recognising the right to collective bargaining and include ensuring that workers have the right to be represented by workers' organisations that are recognised for the purpose of collective bargaining, promoting voluntary negotiation between employers or their organisations and workers' organisations and including in collective agreements provisions for the settlement of disputes arising over their interpretation and application. According to paragraphs 57-59, companies should establish a voluntary conciliation machinery to assist in preventing or settling industrial disputes. Moreover, respect for the right of workers to submit and have their grievances examined should be ensured.<sup>63</sup>

### 3.3 Supervision/Implementation

The supervisory procedures were decided upon in 1978 and endorsed by the International Labour Conference at its 1979 session. The system of monitoring compliance with ILO Conventions focuses on the state as the bearer of obligations but the MNE Declaration directly focuses on corporations. For ratified Conventions, the ILO has an extensive supervision and enforcement system which includes reporting mechanisms for examining complaints brought by workers' or employers' organisations or member states. If the Declaration was a legally binding instrument, follow-up would be required under national law and practise and the national complementary machinery for legislation would subsequently apply.<sup>64</sup>

However, the implementation procedures to monitor and verify adherence to the MNE Declaration are very restricted. The supervisory mechanism is partly similar to the procedure under the OECD Guidelines but is more limited as not even the weak monitoring function in the form of national contact points exists. On the other hand it can be said that ILO offices in many countries provide advice and technical assistance on a tripartite basis whereas the assistance provided by many NCPs may not include business and labour in consultative or decision making roles. The procedures for interpretation at the international level differ in the decision making bodies of the two organisations. Within the ILO power is shared equally among

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<sup>63</sup> A Guide to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, pp. 14-15

<sup>64</sup> H. Günter, "The Tripartite Declaration of Principles (ILO): standards and follow-up", in N. Horn (ed.), *Studies in transnational economic law, volume 1, Legal Problems of Codes of Conduct for Multinational Enterprises*, 1980, p. 163.

government, business and labour, while at the OECD governments alone decide the cases.<sup>65</sup> Furthermore, the complaint mechanisms are different in that OECD complaints would tend to lay stress on a multinational company's responsibility, whereas ILO complaints allow insisting more on the responsibility of governments in upholding workers' fundamental rights established by ILO Conventions.<sup>66</sup>

The Governing Body is to oversee the implementation of the Declaration. One of the elements of the implementation procedure consists of a system of questionnaires that asks governments, with input from employers' and workers' organisations, to report on the effect given to the principles. The ILO Secretariat compiles the results in a report which is later discussed at the Governing Body. Recommendations for action are based on the findings of the reports received from governments. The reports are written in general terms as individual companies are not mentioned. It was explicitly stated that consideration of the reports would not be designed to determine compliance with what was recognised to be a non-mandatory instrument nor to pass judgement on measures adopted within member states.

The Governing Body is also responsible for examining disputes concerning the application of the MNE Declaration by means of interpreting its provisions. Governments of member states, using a procedure instituted in 1981, can direct a request for interpretation to the International Labour Office whereas workers' or employers' organisations have to submit a request for interpretation to the state.<sup>67</sup> In the case of receivable requests the International Labour Office shall prepare a draft reply in consultation with the Officers of the Committee on Multinational Enterprises. All appropriate sources of information shall be used, including government, employers' and workers' sources in the country concerned. The draft reply to a receivable request shall be considered and approved by the Committee on Multinational Enterprises prior to submission to the Governing Body for approval.<sup>68</sup>

Again, individual cases are not identified and the interpretation procedure has rarely been used.<sup>69</sup> So far, a total of five cases of interpretation have

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<sup>65</sup> Ibid, p. 39.

<sup>66</sup> J. Oldenziel, *The added value of the UN Norms. A comparative analysis of the UN Norms for Business with existing international instruments*, SOMO, Amsterdam, April 2005, p. 16.

<sup>67</sup> If however the state declines to submit such a request to the International Labour Office, or fails to indicate its intention within three months, the workers' or employers' organisations can submit the request themselves. *Procedure for the examination of disputes concerning the application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by means of interpretation of its provisions* (adopted by the Governing Body of the International Labour Office at its 232nd Session (Geneva, March 1986)), paras 5-6.

<sup>68</sup> Ibid, paras 7-8.

<sup>69</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series*, Volume 17, 2002, pp. 112-113. See also J. Oldenziel,

occurred. Two were submitted by a government and three by an international organisation of workers on behalf of representative national affiliates. Four of the cases were found receivable.<sup>70</sup> The procedure should in no way duplicate or conflict with existing national or ILO procedures and can therefore not be invoked in respect of national law and practise, in respect of international labour Conventions and Recommendations or in respect of matters falling under the freedom of association procedure.<sup>71</sup> The interpretation procedure is strictly voluntary and promotional in nature. It is used to clarify the way the MNE Declaration's principles apply to specific situations in order to better guide future decisions and actions in line with the aims of the MNE Declaration.<sup>72</sup>

### 3.4 Legal status

The MNE Declaration is non-mandatory. Nevertheless, according to the ILO, the fact that it was adopted by a consensus of the ILO's Governing Body creates a political and moral obligation for member states to follow its recommendations.<sup>73</sup> Furthermore, standards adopted in the context of the ILO can carry significant authority given the international and intergovernmental character of the organisation. The Declaration is voluntary for business but the ILO Conventions it refers to are binding on state parties.<sup>74</sup>

### 3.5 Conclusion

The MNE Declaration has worldwide application based on universal tripartite consensus. However, it only covers labour issues; a major difference from the OECD Guidelines. It sets out principles in the fields of employment, training, working conditions and industrial relations while the OECD Guidelines cover all major aspects of corporate behaviour. Given the universal nature of the ILO and its tripartite structure, the territorial and company reach of the Declaration is technically broader than that of the OECD Guidelines, although, in practise, at least the company coverage of

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*"The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct"*, SOMO, Amsterdam, September 2000, p. 37.

<sup>70</sup> For a description of the cases see

<http://www.ilo.org/public/english/employment/multi/case.htm> Last visited 2005-09-02.

<sup>71</sup> Procedure for the examination of disputes concerning the application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by means of interpretation of its provisions, paras 2 a-c.

<sup>72</sup> See <http://www.ilo.org/public/english/employment/multi/download/quickguide.pdf> Last visited 2005-09-02.

<sup>73</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, p. 112.

<sup>74</sup> 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, document E/CN.4/2005/91 of 15 February 2005, p. 8.

the two might in fact be more similar given the concentration of foreign direct investment in and between states adhering to the Guidelines.

The OECD Guidelines and the MNE Declaration refer to the behaviour expected from enterprises and are intended to parallel and not conflict with each other. The MNE Declaration can therefore be of use in understanding the Guidelines to the extent that it is of a greater degree of elaboration.<sup>75</sup>

The MNE Declaration is of limited use. Its voluntary nature implies that its effectiveness relies on the commitment of corporations to it as a point of reference. The Declaration was adopted on a tripartite basis which means it has its origins in the support of Governments, employers and workers. Yet, the tripartite structure of the ILO can hamper the effectiveness of the supervision. The follow-up reporting, in the form of a questionnaire procedure, is addressed to governments and not to the companies themselves. However, 28 years after its adoption, the MNE Declaration stands as the only international consensus among governments and interested parties on social policies and measures to be taken on a voluntary basis by enterprises.

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<sup>75</sup> OECD Guidelines, Commentary on Employment and Industrial relations, Para 20.

# 4. The United Nations Global Compact

In the previous chapters two of the main international codes of conduct directly addressing companies have been presented. Within the United Nations (hereafter referred to as the UN) the regulation of corporations has also received attention. Unfortunately, attempts to adopt a code of conduct on transnational corporations during the 1970s and 80s failed. Furthermore, the UN's Centre on Transnational Corporations closed down in 1992. However, recently, a development has taken place within the UN that focuses on the voluntary cooperation of companies with the UN to further human rights.<sup>76</sup> In the following, UN Secretary-General Kofi Annan's initiative on cooperation between business and the UN will be presented.

## 4.1 Introduction to the Global Compact

In an address to the World Economic Forum in January 1999, Kofi Annan for the first time called for a so called Global Compact (hereafter called GC), a cooperation between major companies and the UN, to promote nine (a tenth principle on corruption was added in 2004) universally accepted principles associated with human rights, labour standards and environmental protection, drawn from the UDHR, the ILO's Fundamental Principles on Rights at Work and the Rio Principles on Environment and Development.

The Global Compact is not a traditional UN agency but a network that exists to promote an initiative. It is purely voluntary with two objectives:

- Mainstream the ten principles in business activities around the world
- Catalyse actions in support of UN goals

To achieve these objectives, the Global Compact offers facilitation and engagement through several mechanisms: Policy Dialogues, Learning, Country/Regional Networks, and Projects.<sup>77</sup> At its core are the Global Compact Office and six UN agencies: the Office of the High Commissioner for Human Rights, the United Nations Environment Programme, the International Labour Organization, the United Nations Development Programme, The United Nations Office on Drugs and Crime and the United Nations Industrial Development Organisation.

The Global Compact involves all the relevant social actors: governments, who defined the principles on which the initiative is based; companies, whose actions it seeks to influence; labour, in whose hands the concrete

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<sup>76</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, pp. 119, 128.

<sup>77</sup> See <http://www.unglobalcompact.org/Portal/Default.asp>? Last visited 2005-09-08.

process of global production takes place; civil society organisations, representing the wider community of stakeholders; and the UN, as an authoritative convener and facilitator.<sup>78</sup>

The GC was officially launched in July 2000 by the Secretary-General together with senior executives from some 50 companies and representatives from labour, human rights, environmental and development organisations. With more than 2000 companies and other societal actors participating from more than 80 countries, the Global Compact is the world's largest corporate citizenship initiative.<sup>79</sup>

An Advisory Council, which met for the first time in 2002, supports the Compact's development. The Council is composed of 17 senior business executives, international labour leaders and heads of civil society organisations from all over the world acting in their individual capacities. It convenes twice a year to assist the Secretary-General in forwarding the aims of the GC and to consider issues such as standards of participation to help protect the integrity of the initiative.<sup>80</sup>

A new governance structure was endorsed by the Secretary-General on 12 August 2005 and will be fully implemented over the following 12 months. A twenty-member board will be introduced to provide ongoing strategic and policy advice for the initiative as a whole, making recommendations to the Global Compact Office (GCO), participants and other stakeholders. It will comprise senior representatives from four constituency groups: business, civil society (one each from the areas of human rights, environment, anti-corruption and development), labour and the UN with differentiated roles and responsibilities apart from their overall advisory function. The board as a whole will hold an annual formal meeting but the constituency groups will be expected to interact with the GCO on an ongoing basis.

To participate, companies are encouraged to publicly advocate the principles of the GC via communication vehicles such as press releases, speeches, etc. This does not mean that the Global Compact recognises or certifies that these companies have fulfilled the Compact's principles. The Office has neither the capacity to do so nor is the Compact designed as a static verification instrument. Instead, companies are asked once a year to provide the UN with concrete examples of progress made or lessons learned in implementing the principles. The examples are then posted on the UN website. Finally, if a company wants to, it is encouraged to join in with the

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<sup>78</sup> See *Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles*, available at [http://www.unglobalcompact.org/content/Public\\_Documents/gcguide.pdf](http://www.unglobalcompact.org/content/Public_Documents/gcguide.pdf), p. 5. Last visited 2005-10-01.

<sup>79</sup> *The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and distinctive contributions*, DAF/INV/(2005)6, 26 April 2005, p. 2.

<sup>80</sup> *Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles*, p. 5.



UN in partnership projects.<sup>81</sup> The entire UN must also adopt the GC's ten principles in its every agency resembling an "eating what you advocate" approach.

Under the new governance structure, key elements, such as the Global Compact's ten principles, mission and objectives remain unchanged, as do the open and voluntary multi-stakeholder nature of the initiative. The initiative will retain its leadership model and, with some refinements, the types of engagement mechanisms that it offers: practical learning and dialogue, and concrete undertakings. Greater efforts to foster participants' continuous quality improvement and to protect the integrity of the initiative will be made. Along these lines, the GCO has developed stronger integrity measures and introduced a new policy to protect the Global Compact name and logo from misuse.<sup>82</sup>

## 4.2 The Global Compact's principles

The Global Compact sets out ten principles in the areas of human rights, labour standards, the environment and corruption.

### 4.2.1 Human Rights

World business is asked to:

- Principle 1: support and respect the protection of international human rights within their sphere of influence; and
- Principle 2: make sure their own corporations are not complicit in human rights abuses.

The origin of principles 1 and 2 is to be found in the UDHR. The fundamental nature of its provisions means that they are now widely regarded as forming the foundation of international law. The UDHR was given legal force by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Its authors knew that to reach their objective of making the provisions universally accepted and respected by everyone would require immense effort by every individual and group in society. They thus addressed their call to action not specifically to governments, but to "every individual and organ of society". It is on the basis of that the responsibilities fall on every individual and organ of society that the GC principles 1 and 2 call on

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<sup>81</sup> N. Jagers, "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002, p. 129.

<sup>82</sup> See *The Global Compact's Next Phase*, 6 september 2005, p. 1. Available at [http://www.unglobalcompact.org/content/AboutTheGC/gc\\_gov\\_framework.pdf](http://www.unglobalcompact.org/content/AboutTheGC/gc_gov_framework.pdf) Last visited 2005-09-08.

business not only to develop an awareness of human rights, but also to work within their sphere of influence to uphold these universal human rights.<sup>83</sup>

### 4.2.2 Labour

Labour rights are an area where companies are likely to have a direct influence on the protection of human rights. The Secretary-General asked world business to uphold:

- Principle 3: freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective elimination of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

The labour standards mentioned in the GC are the four fundamental labour standards derived directly from the ILO's Declaration on Fundamental Principles and Rights at Work as well as its Core Conventions. The Conventions are treaties that the member states ratify, thus accepting to be legally bound by them. All countries, whether they have ratified the Conventions or not, have a legal obligation to respect, promote and to realise in good faith the principles.

The principles deal with fundamental rights in the workplace and the challenge for business is to take these universally accepted values and apply them at company level.<sup>84</sup> The ILO provides feedback and guidance to companies, workers' and employers' organisations and others that have joined the UNGC. Although the GC cover the four fundamental labour standards: freedom of association and collective bargaining, abolition of child and forced labour and elimination of employment discrimination, it is not as elaborate in the field of labour rights as some other codes on CSR, as there is no mentioning of living wages, health and safety, hours of work, and the right to security of employment.<sup>85</sup>

The GC is not intended to compete with other voluntary initiatives. Instead, it seeks to build on complementarities and to reinforce initiatives which advance the goals of the Compact, assuming that over time, content compatibility and convergence will lead to effective global norms that are unique in their universality and legitimacy.

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<sup>83</sup> *Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles*, pp. 15, 17.

<sup>84</sup> *Ibid*, p. 29.

<sup>85</sup> J. Oldenziel, *The added value of the UN Norms. A comparative analysis of the UN Norms for Business with existing international instruments*, SOMO, Amsterdam, April 2005, p. 11.

### 4.2.3 Environment

World business is asked to:

- Principle 7: support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

The principles on environment are derived from the Rio Declaration on Environment and Development. The Declaration's 27 principles define the rights of people to development but also their responsibilities to protect the common environment. The idea behind the Rio Declaration is that, in order to have long-term economic progress, it has to be linked to environmental protection to create a sustainable form of development. This requires a new equitable global partnership involving governments, people and key sectors of society.<sup>86</sup>

From the GC's three environmental principles, the precautionary approach is the most concrete.<sup>87</sup> The other two principles are rather vague as companies are encouraged to undertake initiatives to promote greater environmental responsibilities and to encourage the development and diffusion of environmentally friendly technologies.<sup>88</sup>

### 4.2.4 Corruption

Principle 10: Businesses should work against all forms of corruption, including extortion and bribery.

In January 2004, Kofi Annan initiated a comprehensive, inclusive and transparent consultation process on the possible introduction of a tenth principle against corruption. Consultation on the addition of a tenth principle came shortly after the emergence in 2003 of an internationally recognized convention against corruption.<sup>89</sup> A formal letter was sent to all

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<sup>86</sup> Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles, p. 51.

<sup>87</sup> In the Rio Declaration, principle 15, the precautionary approach is described as: *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

<sup>88</sup> For the purposes of engaging with the GC, environmentally friendly technologies are considered to be those that are described in Chapter 34 of Agenda 21 as being "environmentally sound". Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles, p. 64.

<sup>89</sup> The new treaty provided the globally agreed language on the parameters of the corruption issue that already was available in the other three areas of principle, in the form of International Labour Organisation statutes on labour rights, the Universal Declaration of

participants (1,205, as of 31 December 2003), seeking their views. The Secretary-General stressed that the adoption of such a principle would only occur if there was broad-based support, and that such an addition would be exceptional in nature. The following wording was proposed: “Businesses should combat corruption in all its forms, including extortion and bribery”. For a variety of reasons, many respondents expressed discomfort with the phrase “*to combat corruption*,” which was part of the proposed language. Addressing these concerns, the following wording was instead recommended to the Secretary-General: “*Business should work against corruption in all its forms, including extortion and bribery.*”

The consultation process was concluded on 7 May 2004. Of the responses received, approximately 95 percent supported the addition of the principle. In addition, 252 new participants, who joined the Global Compact after 21 January, were consulted. None of these new signatories opposed the addition of a tenth principle. Based on the results of the consultation process, the Secretary-General formally introduced a principle against corruption at the Global Compact Leaders Summit, convened on 24 June 2004.<sup>90</sup> As of that date, it is automatically assumed that all participants adhere to all ten principles.

The adoption of the 10th principle commits Global Compact participants, not only to avoid bribery, extortion and other forms of corruption, but also to develop policies and concrete programs to address corruption. Companies are challenged to join governments, UN agencies and civil society to create a more transparent and corruption-free global economy.<sup>91</sup>

### 4.3 Supervision/Implementation

The GC is non-binding and includes no specific criteria of performance. It does not provide for an enforcement mechanism or a monitoring system. Rather, the Global Compact relies 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

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Human Rights, and the Agenda 21 action plan negotiated at the 1992 Earth Summit in Rio de Janeiro. The United Nations Convention Against Corruption was approved by consensus by the UN General Assembly on 31 October 2003. See *Global Compact Enters the Fight against Corruption* available at

[http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc\\_html\\_content/NewsDocs/Backgrounder\\_Corruption.pdf](http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc_html_content/NewsDocs/Backgrounder_Corruption.pdf) p.1 Last visited 2005-10-01.

<sup>90</sup> *Transparency and anti-corruption. Results of the Consultation Process on the Introduction of a Principle Against Corruption*, Global Compact Office, New York, 10 May 2004, pp 1-2, 6.

<sup>91</sup> *The 10th Principle against Corruption*, p. 1, available at [http://www.unglobalcompact.org/content/NewsDocs/10pr\\_2p\\_doc.pdf](http://www.unglobalcompact.org/content/NewsDocs/10pr_2p_doc.pdf) Last visited 2005-10-02.

the Global Compact is based.<sup>92</sup> Nevertheless, it is important to have transparent procedures in place to protect the integrity of the United Nations and the GC. Therefore some measures have been introduced that will be presented *infra*.

To participate in the initiative, companies are encouraged to publicly advocate the principles and the Global Compact. Companies are asked once a year to provide the UN with a concrete example of progress made or lessons learned in implementing the principles known as the “communication on progress”.<sup>93</sup> Practical guidance exists on how companies should approach this annual communication. It should be included in a company’s general annual report or other corporate communication and is expected to contain:

- A general description of the company’s activities in support of the GC together with a statement from a senior executive.
- A description of the ways in which the company has implemented the GC and its principles and key outcomes or expected outcomes.

Examples of progress should focus on change in internal policies, strategies, codes and standards, decision-making and other practices aimed at minimising the company’s own human rights impact and/or environmental impact, and/or improving the conditions of its own labour force.<sup>94</sup> The GC Office neither regulates nor monitors a company’s submissions and initiatives.<sup>95</sup>

Posted on the “Learning forum” section of the GC website, the submission of reports are supposed to act as an information databank to stimulate action, enhance transparency and encourage information sharing among businesses. Should a participant not submit a link to/description of its communication on progress to the GC website by 30 June 2005, or within two years of joining the compact (whichever is later), that participant will be removed from the list of participants until such a submission is made. Moreover, the participant will not be permitted to take part in GC events. The GC Office has the right to publish the names of participants removed from the list.<sup>96</sup> As from July 2005, participating companies that do not communicate their progress for two years in a row will be regarded as “inactive” and will be so identified publicly on the Global Compact website.

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<sup>92</sup> See GC website at

[http://www.unglobalcompact.org/Portal/Default.asp?NavigationTarget=/roles/portal\\_user/dialogue/Dialogue/nf/nf/transparency](http://www.unglobalcompact.org/Portal/Default.asp?NavigationTarget=/roles/portal_user/dialogue/Dialogue/nf/nf/transparency) Last visited 2005-10-02.

<sup>93</sup> N. Jagers, “Corporate Human Rights Obligations: in Search of Accountability”, *School of Human Rights Research Series, Volume 17*, 2002, pp. 129-130.

<sup>94</sup> See Example/Report Submission Template available at

[http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc\\_html\\_content/Learning/example\\_temp.doc](http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc_html_content/Learning/example_temp.doc) Last visited 2005-10-02.

<sup>95</sup> How the Global Compact Works: Mission, Actors and Engagement Mechanisms, 2003, p. 2.

<sup>96</sup> Global Compact Integrity Measures, available at

[http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc\\_html\\_content/NewsDocs/im\\_fin\\_140604.pdf](http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc_html_content/NewsDocs/im_fin_140604.pdf) Last visited 2005-10-02.

Inactive participants would not be permitted to participate in GC events until a submission is made. Nor would they be authorized to use the GC name and logo.<sup>97</sup>

From the outset, the GC generated significant concerns among NGOs promoting more socially and environmentally responsible corporate practises. CorpWatch for instance believed that rather than challenging corporations to behave in a more socially responsible manner, the GC was helping them to avoid their social responsibilities and to clean up their tarnished reputations and images, a process that could put the good name of the UN at risk. They argued that corporate influence at the UN was already substantial and any new partnership between the UN and the commercial sector was leading down a slippery stone toward the partial privatisation and commercialisation of the UN system itself. CorpWatch brought forward four main examples to illustrate their point. Firstly, the GC lacked mechanisms to monitor or enforce corporate adherence. Secondly, the GC office had allowed known violators of some of the Compact's principles to become members. Thirdly, the UN should not aspire to partner with businesses. Finally, CorpWatch feared risk of image transfer. They argued that the GC provided substantial opportunities for corporations to blue wash their image by using the flag of the UN and thereby improving their image and reputation.<sup>98</sup>

However, there are internal measures in place regarding the usage of the UN and the GC logo. The UN Secretary General's July 17<sup>th</sup> 2000 Guidelines on UN cooperation with the business community state that companies that violate human rights are not eligible for membership. With the introduction of a new governance structure, a number of measures to safeguard the GC's integrity are being strengthened. Restrictions on the use of the UN and GC logos have been made more explicit. The general policy is to permit its participants and other stakeholders to use the GC logo only in the context of their activities promoting the GC and its goals, but not in any manner that suggests or implies that the Global Compact Office (GCO) has endorsed or approved of the activities, products and /or services of the organisation, or that the GCO is the source of any such activities, products and/or services. Possible actions in response to breaches include, but are not limited to, revoking participant status, requesting the assistance of the relevant governmental authorities and/or instituting legal proceedings. Any suspected misuse of the GC name or logos should be referred to the GCO.<sup>99</sup>

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<sup>97</sup> See *The Global Compact's Next Phase*, 6 september 2005, p. 4 and attachment 1, p. 2, available at [http://www.unglobalcompact.org/content/AboutTheGC/gc\\_gov\\_framework.pdf](http://www.unglobalcompact.org/content/AboutTheGC/gc_gov_framework.pdf) Last visited 2005-10-02.

<sup>98</sup> J. Richter, "Building on Quicksand: Global Compact, democratic governance and Nestle", October 2003, pp. 12-13, available at <http://www.gifa.org/Documents/QuicksandReprint.pdf> Last visited 2005-09-15.

<sup>99</sup> See *The Global Compact's Next Phase*, 6 september 2005, attachment 2, p. 1.

## 4.4 Legal status

The Global Compact is a voluntary corporate citizenship initiative with two objectives:

- Mainstream the ten principles in business activities around the world
- Catalyse actions in support of UN goals

The Global Compact is purely voluntary for businesses, although the “internationally proclaimed human rights” it refers to are generally binding on States.<sup>100</sup> The Global Compact is not a regulatory instrument – it does not “police”, enforce or measure the behavior or actions of companies. The Global Compact is not a performance or assessment tool. It does not provide a seal of approval, nor does it make judgments on performance.<sup>101</sup> However, the introduction of a complaints procedure to deal with any allegations that corporate signatories to the Global Compact might be breaching its underlying principles has brought some teeth to the initiative. The “integrity measures” take effect immediately as part of the revised governance structure discussed *supra*.

Until now any corporate signatory has theoretically been able to flout the compact’s ten principles on issues such as human rights, bribery and the environment with impunity, leading to complaints from NGOs and some of the corporate signatories that it is a boon for “free riders”. However, under the new rules, complaints can now be lodged with the UN Global Compact Office, which will relay them to the company and can help to remedy any concerns.<sup>102</sup> If the company fails to respond satisfactorily, it will be removed from the signatories’ list and barred from Global Compact activities and use of the Compact logo until it rectifies the irregularity. The new system could lead to a flurry of complaints from pressure groups as has happened under the OECD Guidelines.<sup>103</sup>

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<sup>100</sup> 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, document E/CN.4/2005/91 of 15 February 2005 at p. 8.

<sup>101</sup> See GC website at [http://www.unglobalcompact.org/Portal/?NavigationTarget=/roles/portal\\_user/dialogue/Dialogue/nf/nf/transparency](http://www.unglobalcompact.org/Portal/?NavigationTarget=/roles/portal_user/dialogue/Dialogue/nf/nf/transparency) Last visited 2004-05-24.

<sup>102</sup> Should the behaviour of a participating company entail systematic or egregious abuse of the GC’s overall aims and principles, complaints can be made to the GC Office. In each instance, the first aim will be to find ways whereby the company in question can resolve the matter at hand, but the GCO reserves the right ultimately to revoke participant status. No entity involved in the complaints process should make any public statements regarding the matter until it is solved. The Office will not involve itself in any way in claims of a legal nature that a party may have against a participating company.

<sup>103</sup> “Firms put on notice as UN Compact gets teeth”, *Ethical Performance*, Volume 7, Issue 5, October 2005, p. 1.

## 4.5 Conclusion

The GC is a wholly voluntary initiative and does not provide for an enforcement mechanism or a monitoring system. Basically, it calls on companies to conduct a form of self-regulation through a learning process where relevant actors come together to discuss how best to implement the principles. This approach has caused a great deal of criticism among NGOs. Fear is expressed that companies with poor environmental or human rights record will use the name of the UN to blue wash their reputation and appear legitimate. Even though the Compact itself has put in place a mechanism to process allegations that companies are in breach of the GC's principles, the small secretariat of the GC can only do so much. Furthermore, the criteria for assessing a breach of the principles would be easier if there were greater precision in the language. Attention should also be given to elaborating the meaning of complicity in principle 2 and the precautionary approach in principle 7.<sup>104</sup>

Critics are concerned that the GC might do more to enhance the reputation of businesses than aiding the environment and improving human rights. Harsh critics have even pointed out that the role of the UN is not to distribute medals to companies that make vague promises that they will not violate certain provisions of international law.<sup>105</sup>

Nevertheless, there are some positive aspects to the GC. The UN embodies an international legitimacy and its efforts to use its unique authority in bringing companies to commit themselves to basic principles in regard to labour rights, human rights and environmental rights should be supported. The inclusion of companies from all regions of the world is commendable. In developing countries in particular the GC can play a role in raising the awareness of business leaders on CSR issues. Over half of the participants are from non-OECD countries. The Global Compact has potential to be a truly global platform with a great appeal to companies all over the world.<sup>106</sup> It is grounded in universally accepted declarations and conventions and may play a role in reinvigorating international instruments such as the ILO Core Conventions and the UDHR. One important aspect of the GC is that it reaffirms the fact that the UDHR applies not only to governments but also to companies.<sup>107</sup> According to the Global Compact Office, a recent study undertaken on the Global Compact's impact to date found that it had had a

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<sup>104</sup> Amnesty International, "Letter to Louise Frechette raising concerns on UN Global Compact", 7 April 2003, pp. 1-2.

<sup>105</sup> J. Richter, "Building on Quicksand: Global Compact, democratic governance and Nestle", October 2003, p. 4.

<sup>106</sup> *The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and distinctive contributions*, DAF/INV/(2005)6, 26 April 2005, p. 2.

<sup>107</sup> P. Utting, "The Global Compact: Why All the Fuss?", *United Nations Chronicle Online Edition*, p. 2.



significant impact on corporate behaviour, especially in helping to hasten positive change.<sup>108</sup>

However, some supporters and critics overemphasise the advantages and disadvantages of the GC. Only about 2000 transnational companies worldwide participate in the compact and once a member, they have to do relatively little to comply. Statements of ethical and human rights commitments are only first steps. Effective implementation must follow. Monitoring systems are crucial in order to ensure that companies who make promises keep their promises.

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<sup>108</sup> 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, document E/CN.4/2005/91 of 15 February 2005 at p. 8.

# 5. The United Nations Draft Norms

The issue of companies and the impact of their activities has received renewed attention within the UN. Two parallel developments are taking place: the Global Compact initiative described *supra* and the work on a regulatory system drawn up by the Sub-Commission on the Promotion and Protection of Human Rights, the United Nations' Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereafter referred to as the Draft Norms). The Draft Norms are the first attempt to establish an international framework for mandatory standards on corporate responsibility and will be presented in the following.

## 5.1 Introduction to the Draft Norms

In August 1998, the Sub-Commission on the Promotion and Protection of Human Rights<sup>109</sup> (hereafter called the Sub-Commission) established, for a three-year period, a sessional working group, composed of five of its members, to examine the working methods and activities of transnational corporations.<sup>110</sup> One of the tasks that was given to the group was to draw up a code of conduct to regulate the activities of companies. It was stressed that the code should eventually have a binding character.<sup>111</sup> The mandate of the working group was later extended for another three years.<sup>112</sup> Again the intention to end up with a legally binding document was expressed.<sup>113</sup>

After an extensive consultation process, taking place over a timeframe of four years, the working group drafted the Norms.<sup>114</sup> The Sub-Commission recognised that the Draft Norms reflect most of the current trends in the field of international law, and particularly international human rights law, with regard to the activities of transnational corporations and other business enterprises. They approved the Draft Norms by consensus in August 2003 and decided to transmit them to the Commission on Human Rights for consideration and adoption.<sup>115</sup> When approving the Draft Norms, the Sub-Commission also welcomed the commentary, which provides useful,

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<sup>109</sup> At that time the Sub-Commission was called the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

<sup>110</sup> UN Document E/CN.4/Sub.2/Res/1998/8 of 20 August 1998.

<sup>111</sup> UN Document E/CN.4/Sub.2/1999/9 of 12 August 1999, para 26.

<sup>112</sup> In August 2004 it was decided to once again extend, for a three year period, the mandate of the sessional working group of the Sub-Commission on the working methods and activities of transnational corporations. See Sub-Commission on Human Rights Resolution 2004/16 of 12 August 2004, para 3.

<sup>113</sup> UN Document E/CN.4/Sub.2/Res/2001/3 of 15 August 2001, para 2.

<sup>114</sup> UN Document E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003.

<sup>115</sup> Sub-Commission resolution 2003/16 of 13 August 2003.

authoritative guidance on the meaning of specific terms, the scope of particular provisions and the legal basis for different obligations.<sup>116</sup>

In its 60<sup>th</sup> session, which took place in April 2004, the Commission on Human Rights considered the Draft Norms. It confirmed the importance and priority of the question of responsibilities of transnational corporations and related business enterprises with regard to human rights. Furthermore, it requested the Office of the High Commissioner for Human Rights (“OHCHR”) to compile a report setting out the scope and legal status of existing initiatives and standards relating to corporate responsibility, including the Draft Norms, and, identifying outstanding issues, to consult with all relevant stakeholders in compiling the report, including states, transnational corporations, employers’ and employees’ associations, relevant international organisations and agencies, treaty monitoring bodies and non-governmental organisations.<sup>117</sup>

In May 2004, the Office of the High Commissioner for Human Rights (OHCHR) began a consultation process as a first step in implementing the Commission’s decision. The OHCHR sent requests to relevant stakeholders seeking their written responses to the issues raised in the Commission’s decision. In addition to seeking written input, OHCHR also consulted directly with stakeholders. The High Commissioner and OHCHR staff met with stakeholders on their request and participated in meetings organised by them. On 22 October 2004, OHCHR held a public consultation with stakeholders in cooperation with the Global Compact Office with over 50 entities participating.

The report was published in February 2005.<sup>118</sup> The High Commissioner underlined not only the importance for the Commission to identify options for the strengthening of standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation, but also the need for the Commission to act expeditiously to build upon the significant momentum that currently exists to define and clarify the human rights responsibilities of business entities. The High Commissioner further stated that defining and clarifying these responsibilities will provide a significant basis to promote dialogue and to resolve the many challenges that stakeholders face in the area of business and human rights. It was also held that there is still a gap in understanding what the international community expects of business when it comes to human rights and that there is a growing interest in discussing further the possibility of establishing a United Nations statement of universal human rights standards applicable to business.

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<sup>116</sup> ”The UN Human Rights Norms For Business: Towards Legal Accountability”, Amnesty International, 2004, p. 6.

<sup>117</sup> Commission decision E/CN.4/DEC/2004/116.

<sup>118</sup> 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, document E/CN.4/2005/91 of 15 February 2005.

The High Commissioner mentioned that the “road-testing” of the draft Norms by the Business Leaders’ Initiative on Human Rights could provide greater insight into the practical nature of the human rights responsibilities of business and that such an initiative deserves encouragement. The High Commissioner therefore recommended maintaining the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration. Finally, the report confirmed the need to further elaborate on outstanding issues including “sphere of influence” and “complicity”; the nature of positive responsibilities on business to “support” human rights; the human rights responsibilities of business in relation to their subsidiaries and supply chain; questions relating to jurisdiction and protection of human rights in situations where a State is unwilling or unable to protect human rights; sector specific studies identifying the different challenges faced by business from sector to sector; and situation specific studies, including the protection of human rights in conflict zones.<sup>119</sup>

## **5.2 Scope**

The obligation of transnational corporations and other business enterprises under the Draft Norms apply equally to activities occurring in their home country/territory and in any country in which the business is engaged in activities.<sup>120</sup> The definitions provided for transnational corporations and other business enterprises are intentionally broad to prevent transnational corporations from avoiding the application of the Draft Norms by reorganising their operations as strictly domestic entities, conducting business through independent contracts. The Draft Norms should be presumed to apply if the business enterprise has any relation with a transnational corporation, if the impacts of its activities are not entirely local, or the activities are so serious that they affect the right to security of life and person.<sup>121</sup> Moreover, the Draft Norms also require businesses to include them in contracts with, for example, contractors, subcontractors, suppliers and natural or other legal persons that they enter into agreements with.<sup>122</sup>

## **5.3 Key issues**

### **5.3.1 Human Rights**

The Draft Norms set forth basic, minimal business obligations regarding human rights. The Preamble of the Draft Norms refers explicitly to human

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<sup>119</sup> 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, document E/CN.4/2005/91 of 15 February 2005 at pp. 17-18.

<sup>120</sup> Draft Norms, commentary to operative paragraph 1, para a.

<sup>121</sup> Draft Norms, commentary, under I, definitions, paras 20-21.

<sup>122</sup> Draft Norms, operative para 15.

rights instruments such as the UDHR, the UN Charter and all major UN Conventions. Furthermore, references are made to ILO instruments, including the MNE Declaration, the OECD Guidelines and the Global Compact.<sup>123</sup> It acknowledges the universality, indivisibility, interdependence and interrelatedness of human rights. Economic, social and cultural rights such as the right to development, adequate food and drinking water, the highest attainable standard of physical and mental health and adequate housing shall be respected together with civil and political rights.<sup>124</sup>

The terminology used resembles that used in international human rights treaties and declarations and concerns have been raised as to the exact nature of the obligations and how to measure compliance. The difficulties in dealing with broad language must be faced. Businesses need to have clear guidelines as to what is expected of them in terms of human rights promotion/protection. Upcoming challenges include adapting existing methods of interpretation to the new circumstances of dealing with business enterprises as participants.<sup>125</sup> Human rights instruments were never drafted with the business community in mind and many are not easily translated into language that makes immediate sense to business.

The Draft Norms invoke a number of laws and regulations beyond national and international law that businesses should respect including the rule of law, public interest, development objectives and social, economic and cultural policies such as transparency, accountability and prohibition of corruption.<sup>126</sup> Within the limits of their resources and capabilities, companies are expected to encourage social progress and development. The Draft Norms demand considerably less than the Covenant on Economic, Social and Cultural Rights, which obliges states to take steps to the maximum of their available resources with a view to achieving progressively the full realisation of these rights.<sup>127</sup> States' primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights is recognised.<sup>128</sup> In this, the Draft Norms go no further than Principle 1 of the Global Compact. The Preamble, together with operative paragraph 1 of the Draft Norms, holds

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<sup>123</sup> The Global Compact has formally recognised the complementarities of the Draft Norms with its own work thus denying a possible conflict between the Draft Norms and the Global Compact.

<sup>124</sup> Draft Norms, operative para 12. This para is a kind of catch all provision with its far-reaching approach but it does not offer much advice to business.

<sup>125</sup> T. E. McCarthy, "Business and Human Rights: What do the New UN Norms Mean for the Business Lawyer?", *International Legal Practitioner*, November 2003, p. 75

<sup>126</sup> "The UN Human Rights Norms For Business: Towards Legal Accountability", Amnesty International, 2004, p. 8.

<sup>127</sup> C. Hillemanns, "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights", *German Law Journal*, Vol. 4, No. 10, 2003, p. 6.

<sup>128</sup> While primarily addressed to states, the UDHR also calls on every organ of society to respect, promote and secure human rights, laying the foundation for obligations which apply not only to states, but also to non-state actors including private business (preamble).

that within their respective spheres of activity and influence, transnational corporations and other business enterprises, as organs of society, are responsible for promoting and securing the human rights recognised in international as well as national law.<sup>129</sup> Thus, any duties companies have pursuant to the Draft Norms are limited by the reach of their activity and influence.<sup>130</sup> Businesses should refrain from activities that directly or indirectly violate human rights, or benefit from human rights violations and use due diligence and do no harm.<sup>131</sup>

To achieve both the negative and positive obligations, businesses can no longer be wilfully ignorant of the circumstances in which they operate. They must become much more aware of and sensitive to those circumstances and more engaged in taking actions to influence human rights positively.<sup>132</sup> The Preamble notes that multinational corporations, through their business practises and operations, have the capacity to both positively influence economic well-being, development and technological improvement as well as negatively influence human rights and lives of individuals.<sup>133</sup>

Companies need first to have policies and practises in place to ensure that their own direct operations and those of their suppliers and contractors do not violate human rights.<sup>134</sup> Whereas the OECD Guidelines call on companies to encourage, where practicable, partners to apply principles of corporate conduct, the Draft Norms require that businesses shall apply and incorporate them in their contracts or other arrangements and dealings with

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<sup>129</sup> The International Organisation of Employers and the International Chamber of Commerce have been very critical of the Draft Norms, saying that they attempt to place human rights obligations on private business actors and thus put the obligation of governments on private business. As shown these arguments do not hold. The Draft Norms recognise the primary responsibility of states and limit business obligations to their respective spheres of activity and influence. The Draft Norms do not oblige companies to guarantee human rights such as the right to a fair trial. The human rights obligations of companies are not a copy of the responsibilities required of states.

<sup>130</sup> In essence, the larger the company, the larger is its sphere of influence, and therefore the larger its responsibility. N. Rosemann, "Profiting from UN Norms on TNCs", *Human Rights Features*, 29 March - 4 April 2004, p. 9.

<sup>131</sup> Draft Norms, commentary to operative paragraph 1, under b. There are legitimate business concerns of what constitutes indirect complicity. Can the mere presence of a company in a country that has human rights deficiencies be interpreted as complicity to human rights violations? According to Sir Geoffrey Chandler companies will need to judge the risks in countries of operations. Companies are not asked to take the role of governments, nor should they be asked to pull out of countries if they have policies ensuring the support of human rights. However, the presence of a company constitutes economic support for the regime in power. If companies are silent about violations and repressions carried out by the regime, they will be seen as complicit in what is going on around them. CSR Europe Q & A session: United Nations Norms on the Responsibility of Transnational Companies, p. 16.

<sup>132</sup> The UN Human Rights Norms For Business: Towards Legal Accountability", Amnesty International, 2004, p. 8.

<sup>133</sup> Compare to OECD Guidelines where emphasis is put on positive contributions that companies can make to economic and social progress.

<sup>134</sup> Draft Norms, operative paragraph 15.

contractors.<sup>135</sup> Secondly, companies also need to ensure that where they are dependant on state forces for their security, human rights are observed in this protection.<sup>136</sup> Thirdly, they have a duty, as laid down in the UDHR, to support human rights and this should be recognised in their corporate responsibilities.<sup>137</sup>

The Draft Norms also include a non-discrimination provision. Businesses are required not to discriminate on grounds unrelated to the job such as race, colour, sex, language, religion or political opinion, and as well to ensure equal opportunities.<sup>138</sup> The commentary clarifies that the non-discrimination obligation extends also to health status such as HIV/AIDS or disability, sexual orientation and pregnancy.<sup>139</sup> Implementation of the provision may face challenges arising from national legislation, social policy and sensitivities.<sup>140</sup>

### 5.3.2 Labour

Labour rights dominate the rights mentioned in the Draft Norms. They reiterate, on the one hand, the prohibitions of forced or compulsory labour and exploitation of children,<sup>141</sup> and on the other, the mandates for safe and healthy working conditions,<sup>142</sup> remuneration that ensures an adequate standard of living,<sup>143</sup> freedom of association and the right to collective bargaining.<sup>144</sup>

ILO Conventions and Recommendations are referred to and the ILO obviously had great influence in defining the material content of the Draft Norms. The commentary to the paragraphs explains that workers shall have the option to leave employment,<sup>145</sup> and that businesses shall take action against debt bondage and contemporary forms of slavery.<sup>146</sup>

Except for light work, which means work that is not harmful to the health or development of a child and will not prejudice school attendance, child labour prior to the age of 15 or the end of compulsory schooling is presumed to be exploitative.<sup>147</sup>

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<sup>135</sup> N. Rosemann, "Profiting from UN Norms on TNCs", *Human Rights Features*, 29 March - 4 April 2004, p. 9.

<sup>136</sup> Draft Norms, operative paragraph 4.

<sup>137</sup> CSR Europe Q & A session: United Nations Norms on the Responsibility of Transnational Companies, p. 16.

<sup>138</sup> Draft Norms, operative para 2.

<sup>139</sup> Ibid, commentary to operative para 2, under a.

<sup>140</sup> T. E. McCarthy, "Business and Human Rights: What do the New UN Norms Mean for the Business Lawyer?", *International Legal Practitioner*, November 2003, p. 75.

<sup>141</sup> Draft Norms, operative paras 5-6.

<sup>142</sup> Ibid, operative para 7.

<sup>143</sup> Ibid, operative para 8.

<sup>144</sup> Ibid, operative para 9.

<sup>145</sup> Draft Norms, commentary to operative para 5, under b.

<sup>146</sup> Ibid, under a.

<sup>147</sup> Ibid, commentary to operative para 6, under a.

Businesses shall not require any worker to work more than 48 hours a week or more than 10 hours a day and provisions are made for compensated overtime and vacation.<sup>148</sup> There might be some controversy over the provision obliging remuneration that ensures an adequate standard of living – a living wage. However, the Draft Norms do not try to establish an international minimum wage, but simply require a fair compensation under local standards.<sup>149</sup>

### 5.3.3 Environment

Businesses are obliged to carry out their activities in accordance with national and international laws with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle in countries where they operate. They shall furthermore conduct their activities in a manner contributing to the wider goal of sustainable development.<sup>150</sup>

The precautionary principle may conflict with some businesses' interpretation of an entrepreneurial, risk-taking culture. For example, those companies that do not accept the emerging scientific consensus about climate change will not be receptive to the commentary's provision that the lack of full scientific certainty should not be used as a reason to delay remedial measures.<sup>151</sup>

The Draft Norms furthermore entail provisions on the right to security of persons, security arrangements for companies, protection of civilians and laws of wars, corruption and bribery, consumer protection (includes observance of the precautionary principle) and indigenous peoples' rights.<sup>152</sup> They provide an instrument to oblige companies to fulfil a very broad set of human rights guaranteed in different international Declarations and Conventions.

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<sup>148</sup> Ibid, commentary to operative para 7, under f.

<sup>149</sup> Draft Norms, commentary to operative para 8, under a. See also "The UN Human Rights Norms For Business: Towards Legal Accountability", Amnesty International, 2004, p. 10. The Concept of a living wage has been tackled by the social accountability standard SA8000 and the UK Ethical Trading Initiative. At its simplest it aims to prevent sweatshops or exploitative child labour.

<sup>150</sup> Draft Norms, operative para 14.

<sup>151</sup> Draft Norms, commentary to operative para 14, under e. See "The UN Human Rights Norms For Business: Towards Legal Accountability", Amnesty International, 2004, p. 11.

<sup>152</sup> The emphasis on consumer protection and security arrangements could be argued as unnecessary since human rights have to be protected "within a company's total sphere of influence" and in relation to all stakeholders. Furthermore, the UN Convention against Corruption has a wider reach than the Draft Norms in relation to corruption and bribery. The most common reason for bringing corruption within the human rights sphere is the fact that corruption and bribery have serious negative impacts on developing human rights in developing countries.



## 5.4 Supervision/Implementation

One of the main differences between the Draft Norms and the instruments mentioned *supra* is that the Draft Norms include general provisions of implementation in the text itself, with additional provisions in the commentary. The Draft Norms require business to adopt internal rules of compliance. These rules must be disseminated so that their meaning is understood by employers, staff, stakeholders and the general public.<sup>153</sup> Moreover, businesses shall periodically report on and take other measures fully to implement the Draft Norms and include them in contracts with business partners.<sup>154</sup> Businesses should monitor the performance of their partners and if they do not comply with the Draft Norms, companies shall cease doing business with them.<sup>155</sup> The Draft Norms also call upon other actors such as NGOs and trade unions to incorporate them into their contract negotiations with and assessments of companies.<sup>156</sup> Furthermore, the Draft Norms hold that companies shall conduct periodic evaluations concerning the impact of their own activities on human rights.<sup>157</sup>

Businesses shall provide legitimate and confidential avenues through which workers can file complaints with regard to violations. Companies shall press for the full resolution and take actions to prevent recurrences.<sup>158</sup> In cases where lack of compliance has arisen, businesses must establish a plan of action for reparation and redress.<sup>159</sup> Forms of reparation may include restitution, compensation and rehabilitation for any damage done or property taken.<sup>160</sup>

States should establish and reinforce the necessary legal and administrative framework for ensuring that the Draft Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.<sup>161</sup> In determining damages and criminal sanctions, national courts and international tribunals are to apply the Draft Norms pursuant to their respective laws. So far the US Alien Tort Claims Act is the only national law that provides for damages for the violation of international human rights law by corporations.<sup>162</sup>

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<sup>153</sup> Draft Norms, commentary to operative para 15, under a.

<sup>154</sup> Draft Norms, operative para 15.

<sup>155</sup> Draft Norms, commentary to operative para 15, under c.

<sup>156</sup> Draft Norms, commentary to operative para 16, under c.

<sup>157</sup> Draft Norms, commentary to operative para 16, under e.

<sup>158</sup> Draft Norms, commentary to operative para 16, under e and f.

<sup>159</sup> Draft Norms, commentary to operative para 16, under h and operative paragraph 18.

<sup>160</sup> An important aspect of transparency comes into focus when addressing the issue of reparation. If the damages were to become publicly known this could constitute an incentive for businesses to adhere to the Draft Norms so as to avoid so called "name and shame".

<sup>161</sup> Draft Norms, operative para 17.

<sup>162</sup> C. Hillemanns, "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights", *German Law Journal*, Vol. 4, No. 10, 2003, p. 8. It is worth noting that of the 36 ATCA cases to date involving

Whereas the Global Compact posits the UN as a mere mediator in voluntary initiatives undertaken by businesses, the Draft Norms declare that companies shall be subject to periodic monitoring and verification by existing UN and other mechanisms, as well as by any other mechanisms to be created in the future, regarding the application of the Draft Norms.<sup>163</sup> The commentary suggests that the Draft Norms could presently be used by human rights treaty monitoring bodies to create additional reporting requirements by states, and as the basis for future general comments and recommendations.<sup>164</sup>

Until future bodies are created or existing ones charged with the responsibility to enforce the Draft Norms, the Sub-Commission and its working group are equipped to receive and process information regarding compliance.<sup>165</sup> In the resolution approving the Draft Norms the Sub-Commission had requested the working group to be able to receive information from a wide range of sources, including NGOs, about the possible negative impact of the activities of transnational companies and other business enterprises on human rights with particular reference to the Draft Norms. Furthermore, the Sub-Commission asked the working group to invite companies concerned to provide comments. This clearly opened for reporting and monitoring on business practises. However, the Commission on Human Rights ruled out such functions when it declared the Norms to be a draft proposal without legal standing and held that the Sub-Commission should not perform any monitoring.<sup>166</sup>

In April 2005, the UN Commission on Human Rights adopted a resolution requesting the UN Secretary General to appoint a special representative on the issue of business and human rights. The resolution was passed by a vast majority of states. Only the United States, Australia and South Africa opposed and Burkina Faso abstained. The special representative, John Ruggie<sup>167</sup>, is appointed for two years and will report annually to the Commission. Mr Ruggie is mandated to:

- identify and clarify standards of corporate responsibility and accountability for business with regard to human rights;

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companies, 20 have been dismissed, 3 settled and none decided in favour of the plaintiffs; the rest are ongoing.

<sup>163</sup> Draft Norms, operative para 16.

<sup>164</sup> Draft Norms, commentary to operative para 16, under b. N. Rosemann, "Profiting from UN Norms on TNCs", *Human Rights Features*, 29 March-4 April 2004, p. 9.

<sup>165</sup> Draft Norms, commentary to operative para 16, under b.

<sup>166</sup> Commission decision E/CN.4/DEC/2004/116.

<sup>167</sup> John G. Ruggie is Kirkpatrick Professor of International Affairs and Weil Director, Mossavar-Rahmani Center for Business and Government, at Harvard University's John F. Kennedy School of Government. He is also an Affiliated Faculty Member at Harvard Law School.

- elaborate on the role of states in effectively regulating and adjudicating the role of business with regard to human rights, including through international cooperation;
- research and clarify the implications for business of concepts such as "complicity" and "sphere of influence";
- develop materials and methodologies for undertaking human rights impact assessments of the activities of business; and
- compile a compendium of best practices of states and business.<sup>168</sup>

The special representative will build on the findings of the OHCHR report, supplemented by the input received from stakeholders during the consultation period leading to the report. This requires further consultation with a range of stakeholders, and requires that the representative cooperates closely with the UN Global Compact, UN agencies, labour and civil society to support principles in the areas of human rights, labour and the environment.<sup>169</sup> Broad stakeholder consultation, specifically including business associations, will legitimise the process in the eyes of business and other stakeholders. The debate will not be about the Draft Norms, though it would be irrational and wasteful not to regard them as part of the input to it.<sup>170</sup> The special representative will not monitor business practices or function as a complaint mechanism for victims of human rights abuses, but rather will conduct further work and clarification of the process begun by the Draft Norms in 2003.

## 5.5 Legal status

The task of the Sub-Commission is merely to undertake studies and to make recommendations to the Commission on Human Rights.<sup>171</sup> It has referred the Norms to the Commission which affirmed that document E/CN.4/Sub.2/2003/12/ Rev.2 had not been requested by the Commission and, as a draft proposal, had no legal standing and that the Sub-Commission should not perform any monitoring function.<sup>172</sup>

The emphasis on the non-legal nature of the Draft Norms could undermine their value in providing a comprehensive framework for understanding the key human rights responsibilities of companies as well as reducing their value as an advocacy tool. The emphasis on the non-legal nature must however be read in light of the rest of the resolution and does thus seem less severe than at first glimpse considering that the Commission confirmed the importance and priority of the question of responsibilities of transnational

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<sup>168</sup> Commission resolution E/CN.4/2005/69 of 20 April 2005, para. 1.

<sup>169</sup> Commission resolution E/CN.4/2005/69 of 20 April 2005, para. 3.

<sup>170</sup> Sir Geoffrey Chandler, "A human rights opportunity for the corporate world", *Corporate Responsibility Management*, Volume 1, Issue 6, June/July 2005.

<sup>171</sup> The Sub-Commission has drafted a number of human rights documents that have eventually developed into treaties or other UN standards, including the International Convention on the Elimination of All Forms of Racial Discrimination and the UN Declaration on the Human Rights of Non-Nationals.

<sup>172</sup> UN Document E/CN.4/2004/L.73/Rev.1 of 16 April 2004.

corporations and related business enterprises with regard to human rights. Furthermore, although the adoption of standards within the UN system is the responsibility of international intergovernmental conferences or intergovernmental organs, such as the Commission on Human Rights and the General Assembly, the persuasive and moral weight of pronouncements by expert groups such as the Sub-Commission, should not be dismissed.<sup>173</sup> Even so, formal endorsement by the UN would provide the Draft Norms with greater legitimacy.

Under international law, there are only two kinds of legally binding documents: treaties or customary international law. The Draft Norms are not a formal treaty that states ratify and assume binding legal obligations through and certainly not customary law. To develop international customary law takes a long time and requires a high level of consensus among states. However, their language is stronger and they have a more authoritative approach than existing standards on CSR. For a number of reasons, the Draft Norms could bring legal implications:

- International law is not static but is constantly developing. If references are made to the Draft Norms by for example national and international tribunals and courts and they are applied by these tribunals/courts, they will take on greater force and their legal effect will increase.
- Most countries are members of the UN and therefore any code of conduct drawn up by the UN would be more or less universal. Worldwide acceptance of the standards would be more likely than in the case of the OECD Guidelines. Also, the process leading to the Draft Norms is similar to that resulting in soft law standards, some of which are now seen as customary law.
- In their tone and approach the Draft Norms are normative. Unlike the OECD Guidelines and the MNE Declaration, they are not limited by clauses emphasising their non-regulatory nature.
- The Draft Norms have a solid basis in law. All of the substantive human rights provisions are drawn from existing international law and standards. The novelty of the Draft Norms is to apply these standards to private enterprises within the limits of businesses' impact and influence.<sup>174</sup>
- The Draft Norms are the outcome of a multi-year deliberative process of independent experts and the input of many legal scholars

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<sup>173</sup> T. E. McCarthy, "Business and Human Rights: What do the New UN Norms Mean for the Business Lawyer?", *International Legal Practitioner*, November 2003, p. 74.

<sup>174</sup> "The UN Human Rights Norms For Business: Towards Legal Accountability", Amnesty International, 2004, pp. 6-7.

and was drafted by the UN Sub-Commission on Human Rights with a distinguished legacy of contributing to standard-setting.<sup>175</sup>

It is clear that the Draft Norms are not, as of yet, a legal instrument, but rather a work in progress that will be refined as it makes its way through the UN system. What is really necessary for the Draft Norms to be passed by the Commission is evidence of a political will by world governments to hold businesses to account.

They may become binding law many years down the road when there is consensus. On the other hand, since the Draft Norms are based on international law, which countries should translate into national law, a business enterprise may see similar provisions legally binding on it through national legislation.<sup>176</sup> Such an approach is urged by the Draft Norms in operative paragraph 17.

Even if the Draft Norms will not become legally binding, they, along with the commentary, could still be used as a principal source in the identification and assessment of existing standards in the area. Amnesty International considers the Draft Norms to be of use as a benchmark which human rights obligations can be measured against. Furthermore, the Draft Norms are at present being road tested by the Business Leaders Initiative on Human Rights.<sup>177</sup> It must be expected that they will influence to some degree any future attempt to create a minimum basis for corporate responsibility.

## 5.6 Conclusion

The work behind drafting the UN Norms constitutes a remarkable effort, an ambitious move and has considerably increased the awareness of companies as regards the relevance of human rights when it comes to corporate responsibility. The Draft Norms set out, in a single document, a comprehensive list of human rights obligations of companies and their reach is extensive. They deal with a variety of corporate responsibilities, including some that are traditionally dealt with outside the human rights framework such as environmental issues and consumer protection.

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<sup>175</sup> CSR Europe Q & A session: United Nations Norms on the Responsibility of Transnational Companies, p. 9.

<sup>176</sup> Governments have committed themselves at the World Summit on Sustainable Development to actively promote corporate responsibility and accountability, based on Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures. N. Rosemann, "Common standards, contested principles. Are the Norms on the Responsibility of Business Entities an issue for the 60th CHR? *Human Rights Features*, 29 March-4 April 2004, p.8.

<sup>177</sup> The participating companies are: Novartis, National Grid, Body Shop International, Barclays PLC, MTV Networks Europe, Novo Nordisk, ABB, Statoil, GAP Inc. and Hewlett Packard. The project will end in December 2006. S. Skadegard Thorsen and A. Meisling, "Perspectives on the UN Draft Norms", p. 12.

The Draft Norms go more into detail than other standards and initiatives on CSR. Some of the paragraphs are very far-reaching in scope and lack clear descriptions, one example being the precautionary principle. However, in most cases the commentary clarifies ambiguous paragraphs. Critics have held that the Draft Norms are too extensive in scope and that they should focus on human rights solely. In my opinion, their strength lies in their unifying effect of bringing together the elements relevant to the sphere of influence of businesses from a wide range of internationally agreed instruments, something which neither the UN Global Compact nor the OECD Guidelines have done. Aspects of the Draft Norms should not be bargained away until absolutely necessary.

In addition to setting a standard that business can measure itself against, the Draft Norms are also a useful benchmark against which national legislation can be judged. Many countries do not have the legal framework in place to implement/monitor existing laws. The Draft Norms then offer an alternative route to enforcement and monitoring even if the monitoring mechanism as such is yet to be defined.<sup>178</sup> Independent monitoring carried out by an international (UN) body could help create practically applicable measurement and relieve companies from the burden of establishing credible external monitoring and verification.<sup>179</sup>

The Draft Norms fill an important gap in the protection of human rights, applies to all companies and can help to level the playing field for companies that want to do the right thing for human rights. Businesses that have invested considerably in CSR would like this investment to be returned and one way is to make competitors compelled to follow similar standards. The Draft Norms can furthermore be seen as expressing the expectations of public opinion and civil society regarding the conduct of companies. If companies disregard the Draft Norms they will be target for public exposure whether the Draft Norms are binding or not. The Draft Norms have already been widely circulated and civil society is already implementing and monitoring them.

The Draft Norms are the most comprehensive effort as regards standards on corporate responsibility so far but not as unique or unforeseen as some businesses think. Most of the content exists elsewhere. They do not threaten the functioning of businesses, but rather align their operations with firmly established international human rights standards. Responsible companies should not regard the Draft Norms as a threat, but as a tool to advance their thinking and action on human rights issues. The primary responsibility to protect and promote human rights in international law as well as national law remains with governments, even if using treaty language like “shall” might raise legal questions and create confusion as to who the responsible party is. However, the Draft Norms simply attempt to restate relevant

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<sup>178</sup> ”The UN Human Rights Norms For Business: Towards Legal Accountability”, Amnesty International, 2004, p. 5.

<sup>179</sup> Ibid, p. 13.

human rights law in regard to the obligations of businesses within their particular spheres of influence and activity.

One must keep in mind that the Draft Norms are not binding, i.e. they can not be enforced and therefore have similar problems to the other voluntary initiatives discussed and, given the absence of any defined implementation or monitoring mechanism, have at present even fewer teeth than the OECD Guidelines. However, the Draft Norms are designed to incorporate and encourage further evolution and are by no means the last step in relation to corporate social responsibility and human rights.

The High Commissioner mentioned in its report that the “road-testing” of the Draft Norms by the Business Leaders’ Initiative on Human Rights could provide greater insight into the practical nature of the human rights responsibilities of business and that such an initiative deserves encouragement. The High Commissioner therefore recommended maintaining the Draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration.

## 6. Conclusion

Faced with a shift in power from the once dominant nation-state to other entities, such as transnational corporations, it is doubtful if the state-orientated perception of human rights is still adequate to deal with current issues of human rights violations. Companies collectively are a predominant economic force in today's society. Their increasing influence has been followed by growing public distrust. Companies are believed to always put profits first and are seen to be part of the problem of social and economic inequality. In some cases they are even viewed as contributors to human rights violations. Yet, with some exceptions companies are only legally accountable to their shareholders.<sup>180</sup>

Voluntary codes and company guidelines have been adopted as an attempt to rectify the situation, but these have not led to consistent action by companies. Voluntary initiatives do have some value in that they provide minimum standards for companies to follow and raise the level of company behavior. Companies are more likely to act in a certain way if they have agreed themselves that the course of action is correct. Furthermore, voluntary codes raise consciousness about the need for standards and provide guidance for laws that could be adopted at national level.<sup>181</sup>

However, voluntary initiatives have specific limitations such as free riding, require specificity of commitments and obligations and lack accountability to stakeholders. They also lack enforcement mechanisms. There are no penalties for non-compliance. The degree to which they are implemented depends entirely on a company's good will. Some companies may have joined a code merely for public relations purposes and their participation have not had any real impact on their business behaviour. Moreover, many codes do not contain references to the most basic human rights and labour standards.

Voluntary initiatives also let governments off the hook. Governments have a clear obligation to ensure that companies respect human rights. Moreover, the repertoire of policy instruments available to states to improve the human

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<sup>180</sup> Companies can be held responsible for international crimes. Several companies faced criminal sanctions after World war II. In the Zyklon B Gas case, the supplier of the gas used to kill concentration camp inmates was convicted for complicity in international crimes. Likewise, in the I.G. Farben case, leading officers of the corporation were convicted because they used that corporation as an instrument to commit violations of humanitarian law. The Chief Prosecutor of the ICC has announced that he intends to pursue bringing multinational companies to court, when the prosecution can establish that companies participated in violations that form part of the remit of the Court, i.e. gross human rights violations, crimes against humanity and genocide. Companies can also be held responsible under treaties on oil pollution from ships for damages and insurance payments,

<sup>181</sup> J. Oldenziel, "*The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct*", SOMO, Amsterdam, September 2000, p. 41.



rights performance of business is far greater than most states currently employ. This includes home countries providing investment guarantees and export credits, often without adequate regard for the human rights practices of the companies receiving the benefits.

If the role of law is left out altogether it only benefits governments who are failing to live up to their human rights obligations. However, voluntary initiatives can lend themselves to greater accountability over time if they were to be included in business agreements such as host country investment agreements. While the initiatives are welcome, they cannot be seen as a substitute for regulation which establishes a baseline of rights, duties and consistent behaviour. Unless all corporations are made equally accountable for their environmental and social impacts, there remains little incentive for a general improvement in behaviour.

As states are primarily responsible for ensuring and protecting human rights, the logical way of approaching corporate responsibility would be through national legislation. The debate about business and human rights would be far less pressing if all Governments faithfully executed their own laws and fulfilled their international obligations. It has been suggested that a draft model of national legislation for the regulation of companies could be established.<sup>182</sup>

However, multinational companies may have a larger turnover than the gross domestic product of certain states and are thereby more powerful. National laws would in those cases not be sufficient to protect human rights. Also, some states do not live up to their human rights obligations which justify action at the international level. Moreover, each state has situations peculiar to it that could make harmonisation difficult at the international level. Legislation would have to be sufficiently detailed to fit a variety of states without being too general.<sup>183</sup>

An international framework is therefore needed to suit situations where national legislation proves to be insufficient. It must however be emphasized that international law can never replace national law. Even if international rules were developed to make companies responsible for human rights violations, they would still depend on national courts for enforcement. National laws therefore would need to be strengthened. International law in this area would complement, not replace, enforcement

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<sup>182</sup> See comments made by Mr. Alfredsson, member of the working group on the working methods and activities of transnational corporations, in document E/CN.4/Sub.2/2004/21, p. 10.

<sup>183</sup> See comments made by Ms. Hampson, attendant at the sixth session of the working group on the working methods and activities of transnational corporations, UN document E/CN.4/Sub.2/2004/21, p. 10.

at national level. International human rights standards would provide a benchmark against which national legal systems could be assessed.<sup>184</sup> What would such an international framework consist of one might wonder? The value of the Draft Norms is that they set out, in a comprehensive document, agreed international principles, based on human rights, labour and environmental standards such as the UDHR, the Convention on the Rights of a Child and ILO Conventions, applicable to business. Most existing codes cover only a narrow area in the human rights field, such as labour rights, whereas the Draft Norms are comprehensive. Also, the Draft Norms follow already existing norms which provides more legitimacy than standards invented by companies. Voluntary approaches work best for the well-intentioned. Even though a moral obligation must exist alongside legal obligations in order to create a long-term commitment to corporate accountability, the overwhelming majority of companies have no human rights policy at all and only a few are prepared to make commitments in this area.

However, mandatory and voluntary approaches need not be mutually exclusive, but could be complementary. Whereas the advantage of the Draft Norms lays in their broadness, their comprehensiveness and their applicability, the advantage of for example the Global Compact principles lies in the openness of their interpretation beyond the minimal standards set out in the Draft Norms.<sup>185</sup> The Draft Norms may enhance the quality of stakeholder relations, setting out common standards that enable NGOs and companies to communicate in the same language. Another advantage of the Draft Norms is that they level the playing field and open for comparison between companies, thus establishing a basis for better competition on performance. Although the Draft Norms do not have the force of law, they could serve as a useful guidance for governments wishing to develop laws for corporate accountability.

An obligation for states to ensure that human rights are respected by companies already exists under international law. However, the Draft Norms add direct liability for corporations. As reiterated in the Draft Norms, primary responsibility of protecting human rights must lie with states. Business cannot and should not replace government. The two should have complementary roles in protecting human rights. Given the divergent ongoing efforts of the international community to bring business in line with human rights, it must be foreseen that some kind of international regulation over the years will be established.

The change towards corporate responsibility will not be a swift one. It will take time to gain support. It could be that mandatory provisions will start to

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<sup>184</sup> *Business and Human Rights: Towards legal accountability*, speech delivered by David Petrasek, Senior Director of Policy Amnesty International, 23 January 2003, p. 2, available at <http://web.amnesty.org/library/print/ENGIOR500012003> Last visited 2005-10-22.

<sup>185</sup> A. King, "The United Nations Human Rights Norms for Business and the UN Global Compact", February 2004, p. 3.

appear in a range of jurisdictions and that the EU will eventually end up with similar proposals. To date, risks are primarily related to “name and shame”. However, the use of litigation, for example through the Alien Torts Claims Act, the development in social labelling and procurement policies and the ever increasing adoption of internal policies and codes of conduct on corporate responsibility points towards the eventual establishment of regulation.<sup>186</sup>

Whether the Draft Norms are the answer to the corporate accountability vacuum is debatable. They, as a document, have (as yet) even less effectiveness than some of the voluntary mechanisms. It is difficult to predict whether the Commission on Human Rights will follow the Sub-Commissions recommendations and endorse the Draft Norms and its Commentary with the approval of UN member states. There are important instances where initiatives of the Sub-Commission resulted in the adoption of declarations and even international treaties, such as in the case of the Convention on the Elimination of all Forms of Racial Discrimination. However, within the UN system a clear preference exists for voluntary approaches as opposed to binding regulation. Moreover, not a single delegation spoke out in favour of the Draft Norms as they currently stand at the last Commission on Human Rights session in April 2004. As draft has followed draft in order to accommodate different stakeholders’ views, the elaboration of principles became increasingly complex including wording such as the precautionary principle. Furthermore, clauses about monitoring were bound to meet opposition from the home governments of transnational corporations.

Still, the Draft Norms do have a value in that their analysis and commentary could provide a basis for a binding instrument on corporate responsibility as they are an authoritative interpretation of the responsibilities of corporations under international human rights law. It must also be noted that the Draft Norms are not a closed chapter. The High Commissioner on Human Rights report recommended maintaining the Draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration.<sup>187</sup> It was also held that here is a growing interest in discussing further the possibility of establishing a United Nations statement of universal human rights standards applicable to business. This could be interpreted as an indication that the Draft Norms are not seen as the ultimate solution to the problem of corporate accountability.

It is important to point out that it should not be left entirely to the UN to regulate in this area. Companies and associations of business, individual

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<sup>186</sup> No case law has yet found companies liable under the Alien Torts Claims Act, but several cases were settled. Few companies see ongoing media attention worthwhile waiting for a judgement in relation to often very delicate issues.

<sup>187</sup> 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, document E/CN.4/2005/91 of 15 February 2005.

governments (especially from “powerful” countries), international financial institutions and international trade and economic organizations like the OECD and G8 should all contribute in persuading and assisting states to develop the capacity and willingness to ensure that a good legal framework is in place regulating company behaviour.

In sum, I see no alternative but to move gradually towards adopting a set of legally binding rules setting out the responsibilities for businesses when it comes to respecting human rights found in the UDHR, ILO Conventions and other treaties. In the longer term an international regulatory framework will be required for diverse business activities whose mobility makes national legislation and jurisdiction inadequate as regards corporate accountability. Furthermore, most large companies have outgrown the ability of many individual states to regulate them effectively in that countries are worried that tough regulation will scare off foreign direct investment.

Companies should be held accountable for abuses and complicity. Law has a deterrent effect and victims have a right to remedy and reparation. Market forces are not enough to control the behaviour of companies. Companies who act ethically are not always given a competitive advantage. As western multinationals are beginning to move their operations out of “controversial” states, companies from countries like China, Malaysia and Russia are moving in. Moreover, large corporations are beginning to challenge the traditional economic and political dominance of governments. Such power needs to be constrained by law.

The Draft Norms have put businesses’ human rights responsibilities at the top of the agenda and a positive outcome to the issue of human rights accountability of corporations must be ensured. The High Commissioner highlighted in his report the need for the Commission to act expeditiously to build upon the significant momentum that currently exists to define and clarify the human rights responsibilities of business entities. There is still a gap in understanding what the international community expects of business when it comes to human rights. Common benchmarks that provide clarity in regards to responsibility and accountability are therefore needed.

Alongside developing an international framework, national legislation needs to be strengthened. The more international bodies develop standards applicable to companies, the more likely it is that states will develop their own regulatory initiatives to reflect those standards. It is however difficult to foresee national legislative changes unless backed by corporations. Efforts must therefore also be placed on emphasising companies’ moral duties to respect human rights and towards changing corporate culture. If the debate on corporate responsibility ends without an outcome, all stakeholders will be losers. However, the biggest losers will be companies that will be seen as putting profit before principle. The challenge for companies will grow as corporate influence continues to increase. Under international law “every organ of society” should be held accountable.



# Bibliography

## Literature

- Günter, H. "The Tripartite Declaration of Principles (ILO): standards and follow-up", in Horn, N. (ed.), *Studies in transnational economic law, volume 1, Legal Problems of Codes of Conduct for Multinational Enterprises*, 1980.
- Jagers, N. "Corporate Human Rights Obligations: in Search of Accountability", *School of Human Rights Research Series, Volume 17*, 2002.
- Kamminga, M. T. and Zia-Zarifi, S. (eds.) *Liability of Multinational Corporations under International Law*, 2000.
- Kamminga, M. T. "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC", in Alston (ed.), *The EU and Human Rights*, 1999.

## NGO publications

- Amnesty International "The UN Human Rights Norms For Business: Towards Legal Accountability", 2004.
- Feeney, P. (RAID) "Making Companies Accountable. An NGO Report on Implementation of the OECD Guidelines for Multinational Enterprises by National Contact Points", October 2002.
- Friends of the Earth "A Guide to the Guidelines – Practical Guidance for Individuals,

	Communities and NGOs on the Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises".
Friends of the Earth Netherlands	"Using the OECD Guidelines for Multinational Enterprises: A critical starterkit for NGOs".
OECD Watch	"Review of National Contact Points June 2002 – June 2003", <i>OECD Watch Newsletter No. 2</i> .
OECD Watch	"Five years on. A review of the OECD Guidelines and National Contact Points", 2005.
Oldenziel, J.	"The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct", SOMO, Amsterdam, September 2000.
Oldenziel, J.	"The added value of the UN Norms. A comparative analysis of the UN Norms for Business with existing international instruments", SOMO, Amsterdam, April 2005.
Trigo de Sousa, I.	"Codes of Conduct and Monitoring Systems", Bangladesh People's Solidarity Centre, Amsterdam, 2000.

## Articles

Amnesty International	"Letter to Louise Frechette raising concerns on UN Global Compact", 7 April 2003.
Chandler, Sir Geoffrey.	"A human rights opportunity for the corporate world", <i>Corporate Responsibility Management</i> , Volume 1, Issue 6, June/July 2005.
Evans, J.	"OECD Guidelines, one tool for corporate social responsibility",

- Corporate social responsibility: Myth or reality? *Labour Education* 2003/1, No. 130, ILO 2003.
- Hillemanns, C. "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights", *German Law Journal*, Vol. 4, No. 10, 2003.
- McCarthy, T. E. "Business and Human Rights: What do the New UN Norms Mean for the Business Lawyer?" *International Legal Practitioner*, November 2003.
- Rosemann, N. "Profiting from UN Norms on TNCs", *Human Rights Features*, 29 March - 4 April 2004.
- Roth, K. "Rules on corporate ethics could help, not hinder, multinationals", *The Financial Times*, 21 June 2005.
- Utting, P. "The Global Compact: Why All the Fuss?" *United Nations Chronicle Online Edition*.

## International instruments

OECD Guidelines for Multinational Enterprises adopted by OECD member states on 21 June 1976, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>

Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office at its 277th Session (Geneva, March 2000), available at <http://www.ilo.org/public/english/employment/multi/download/english.pdf>

United Nations Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights approved by the Sub-Commission on the Promotion and Protection of Human Rights in August 2003, available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>

United Nations Global Compact launched in July 2000, available at <http://www.unglobalcompact.org/>



## **UN documents/resolutions**

Commission resolution E/CN.4/2005/69 of 20 April 2005.

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, document E/CN.4/2005/91 of 15 February 2005.

Sub-Commission on Human Rights Resolution 2004/16 of 12 August 2004.

UN Document E/CN.4/2004/L.73/Rev.1 of 16 April 2004.

UN Document E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003.

Sub-Commission resolution 2003/16 of 13 August 2003.

UN Document E/CN.4/Sub.2/Res/2001/3 of 15 August 2001.

UN Document E/CN.4/Sub.2/1999/9 of 12 August 1999.

General Assembly resolution 53/144, adopted on 8 March 1999.

UN Document E/CN.4/Sub.2/Res/1998/8 of 20 August 1998.

Commission decision E/CN.4/DEC/2004/116.

UN Document E/CN.4/Sub.2/2004/21.

## **Electronic resources**

Skadegard Thorsen, S. and Meisling, A, "Perspectives on the UN Draft Norms", available at [www.lawhouse.dk](http://www.lawhouse.dk)

OECD Watch, "Five years on. A review of the OECD Guidelines and National Contact Points", 2005, available at [http://www.oecdwatch.org/docs/OECD\\_Watch\\_5\\_years\\_on.pdf](http://www.oecdwatch.org/docs/OECD_Watch_5_years_on.pdf)

A Guide to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, available at <http://www.ilo.org/public/english/employment/multi/download/guide.pdf>

Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles, available at [http://www.unglobalcompact.org/content/Public\\_Documents/gcguide.pdf](http://www.unglobalcompact.org/content/Public_Documents/gcguide.pdf)

The Global Compact's Next Phase, 6 september 2005, available at [http://www.unglobalcompact.org/content/AboutTheGC/gc\\_gov\\_framework.pdf](http://www.unglobalcompact.org/content/AboutTheGC/gc_gov_framework.pdf)

Global Compact Enters the Fight against Corruption, available at [http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportal.s.km.docs/ungc\\_html\\_content/NewsDocs/Backgrounder\\_Corruption.pdf](http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportal.s.km.docs/ungc_html_content/NewsDocs/Backgrounder_Corruption.pdf)

The 10th Principle against Corruption, available at [http://www.unglobalcompact.org/content/NewsDocs/10pr\\_2p\\_doc.pdf](http://www.unglobalcompact.org/content/NewsDocs/10pr_2p_doc.pdf)

Global Compact Integrity Measures, available at [http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportal.s.km.docs/ungc\\_html\\_content/NewsDocs/im\\_fin\\_140604.pdf](http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportal.s.km.docs/ungc_html_content/NewsDocs/im_fin_140604.pdf)

J. Richter, "Building on Quicksand: Global Compact, democratic governance and Nestle", October 2003, available at <http://www.gifa.org/Documents/QuicksandReprint.pdf>

"Business and Human Rights: Towards legal accountability", speech delivered by David Petrsek, Senior Director of Policy Amnesty International, 23 January 2003, available at <http://web.amnesty.org/library/print/ENGIOR500012003>

## **OECD Documents**

The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and distinctive contributions, DAF/INV/(2005)6, 26 April 2005.

The position of CIME on Supply Chain Responsibility in the OECD Guidelines. Report of the annual meeting, September 2003.

Working Party on the OECD Guidelines for Multinational Enterprises: The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, DAF/IME/WPG(2000)15/FINAL.

Decision of the OECD Council of June 2000, DAF/IME/WPG(2000)15/FINAL.

Directorate for Financial, Fiscal and Enterprise Affairs and Committee on International Investment and Multinational Enterprises: The OECD Guidelines in a globalising world, OECD Document DAF/IME/RD(99)3.

Decision of the Council on the Guidelines for Multinational Enterprises, C(2000)96/FINAL.

## **ILO Document**

International Labour Office Governing Body Document GB. 279/12, 279<sup>th</sup>  
Session, Geneva, November 2000.